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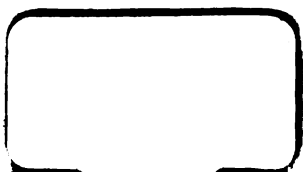
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BEING A COMPLETE

**Encyclopedia and Digest of All the Alabama Case Law up to and In-
cluding Volume 175, Alabama Reports, Volume 6, Alabama
Appellate Court Reports, and Volume 62,
Southern Reporter**

UNDER THE EDITORIAL SUPERVISION OF
THOMAS JOHNSON MICHIE

Volume VI

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XII. Opinion Evidence.**(A) Conclusions and Opinions of Witnesses in General.**

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§ 355. Conclusions and Matters of Opinion or Facts.

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§ 355 (10) Ability to See or Hear.

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§ 355 (13) Bodily Appearance or Condition.

§ 355 (14) Mental Condition or Capacity.

§ 355 (15) Pecuniary Condition.

§ 355 (16) Handwriting.

§ 355 (17) Due Care and Proper Conduct.

§ 355 (18) Nature, Condition, and Relation of Objects.

§ 355 (19) Value.

§ 355 (20) Quantity, Space, or Distance.

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§ 356 (2) Damages.

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I. JUDICIAL NOTICE.

§ 1. Nature and Scope in General.

Judicial Notice a Rule of Evidence.—Where complainant filed a bill to secure her interest in land, and alleged the sale of it to defendant under a decree of the probate court was invalid because the debts of which it was sold were barred as against intestate, the contention that the probate court judicially knew that the administration of the estate had been pending for a sufficient time to bar all debts against the intestate was without merit, since judicial notice is a rule of evidence and can have no bearing on the acquirement of jurisdiction by a court on the filing of a petition. *Neville v. Kenney*, 125 Ala. 149, 28 So. 452.

§ 2. Matters of Common Knowledge in General.

The court takes judicial notice of facts which are matters of common knowledge so common that all persons must be presumed to be cognizant of them. *Loeb v. Richardson*, 74 Ala. 311.

Railroad Ticket a Symbol.—It is a matter of common knowledge that a ticket for railroad transportation or for sleeping car accommodations is treated by the average person as a mere symbol. *Pullman Co. v. Riley*, 5 Ala. App. 561, 59 So. 761.

Escape of Gas.—The supreme court can not take judicial notice as a matter of common knowledge that the escape of artificial gas in a reservoir could be remedied by calking the seams of the reservoir or tightening its rivets for the purpose of denying an injunction to restrain the maintenance of the reservoir on the ground that the escape of the gas was not a permanent nuisance. *Romano v. Birmingham R., etc., Co. (Ala.)*, 62 So. 677.

§ 3. Course and Laws of Nature.

Prematurely Born Child.—The court has no judicial knowledge as to the difference between a prematurely born child and a full grown child. *Bessemer Coal, etc., Co. v. Doak*, 152 Ala. 166, 44 So. 627.

Time for Planting Cotton.—Alabama courts will take judicial notice of the fact that cotton is not planted in that state

until after January. *Wetzler v. Kelly*, 83 Ala. 440, 3 So. 747.

Maturity of Cotton Crop on Certain Dates.—Judicial notice will be taken of the maturity and immaturity of a cotton crop on certain dates. *Loeb v. Richardson*, 74 Ala. 311.

The court takes judicial notice that a crop of cotton has been planted, and was growing but immature, on the thirteenth of May, and that it was still immature on the twentieth of June. *Loeb v. Richardson*, 74 Ala. 311.

§ 4. Qualities and Properties of Matter.

Composition of Intoxicating Liquid.—“Certainly we can not judicially know that Busby's bitters, though shown to be intoxicating, is or contains either distilled liquor or wine, or a “liquor prepared for drink by the infusion of malt.” *Allred v. State*, 89 Ala. 112, 8 So. 56, 57.

§ 5. Operation and Effect of Natural Forces.

Distance within Which Train Can be Stopped.—The supreme court can not take judicial notice that a train going at the rate of twenty to twenty-five miles an hour can be stopped within eighty or ninety yards. *Southern Ry. Co. v. Gullatt*, 150 Ala. 318, 43 So. 577.

§ 6. Scientific Facts and Principles.

Means of Communication by Telephone.—Courts of justice do not ignore the great improvement in the means of communication which the telephone has made, and its nature, operation, and ordinary uses are facts of general scientific knowledges of which the courts will take judicial notice as part of public contemporary history. *Western Union Telegraph Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

§ 7. Geographical Facts.

See post, “Location of Railroads,” § 18 (3); “Public Surveys,” § 19 (2).

§ 7 (1) In General.

Geographical Divisions of Nation and State.—“Courts may judicially notice the geographical divisions of the union into separate states, and of their own states into counties; but the topography of the country is subject to a different rule. In respect to the latter, the courts will not

judicially know the contrary of facts, implied by the state of the pleadings." *Richardson v. Williams*, 2 Port. 239, 242.

Geographical Features of Country.—Judicial notice will be taken of the general geographical feature of the country about the mouth of Fowl river in construing and ascertaining the location and boundary of an ancient French grant of lands made more than 160 years ago, in which the names of all the places and natural objects mentioned, except such river, are now unknown. *Trenier v. Stewart*, 55 Ala. 458.

Location of Virginia.—The court can not judicially know that an instrument declared on as made "at Virginia, to wit, in Greene county" (in Alabama), was made in the state of Virginia, but, nothing appearing to the contrary, will presume that some place of that name within the county was intended. *Richardson v. Williams*, 2 Port. 239.

Location of Tract of Land.—The court judicially knows that there are several §§ 16, 17, 20, and 21 in Franklin county. *State v. Town of Phil Campbell (Ala.)*, 58 So. 905.

The court will take judicial notice that there are two tracts of land in Mobile county which answer to the description "N. E. $\frac{1}{4}$ of § 36, township 2, range 4." *Brannan v. Henry*, 175 Ala. 454, 57 So. 967.

§ 7 (3) Location of Cities, Towns, and Villages.

Location within State.—"The declaration that avers, that the note was made at Fayetteville, in the county of Madison; and this averment is not denied. The court could not judicially know that this place is not in this state, and from the record was bound to conclude that the contract was made in Madison county, and that it carried interest according to the laws of this state." *Garner v. Tiffany, etc., Co.*, Minor 167, 168.

Location in Certain Counties.—The courts will take judicial notice as to the county within which a certain city of the state is situated. *Anniston Electric & Gas Co. v. Elwell*, 144 Ala. 317, 42 So. 45.

Location of New York.—When a bill of exchange is drawn in Alabama, payable "at the Merchants Bank in the city of

New York," the courts of Alabama will take judicial notice that "the city of New York" is the commercial city of that name, beyond the limits of the state of Alabama. *Dickinson v. Branch Bank*, 12 Ala. 54.

Town as a Railroad Terminus.—A probate court may take judicial notice of the facts that a certain town is a railroad terminus and the location of the post office, and the only town by that name in the state. *Smitha v. Flournoy's Adm'r*, 47 Ala. 345.

Town Not Located on Railroad.—The courts will take judicial notice of the fact that a certain city in the state is not on a railroad. *Robert M. Green & Sons v. Lineville Drug Co.*, 150 Ala. 112, 43 So. 216.

§ 7 (3) Location and Boundaries of States, Counties, and Townships.

Location of Counties.—The court will take judicial notice of the location of counties and the lines of railroads connecting points in the several counties. *Western Union Tel. Co. v. Robbins*, 3 Ala. App. 234, 56 So. 879.

Courts will take judicial notice of the official survey of the state, and its subdivision into counties, and their location. *Scheuer v. Kelly*, 121 Ala. 323, 26 So. 4.

Boundaries of County.—The probate court will take judicial notice of the boundaries of the county. *Smitha v. Flournoy's Adm'r*, 47 Ala. 345.

Location of Road in County.—Where a warrant is issued on an affidavit charging defendant with failure, after notice, to "work the Columbia and Rocky Creek road, beginning at the forks of Rocky Creek and Dothan road, and running to a six mile post towards Ashford, Ala.," the court can not take judicial notice that such part of the road is in Henry county. *Waters v. State*, 117 Ala. 189, 23 So. 28.

Location of Land.—Where it is judicially known to the court that lands "within two miles of the city of Montgomery" may not be within Montgomery county, a bill so describing land is defective in not stating that the land is in Montgomery county. *Ward v. Janney*, 104 Ala. 122, 16 So. 73.

"Moreover, since we judicially know that lands within two miles of the city of

Montgomery may not be in the county of Montgomery, the bill is bad for the further reason that it fails to aver that this land is in Montgomery county. The court below erred, therefore in, overruling the demurrer to the bill in so far as it had reference to the description of the land; and its decree must be reversed. The cause is remanded. Reversed and remanded." *Ward v. Janney*, 104 Ala. 122, 16 So. 73, 74.

§ 7 (4) Lakes, Streams, and Mountains, and Navigability of Waters.

Tidal Streams.—The court will take judicial notice that there are no tidal streams in Jackson county. *Walker v. Allen*, 72 Ala. 456.

"We know judicially that within the limits of Jackson county there are no tidal streams, which are prima facie navigable and public, that all its streams are fresh water, and prima facie private. *Lewis v. Harris*, 31 Ala. 689; *City Council v. Montgomery, etc., Plankroad Co.*, 31 Ala. 76." *Walker v. Allen*, 72 Ala. 456, 458.

Location of River.—The courts of this state judicially know that no part of the Tallapoosa river lies within the corporate limits of the city of Montgomery. *City Council v. Montgomery, etc., Plankroad Co.*, 31 Ala. 76.

In an action of ejectment, where the complaint alleges that the land sued for is on the west bank of the Mobile river, without showing by a specific averment that it is in Mobile county, in this state, the judgment rendered in said case in favor of the plaintiffs is not void on account of the failure of the complaint to show that the lands sued for were in Mobile county, since the court judicially knows that the Mobile river is formed by the junction of the Alabama and Tombigbee rivers south of the north line of Mobile county, and that therefore the entire county of Mobile lies west of the Mobile river. *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550, 29 So. 584.

§ 8. Historical Facts.

Attitude of Virginia to Confederate States.—"These facts, and the known history of the times, of which we take judicial cognizance, see 1st Greenl. Ev., § 4, demonstrate the truth of the proposition

stated above, that at no time has the state of Virginia been a party to the war against the Confederate States." *Whitworth v. Oliver*, 39 Ala. 286, 289.

The recitals in the preamble to the act of the provisional congress of the Confederate States, approved May 6, 1861, which first recognized the existence of the war between the United States and the Confederate States, and the known history of the times, of which the courts will take judicial notice, show that Virginia never was an alien enemy to the Confederate States. *Whitworth v. Oliver*, 39 Ala. 286.

"The demurrer to the bill in this case, on the ground that when the bill was filed, February 2, 1861, the complainants, who were residents of the state of Virginia, were alien enemies, and therefore incapable of maintaining an action in our courts, is not well taken. Without intending, at this time, to declare at what time the present war between the United States and the Confederate States had its beginning, we feel no hesitation in affirming that at no time has the commonwealth of Virginia been a party to the war against us; and hence we hold, that the unsupported fact, that the complainants were residents of Virginia, did not, at the time the bill in this case was filed, constitute them alien enemies." *Whitworth v. Oliver*, 39 Ark. 286, 288.

Abolition of Slavery.—The court takes judicial notice of the abolition of slavery. *Glover v. Taylor*, 41 Ala. 124; *Rose v. Pearson*, 41 Ala. 687; *Morgan v. Nelson*, 43 Ala. 586.

In such action, the failure of the jury to assess the value of each of the slaves separately, if erroneous, is not an error of which the defendant can complain; since the abolition of slavery, of which the court will take judicial notice, has rendered it impossible for the defendant to make a voluntary delivery of the slaves, and impossible for the plaintiff to compel their delivery by any legal process. *Rose v. Pearson*, 41 Ala. 687.

That slavery was destroyed in this state, by the act of war, prior to the passage of the ordinance approved on the twenty-second of September, 1865, is a historical fact, of which the court will

take judicial notice. *Ferdinand v. State*, 39 Ala. 706.

Election Contest.—A contested election for congress, which is public official history, is a matter of which the court takes judicial notice. *Lewis v. Bruton*, 74 Ala. 317.

The contested election between Gen. J. Wheeler and Col. W. M. Lowe, as member of congress from the eighth district of Alabama, at the general election held in November, 1880, "is public, official history, of which the court takes judicial notice." *Lewis v. Bruton*, 74 Ala. 317.

Date of Battle of Atlanta.—Since the court will take judicial knowledge of historical facts, the court will take judicial notice of the fact that the battle of Atlanta in the war between the states occurred on July 20, 1864. *Ham v. State*, 156 Ala. 645, 47 So. 126.

"The court takes judicial knowledge of historical facts (16 Cyc. 864, 865), and therefore of the fact that the battle of Atlanta, fought in the war between the states, occurred on the twentieth of July, 1864; and even if it was error to allow the date of the occurrence of that battle to be proved by a witness who, as a soldier, was engaged in the battle, his testimony corresponding with the true date, no injury could possibly have resulted from the court's allowing such evidence to be given. 17 Am. & Eng. Ency. Law, 902 (2), and authorities cited in notes 3 and 4 to the text; *Cook v. State*, 110 Ala. 40, 20 So. 360." *Ham v. State*, 156 Ala. 645, 47 So. 126, 131.

Effect of Civil War on Trustee's Responsibility.—On a question whether a trustee acted with prudence in the management of assets during war times, the court will take judicial notice of the disturbed condition of business during that period, and the difficulty of making safe and productive investments. *Foscue v. Lyon*, 55 Ala. 440.

In fixing a trustee's commission, the court will take judicial notice of the increased responsibility of his office by the condition of affairs during the Civil War. *Lyon v. Foscue*, 60 Ala. 468.

Issuance of Confederate Currency.—"We know, historically, that Confederate, treasury-notes, was first issued about the year 1862, and, therefore, the

alleged custom wanted nearly all the necessary requisites and elements of a good custom. It certainly wanted antiquity, and it must also have wanted certainty, consent, obligation and the other elements of a good custom." *Buford v. Tucker*, 44 Ala. 89, 91.

Circulating Medium during Civil War.—The court will take judicial notice of the fact that during the late civil war neither gold, silver, nor United States money circulated in Alabama, but that until the downfall of the Confederacy, in 1865, Confederate States treasury notes or their convertible equivalents composed the only circulating medium. *Morris v. Morris*, 58 Ala. 443.

The courts of Alabama will take notice, without proof, that, as a general thing, contracts made in January, 1865, were made with reference to Confederate currency. *Buford v. Tucker*, 44 Ala. 89.

In construing contracts made during the late war, judicial notice will be taken of the facts of public history as to the condition of the country and its currency at that time; and so, in an action on a note, payable in "dollars" given for property sold in Alabama in 1863, evidence of a contemporaneous parol agreement between the parties that it should be discharged in Confederate treasury notes is admissible, as it would not vary the legal effect of the contract, but only aid the court in ascertaining the intention of the parties and the legal effect of their contract. *Riddle v. Hill's Adm'r*, 51 Ala. 224, cited in note in 31 L. R. A., N. S., 241.

Financial Condition of State in 1867.—The courts will take judicial notice of the fact, as a part of the history of the times, that the people of this state were, in 1867, in a condition of very great pecuniary embarrassment and insolvency, and that, in consequence of this state of affairs, it may not have been practicable for a guardian, at that time, to make a safe loan of a large sum of money, without some delay after receipt. *Ashley's Adm'r v. Martin*, 50 Ala. 537.

Termination of Civil War.—The courts will take judicial notice of the fact that the late civil war, or rebellion, in the United States, was terminated prior to June 1, 1865. *Turner's Adm'r v. Patton*, 49 Ala. 406.

Suspension of United States' Mails.

Judicial notice will be taken that the regular mails established by the laws of the United States were suspended in Louisiana prior to the first day of February, 1862. *Donegan v. Wood*, 49 Ala. 242.

Re-Establishment of United States'

Mails.—The court will take judicial notice of the fact that the United States' mails were re-established between Huntsville and New Orleans prior to December 18, 1865. *Turner v. Patton*, 49 Ala. 406.

General Election of 1880.—The general election held in November, 1880, is public official history, of which the court takes judicial notice. *Lewis v. Bruton*, 74 Ala. 317.

Panic of 1907.—Courts will take judicial notice of general panics, as the one of 1907. *Louisville & N. R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001.

"The statement of counsel that court and jury would take judicial knowledge that a condition of panic prevailed 'for many months prior to the death of plaintiff's intestate' on March 6, 1908, was not objectionable. Courts will take judicial notice of what is generally known within the limits of their jurisdiction; of facts, without evidence thereof, presumably known to everybody; of facts which everybody does know. *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232, 237; *Wall v. State*, 78 Ala. 417, 418, and other cases cited in *Mayfield's Digest*, vol. 3, p. 437." *Louisville, etc., R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001, 1009.

Development of Mineral Interests of

State.—"Consistent with the general rule stated, this court, in *Clifton Iron Co. v. Dye*, 87 Ala. 468, 6 So. 192, decided in 1888, took judicial knowledge 'of the fact that in the development of the mineral interests of this state, recently made, very large sums of money have been invested.' This view was approvingly quoted in *Drake v. Lady Ensley, etc., R. Co.*, 102 Ala. 501, 14 So. 749. Such recognition of the facts as the quoted case made necessarily comprehended an assumed knowledge, unaided by evidence, of industrial activity in the mineral region of this state. The result can not be different when reference is had, as here, to a condition of 'panic' in our country. The press teemed with news of its prevalence during the

winter 1907-08, as well as with evidence of its effect upon enterprises and industrial activity. Many large and small banks of deposit throughout the country issued 'clearing house certificates,' and these were used, accepted, as tokens of the value their faces purported to assure. Withal, the fact of financial and industrial suppression throughout the country, during the period indicated, was universally known. So we think the part of the argument just considered was not without the justification. *Ashley v. Martin*, 50 Ala. 537." *Louisville, etc., R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001.

Ancient Name of Dauphin Island.—Judicial notice will be taken of the historical fact stated by Bancroft and Pickett that Dauphin Island was anciently called "Massacre Island." *Trenier v. Stewart*, 55 Ala. 458.

Evils to Be Remedied by Funding Act.

—The supreme court takes judicial notice of the fact, as a matter of public history, that the evil sought to be remedied by the Alabama funding act of December 19, 1873, in requiring county treasurers, under penalties, to pay into the treasury the identical moneys received by them in payment of taxes, was speculation by those officers in warrants issued by the state, and also of the historical fact that the purpose of the constitutional provision, "No money shall be drawn from the treasury but in pursuance of an appropriation made by law," was to prevent the executive power from controlling the public moneys, and not to restrict the legislative power. *Smith v. Speed*, 50 Ala. 276.

Tenure of Land.—It is a historical fact, of which the courts of this state are bound to take judicial notice, that all the lands in Franklin county are held under the government of the United States. *Lewis v. Harris*, 31 Ala. 689.

Legality of Confederate Transaction.

—In an action on a note, its admission in evidence can not be refused on the ground that it was dated in 1862 and that the court must judicially know that it was for a Confederate transaction and was therefore illegal and incompetent evidence. *Spence v. Johnson*, 45 Ala. 409.

§ 9. Statistical Facts.

Mortality Tables.—The court will take

judicial notice of mortality tables showing the natural expectancy of duration of one's life at a given age. *Gordon v. Tweedy*, 74 Ala. 232; *Kansas City, M. & B. R. Co. v. Phillips*, 98 Ala. 159, 13 So. 65. See, also, post, "Mortality Tables and Tables of Expectancy of Life," § 272.

Depreciation of Currency.—The court can not take judicial notice of the extent of the depreciation of the currency during the rebellion. *Modawell v. Holmes*, 40 Ala. 391.

§ 10. Facts Relating to Human Life, Health, Habits, and Acts.

Effect of Venereal Disease.—Judicial notice will not be taken of the effects a venereal disease will cause. *Empire Improv. Co. v. Lynch* (Ala.), 62 So. 16.

That a nervous condition is a characteristic of syphilis may not be judicially noticed. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113.

Inheritable Tendency of Weak Eyes.—In an action for personal injuries, one alleged result of which was weak and inflamed eyes, it was not error to exclude questions asked plaintiff on cross-examination, as to whether members of his family did not have weak eyes, as the court could not take judicial notice that the disease might be inherited, but evidence to that effect should have been offered. *Birmingham, etc., R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979.

"Very high authority, none other, indeed, than the Good Book itself, is cited by counsel for appellant in support of his exceptions to these rulings of the court. They say: 'There is no truer saying in the Bible than that, the sins of the fathers shall be visited upon the children unto the third and fourth generations. This is a law of heredity, promulgated by the Almighty, and is known of all men.' We have acquaintance with this sacred text; but we are not prepared to admit its application in the premises here. We do not know that inflamed or weak eyes is a sin within its terms, nor are we prepared to say that these infirmities have customarily such a descending quality as that proof of them in the sire accounts for their existence in the son. The matter lies beyond our judicial ken. If the fact be as counsel insist it is in this connec-

tion, there should have been evidence of it. We do not think the city court erred in its ruling on the questions." *Birmingham, etc., R. Co. v. Cuzzart*, 133 Ala. 262, 31 So. 979, 981.

Effect of Fracture of Skull.—That a fracture of the skull may produce death, but does not necessarily have that effect in every case, is matter of common knowledge. *McDaniel v. State*, 76 Ala. 1.

Physical Effect of Fright.—Courts can not take judicial notice of the existence of any physical or natural law justifying an affirmation that physical injury may not follow shock caused by fright alone, where the incident occasioning the fright involved no contact with or touching of the person of the victim of the injury. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927.

"Unless we are warranted in saying that we can take judicial cognizance of it as a matter of common knowledge that real bodily harm can not, without the intervention of some other independent proximate cause, result from frightening or putting one in terror, we may well refuse to assert it as a legal proposition that fright or terror may not be recognized as a proximate cause of a physical injury, because of not being convinced that the announcement of such a proposition would not in effect involve a misstatement of fact. We must plead ignorance of the existence of any such physical or natural law." *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, 929.

§ 11. Personal Status and Conditions.

Reduction in Earnings.—In an action against a railroad company for wrongful death, the court, will not take judicial notice that the prevalence of a panic reduced the earnings of plaintiff's intestate during the year next preceding his death. *Louisville & N. R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001.

§ 12. Language, Words and Phrases, and Abbreviations.

Words of Statutes.—The court will take judicial notice of the meaning of a compound word found in a statute, and a standard authority like Webster's Unabridged Dictionary may be used before the court or jury to refresh the memory of the court, and the definition of such

dictionary may be given in evidence to the jury. *Adler v. State*, 55 Ala. 16, cited in note in 40 L. R. A. 567.

"We can perceive no good reason why a work of such standard authority as Webster's Unabridged Dictionary confessedly is, should not be used before a court or jury, whenever the meaning of an English word is brought in question. That it is a work of standard authority, is so widely known; indeed, so universally acknowledged wherever the English language is spoken, that it must be classed among the facts judicially known. See *Stoudenmeier v. Williamson*, 29 Ala. 558; *Merkle v. State*, 27 Ala. 139; *Salomon v. State*, 28 Ala. 83; *Burdine v. Grand Lodge*, 37 Ala. 478." *Adler v. State*, 55 Ala. 16, 23.

Abbreviations.—The court will judicially take notice of the meaning of the abbreviation "adm'r." *Moseley's Adm'r v. Mastin*, 37 Ala. 216.

It is a matter of common knowledge, when speaking of shingles, that "5x16" means five inches wide and sixteen inches long, and of this the court will take judicial notice, as they will of the meaning of all abbreviations in common use when employed in contracts. *Birmingham & A. R. Co. v. Maddox & Adams*, 155 Ala. 292, 46 So. 780.

§ 13. Time, Days, and Dates.

Coincidence of Days of Week and Month.—Courts will take judicial notice of the coincidence of the days of the months with days of the week, as shown by the almanac. *Sprowl v. Lawrence*, 33 Ala. 674; *Allman v. Owen*, 31 Ala. 167, cited in note in 40 L. R. A. 560.

The court will take judicial notice of the computation of time, and upon what day of the week a certain day of the month falls. *Allman v. Owen*, 31 Ala. 167; *Sprowl v. Lawrence*, 33 Ala. 674; *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893.

The court will take judicial notice that a certain day of the month was Sunday. *Brennan v. Vogt*, 97 Ala. 647, 11 So. 893.

"The bond, as set forth in the complaint, recites that the principal obligor was elected sheriff on the first Monday in August, 1853; and it is alleged that the bond was executed on the twentieth August, 1853. We will take judicial notice of the fact, that the first Monday in

August, 1853, was the first day of that month. *Allman v. Owen*, 31 Ala. 167." *Sprowl v. Lawrence*, 33 Ala. 674, 684.

Time Sun Sets.—The time the sun sets on a particular day is matter of common knowledge, which the court and jury are presumed to know, and need not be proved. *Louisville & N. R. Co. v. Brinckerhoff*, 119 Ala. 606, 24 So. 892.

Date of Rendition of Judgment.—A court will take judicial notice that the date on which a judgment by default was recorded in a given year was or was not a day of a term such that the same was not prematurely rendered. *Bethune v. Hale*, 45 Ala. 522.

§ 14. Weights, Measures, and Values.

Weight of Bale of Cotton.—The supreme court can not take judicial notice of the weight of a "bale" of cotton. *Elmore, Quillian & Co. v. Parish Bros.*, 170 Ala. 499, 54 So. 203.

Rule of Measuring Corn.—The courts will not take judicial notice of the rule for measuring corn in the shock, or the capacity of a railroad car of a certain size. *South & N. A. R. Co. v. Wood*, 74 Ala. 449.

Value of Services.—We do not think the court could take judicial knowledge of the value of services rendered by the solicitors. *Clark v. Knox*, 70 Ala. 607.

An appellate court can not take judicial cognizance of the value of an attorney's services, by looking at his argument as shown in the printed Reports. *Pearson v. Darrington*, 32 Ala. 227, cited in note in 32 L. R. A. 595.

Where complainants are awarded solicitor's fees, the court can not take judicial notice of the value of the services rendered, but the fee must be determined from the evidence. *Decatur Mineral & Land Co. v. Palm*, 113 Ala. 531, 21 So. 315.

Value of Nickel.—The court will take judicial notice that there is lawful current coin in the United States, representing the value of five cents, called a nickel, and that there is no money called a nickel, other than such lawful coin. *Braddell v. State*, 144 Ala. 54, 39 So. 975.

Nominal Consideration.—Judicial notice will be taken that a pecuniary consideration of \$2 for property worth from

\$1,500 to \$2,000 was merely nominal. *York v. Leverett*, 159 Ala. 529, 48 So. 684.

§ 15. Matters of Art and Skill.

Photography.—Where photographs are offered in evidence, courts will judicially notice the art of photography, the mechanical and chemical process employed, the scientific principles on which they are based, and their results. *Luke v. Calhoun County*, 52 Ala. 115, cited in note in 35 L. R. A. 802, 807.

Judicial cognizance is taken to the fact that photography is the art of producing facsimiles or representations of objects by the action of light on a prepared surface. *Luke v. Calhoun County*, 52 Ala. 115, cited in note in 35 L. R. A. 802.

A picture produced by the art of photography is in fact but a scientific reproduction of a facsimile of the original object in nature by a mechanical art every day advancing toward perfection, and it is admissible in evidence under the same rule that admits diagrams and maps, when proved to be correct. *Kansas, etc., R. Co. v. Smith*, 90 Ala. 25, 8 So. 43, cited in note in 35 L. R. A. 802.

§ 16. Management and Conduct of Occupations.

§ 16 (1) In General.

Course of Human Transactions.—It is the duty of courts judicially to know the general course of the transactions of human life, and whatever ought to be generally known within the limits of their jurisdiction, e. g. the peculiar nature of lotteries and the mode in which they are carried on. *Salmon v. State*, 28 Ala. 83; *Boullemet v. State*, 28 Ala. 83.

Power of Partner.—Courts take judicial cognizance of the scope of the authority of a partner to bind a trading or commercial partnership with reference to commercial paper, but as to other matters the authority must be established either by proof of express delegation or implication. *Lichenstein v. Murphree (Ala.)*, 62 So. 444.

"Courts take judicial cognizance of the scope of the authority of a partner to bind a trading or commercial partnership, especially with reference to commercial paper; but as to other matters and cer-

tainly as to other classes of partnership, it is usually a matter of proof as to the extent of his authority, and in such cases, in order to hold the firm liable, it is necessary to show either that the contract made was expressly authorized, or that it was necessary to the carrying on of the partnership business, or a usual and customary incident to other partnerships of like nature. *Woodruff v. Scaife*, 83 Ala. 152, 3 So. 311." *Lichenstein v. Murphree (Ala.)*, 62 So. 444, 445.

§ 16 (3) Banks, Railroads, and Telegraphs.

See, generally, the titles BANKS AND BANKING; RAILROADS; TELEGRAPHS AND TELEPHONES.

Bank Collections.—Courts will take judicial notice that banks, in their ordinary course of business, receive paper for collection, and collaterals accompanying it. *First Nat. Bank v. First Nat. Bank*, 116 Ala. 520, 22 So. 976.

Control of Railroads.—Courts will judicially know that, as a general rule, trains running upon a railroad are run, directed, and controlled by the owners of the road. *South & N. A. R. Co. v. Pilgreen*, 62 Ala. 305.

Manner of Designating Railroad Lines.

—Courts will take judicial notice that railroad lines are marked out and the grades fixed by the company's engineer; and it can not be contended, in an action against the company for damage to property by excavations in construction of its road, that defendant is not connected with the damage, since, for aught that appears, the grading contracts might have avoided the injury by making shallower cuts. *Alabama M. Ry. Co. v. Coskry*, 92 Ala. 254, 9 So. 202.

Right of Way of Railroad.—The supreme court does not judicially know that the right of way of a railroad company authorized to acquire such right of way as may be necessary, not to exceed one hundred feet in width, is one hundred feet wide, or that the track is in the center, though most rights of way are one hundred feet wide, and though the track is usually in the center. *Lovelace v. Montgomery, etc., Ry. Co.*, 174 Ala. 154, 56 So. 711.

Post of Duty of Yardmaster.—The fact that the footboard in front of a switch engine is the post of duty of the yardmaster is not a matter of common knowl-

edge of which the court will take judicial notice. *Highland Ave. & B. R. Co. v. Walters*, 91 Ala. 435, 8 So. 357.

Duty of Telegraph Companies.—The court will take judicial notice that it is the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road. *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500, cited in note in 24 L. R. A., N. S., 254.

"The objection, taken by demurrer, that the complaint does not sufficiently show a duty on the part of the defendant to keep its wires out of the way of travelers along public roads, is too palpably unfounded to require discussion. The complaint does aver such duty, and the courts take cognizance of it even without averment. In this respect the case is analogous to that of *Louisville, etc., R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 So. 438, in which the complaint averred that the defendant negligently set fire and burned plaintiff's cotton. We know in this case that it was defendant's duty to exercise care to avoid obstructing public roads, as we know in that it was defendant's duty to exercise care to avoid burning plaintiff's cotton." *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500, 502.

Minimum Charge of Telegraph Companies.—The supreme court will take judicial notice of the fact that telegraph companies in Alabama make twenty-five cents a minimum charge for transmission and delivery of messages the distance from Birmingham to Ft. Payne. *Western Union Telegraph Co. v. Saunders*, 164 Ala. 234, 51 So. 176.

§ 17. Customs and Usages.

A custom or usage after it has ripened into a law may be judicially noticed by a court. *Innerarity v. Heirs*, 1 Ala. 660, cited in note in 25 L. R. A. 452.

Sales of Hotel Furnishing.—If it is customary for agents, in making sales of hotel furnishings, to enter into a covenant that the seller shall not engage in a competing business, it is not a matter of which the courts take judicial knowledge. *Sanders v. Brown*, 145 Ala. 665, 39 So. 732.

Dangers of Rivers.—The court can not take judicial notice of the existence of

a custom whereby losses by burning of a steamboat are comprehended among dangers of the river, under a contract to deliver goods in good condition, "dangers of the river excepted." *Sampson v. Gazzam*, 6 Port. 123; *Ezell v. Miller*, 6 Port. 307.

§ 18. Corporations and Associations and Members Thereof.

§ 18 (1) In General.

Existence of Corporation.—It can not be judicially known whether or not there is another corporation of a name similar to defendant's. *Mobile Light & R. Co. v. Mackay*, 158 Ala. 51, 48 So. 509.

In an action in which the complaint was amended to designate defendant as the K. Land & Improvement Company, instead of K. Land Company, the court of appeals could not take judicial notice that there was a corporation known as the K. Land Company, where the record did not show this fact. *King Land Co. v. Bowen* (Ala.), 61 So. 22.

Corporation Created by Special Law.—Courts will not judicially notice a private corporation created by special law. *Kelly v. Trustees of Alabama & C. R. Co.*, 58 Ala. 489.

President of State Bank.—A person appointed by the legislature a director of the state bank can not be judicially recognized as president, when chosen pro tempore by the board. His authority to perform an act belonging to that office must be established by proof. *Crawford v. Branch Bank at Mobile*, 7 Ala. 205.

"In *Roberts v. State Bank*, 9 Port. 312, it was decided that it was not necessary that the certificate of the president elected by the legislature should be authenticated by the seal of the corporation; that the court would judicially recognize his official character, and intend in the absence of all proof on the point that his signature was genuine. This decision was made upon the ground that the president was quasi a public officer, and the evidence of his election and qualification was shown by the archives of the state. But in *Crawford v. Planters', etc., Bank*, 6 Ala. 289, we considered, that as the state had no interest in that institution, and no agency in electing its officers, it could

not be judicially known that certain persons who had acted as president and commissioner, were in point of fact such officers; and that their official character should be shown by proof." *Crawford v. Branch Bank*, 7 Ala. 205, 216.

Telegraph Line as Public Improvement.—Judicial notice will be taken that a public telegraph line is a public improvement, for which property may be taken as for a public use. *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 So. 408.

§ 18 (2) Powers and Acts Thereof.

Commissioners of State Bank.—The courts in Alabama are bound to take judicial notice that the assets of the state bank and branches are placed in the hands of commissioners, who are authorized to sell or lease its real estate, and to appoint assistant commissioners to aid in the adjustment and settlement of its affairs. *Douglass v. Branch Bank at Mobile*, 19 Ala. 659.

Divisions of Church Organization.—Courts will take judicial notice of the division of the Methodist Episcopal Church, of the territory over which jurisdiction was to be and has been exercised by the subdivisions thereof, respectively, and of the articles of separation, with reference to a territorial division of the common property. *Malone v. La Croix*, 143 Ala. 657, 144 Ala. 648, 41 So. 724.

"We think the courts of the land can and will take judicial notice of the division of perhaps the largest and most powerful protestant Church in the United States, of the territory over which jurisdiction was to be and has been exercised by the subdivisions, respectively, and of the articles of separation, with reference to a territorial division of the common property. Not only is this a fact of historical notoriety, but the title to the property one held before the separation has often been passed upon by the high courts of the country, and in reference to the rights and ownership of the respective wings of the church thereto." *Malone v. La Croix*, 143 Ala. 657, 144 Ala. 648, 41 So. 724, 725.

Principles of Labor Union.—Courts will not take judicial notice of the principles by which laborers belonging to a labor

union are bound. *Birmingham Paint & Roofing Co. v. Crampton & Tharpe* (Ala.), 39 So. 1020.

Fraternal Organization.—The courts of Alabama will take notice that the society of Free Masons is purely a charitable corporation. *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478.

§ 18 (3) Location of Railroads.

See, also, ante, "Geographical Facts," § 7.

Continuity of Connecting Lines.—The principle that courts will take judicial notice of all matters of a public nature, or of facts that are commonly known by well informed persons, does not authorize the court to assume that the lines of the constituent members of a consolidated railroad company, when completed according to their charters, will be so located as to admit the passage of trains from one to the other continuously, without break or interruption. *Georgia Pac. Ry. Co. v. Gaines*, 88 Ala. 377, 7 So. 382.

Connecting Points in Several Counties.—The court will take judicial notice of the lines of railroads connecting points in the several counties. *Western Union Tel. Co. v. Robbins*, 3 Ala. App. 234, 56 So. 879.

§ 19. Matters Relating to Government and Its Administration in General.

§ 19 (1) In General.

Commission Form of Government.—The supreme court will take judicial notice that the city of Birmingham was the only city to which Gen. Acts 1911, p. 204, providing a commission from a government for cities having a population of 100,000, was applicable when the act was passed. *Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942.

Suspension of Local Laws.—This court will take judicial notice of "General Orders No. 100," approved by the president of the United States on April 24, 1863, which dispenses with a proclamation of martial law in any place occupied by an invading army of the United States, and declared all local laws suspended by the presence of the occupying army. *Jeffries v. State*, 39 Ala. 655.

Forfeiture of Railroad Lands.—The supreme court of Alabama judicially knows that the United States government has

never taken any action declaring a forfeiture of the lands allotted to the Tennessee & Coosa River Railroad Company. *Mathis v. Tennessee & C. R. R. Co.*, 83 Ala. 411, 3 So. 793.

§ 19 (2) Public Surveys.

See, also, ante, "Location and Boundaries of States, Counties, and Townships," § 7 (3).

Divisions into Ranges, Townships and Sections.—The supreme court knows judicially the ranges, townships, and sections in a county. *Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

The courts will take judicial notice of the government surveys of the public lands in Alabama, and know that lands lying in "township 7, range 29," can only be found in Henry county. *Money v. Turnipseed*, 50 Ala. 499.

"It is known, also, that township seven, in range twenty-nine, is found in said county of Henry, and nowhere else in this state. The situation of the lands is, therefore, sufficiently fixed to make it certain. This is sufficient to support the jurisdiction of the court. *King v. Kent*, 29 Ala. 542; *Smitha v. Flournoy*, 47 Ala. 345." *Money v. Turnipseed*, 50 Ala. 499, 500.

This court judicially knows, that there is but one range 18 in this state, and that lies east of the basic meridian of St. Stephens; and that there is but one township twelve that bisects range eighteen, and that is north of the base of that survey. *Chambers v. Ringstaff*, 69 Ala. 140.

So, too, in the case of *Chambers v. Ringstaff*, 69 Ala. 140, with the aid of judicial knowledge the court knew that the land, described by section, township, and range, omitting the state, county, and land district, was situate in Montgomery county, and that there was no land elsewhere in the state answering the description, and is further shown that the mortgagor resided on it, and there was no evidence that the mortgagor owned land any where else; and from this the court argues it was reasonable to conclude that the land in question was the only land the mortgagor owned, rather than, in the absence of evidence, to conclude that he owned land answering the description in

the mortgage in some other state. *Elliott v. Coleman*, 170 Ala. 355, 54 So. 491, 492.

Courts take judicial knowledge of the surveys of public lands by the general government, and of the location and relative situation of the lands officially surveyed and mapped out under the authority of the acts of congress. *Ledbetter v. Borland*, 128 Ala. 418, 29 So. 579.

"Courts will take judicial notice of the situation of lands according to the government survey. *Knabe v. Burden*, 88 Ala. 436, 7 So. 92. We know judicially, as well as from transcripts in evidence from the United States land office, that fractional section 14 of township 7, range 12, of the district of lands which were subject to sale at Elba, contained approximately 473.75 acres; that it was, according to the government survey, divided in lots numbered, respectively, 1, 2, 3, 4, 5, and 6. The transcript from Tract Book 1 in the land office shows that the identical warrant under which the patent purports to have been issued to Wilkinson was on September 29, 1858, located on said lots 1 and 2 together containing 154.15 acres, which location corresponds with recitals of the patent as to the quantity of land appropriated under the warrant. It is thus affirmatively shown that the warrants location did not cover lots 3 and 4, which, together, contained 159.50 acres, and which were subsequently entered by the plaintiff." *Ledbetter v. Borland*, 128 Ala. 418, 29 So. 579, 580.

"We do not judicially know which tract M. D. Mann owned, and we are clear in our conclusion that this reference to the lands in the deed would authorize a resort to competent parol evidence to aid the description set forth in the deed, and that the deed is not within the qualification above referred to. *Black v. Pratt Coal Co.*, 85 Ala. 504, 5 So. 89; *De Jarnette v. McDaniel*, 93 Ala. 215, 9 So. 570; *Black v. Tennessee, etc., R. Co.*, 93 Ala. 109, 9 So. 537; *Webb v. Elyton Land Co.*, 105 Ala. 471, 18 So. 178; *Dorlan v. Westervich*, 140 Ala. 283, 37 So. 382." *Brannan v. Henry*, 142 Ala. 698, 39 So. 92, 94.

Where premises conveyed are described in a deed as a subdivision of a section in "fractional township twenty (20), range thirteen (13)," judicial notice will be taken of the fact that there is but one

fractional township answering the description, and that it is situated in a certain county. *Webb v. Mullins*, 78 Ala. 111.

Situation of Land within State.—A petition described the land by stating the section, township, and range in the district of lands sold at Cahaba. Held a sufficient description, for the courts will take judicial notice that lands within the district of lands for sale at Cahaba are within the state of Alabama. *King v. Kent's Heirs*, 29 Ala. 542.

Numbers of Land within County.—Probate court of a county may take judicial notice of the numbers of the lands within its limits as described in the records of the land office of the United States. *Smitha v. Flournoy's Adm'r*, 47 Ala. 345.

Separate Tracts of Land.—Upon a bill to quiet title to land described as the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 28, township 17 S., range 4 W., and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 29, township 17 S., range 6 W., the court takes judicial notice that there are two separate tracts. *Rucker v. Tennessee Coal, Iron & R. Co. (Ala.)*, 58 So. 465.

Number of Acres in Section.—The court judicially knows that "Sec. 18." as used in a deed, contains 640 acres, which is capable of division into different tracts, five of which may contain 100 acres each. *Elliott v. Coleman & Davis*, 170 Ala. 355, 54 So. 491.

§ 20. Political Divisions and Bodies.

§ 20 (1) Counties and County Seats.

Names and Character of Counties.—The court will take judicial notice of the division of the state into counties. *Camp v. Marion County*, 91 Ala. 240, 8 So. 786; *Trammell v. Chambers County*, 93 Ala. 388, 9 So. 815.

"The court has judicial knowledge of the names of all the counties in the state, and of their corporate character. *Overton v. State*, 60 Ala. 73; Code, § 886." *Camp v. Marion County*, 91 Ala. 240, 8 So. 786, 787; *Trammell v. Chambers County*, 93 Ala. 388, 9 So. 815.

§ 20 (2) Cities, Towns, Villages, and School Districts.

Town Charter.—The supreme court

takes judicial notice of a town charter. *State v. Matthews*, 153 Ala. 646, 45 So. 307.

"The charter of the city of Montgomery is a public statute, of which the courts will take judicial notice. It provides that the corporate authorities may sue and be sued by the name of 'The City Council of Montgomery.' The court must, therefore, judicially know the legal identity of the defendant corporation in this action with that of the municipality known as the city of Montgomery. 1 Dill. Mun. Corp., § 83; *Kelly v. Trustees, etc., R. Co.*, 58 Ala. 489; *Selma v. Perkins*, 68 Ala. 145." *City Council v. Wright*, 72 Ala. 411, 419.

Incorporation of City.—The courts will take judicial notice of the incorporation of a city. *City Council of Montgomery v. Wright*, 72 Ala. 411.

Probate court of a certain county may take judicial notice of the fact that a certain town is an incorporated city in that county. *Smitha v. Flournoy's Adm'r*, 47 Ala. 345.

Application of Law to City.—The supreme court will take judicial notice that the city of Birmingham, at the time of the enactment of Gen. Acts 1911, p. 204, was the only city to which it was applicable. *State v. Joseph*, 175 Ala. 579, 57 So. 942.

§ 21. Laws of the State.

See, also, post, "Charter of Public and Private Corporations," § 25; "Municipal Ordinances," § 25.

§ 22. — In General.

Expense of Publication of Application for Local Law.—The court will take judicial notice of the fact that there is no law whereby the state may pay for the publication of an application for the passage of a local law within Const. 1901, § 106, and the journals of the legislature showing that a local law was passed in accordance with the constitution affirmatively shows that the notice was given and publication had without expense to the state. *Clarke v. Carter*, 174 Ala. 266, 56 So. 974.

The law merchant can not be proved by witnesses, but is matter of law for the court. *Jewell v. Center*, 25 Ala. 498.

§ 23. — Public Statutes.

Acts of State Legislature.—The courts

take judicial knowledge of acts of the state legislature. *Cox v. Board of Trustees of University of Alabama*, 161 Ala. 639, 49 So. 814.

Local Laws.—The courts will take judicial notice of local acts of the legislature. *Duy v. Alabama Western R. Co.*, 175 Ala. 162, 57 So. 724.

"The statute though local in its nature, extends to all persons who may come within the territory described, and is a statute of which the courts take judicial knowledge. *Carson v. State*, 69 Ala. 235; *Compton v. State*, 95 Ala. 25, 11 So. 69." *Davis v. State*, 141 Ala. 84, 37 So. 454, 456.

The courts will take judicial notice of public acts of the legislature, though local in application. *Duy v. Alabama Western R. Co.*, 175 Ala. 162, 57 So. 724.

Stock Law.—Acts 1898, 99, p. 683, as amended by acts 1900, 1901, p. 170, to prevent stock from running at large in E. county, though local in its nature, is a statute of which the courts will take judicial knowledge. *Davis v. State*, 141 Ala. 84, 37 So. 454.

Joint Resolution of General Assembly.—Courts take judicial notice of a joint resolution of the general assembly as a public legislative act. *McCarver v. Herzberg*, 120 Ala. 523, 25 So. 3.

Repeal of Statute by Constitution.—The court knows judicially of the repeal of a statute by the constitution. *Campbell v. Shelby County*, 147 Ala. 703, 41 So. 407, 408.

Laws Relating to Sale of Swamp Lands.—The supreme court will take judicial notice that the sale of swamp and overflowed lands belonging to the state has for years received the attention of the legislature. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415.

Local Option Election.—The supreme court will not take judicial cognizance that a certain county has voted for prohibition under a statute authorizing a popular election for such purpose. *Ex parte Reynolds*, 87 Ala. 138, 6 So. 335.

The court will not take judicial notice of the result of an election held under the provisions of act March 19, 1875, known as the "Local Option Law," in any one of the counties to which it is applicable. *Grider v. Tally*, 77 Ala. 422.

"We have decided that we will not take judicial cognizance that the county had voted for prohibition. *Grider v. Tally*, 77 Ala. 422. We need not decide, if the county did so vote, that such would constitute a violation of such prohibition an 'offense punishable by the laws of the state of Alabama,' so that the city government, by an ordinance, could make it a punishable offense against the municipality. We decide nothing on this question." *Ex parte Reynolds*, 87 Ala. 138, 6 So. 335, 337.

Suspension of Statute.—The courts judicially know that the Alabama statutes of limitations were suspended during the late Civil War, namely, from January 11, 1861, to September 21, 1865. *Bernstein v. Humes*, 60 Ala. 582.

§ 24. — Private Statutes.

No Judicial Notice of Private Acts.—Courts do not take judicial notice of a private act of the legislature. *Moore v. State*, 26 Ala. 88; *Broad St. Hotel Co. v. Weaver*, 57 Ala. 26.

Although private acts may be read in evidence at the trial of a cause, without being specially pleaded, courts do not take judicial notice of them, and can not look outside of a complaint or plea demurred to, which contains a reference to a private statute by date and title only, to ascertain what it contains, and thereby determine the sufficiency of the demurrer. *Broad St. Hotel Co. v. Weaver*, 57 Ala. 26.

Under an indictment for failing and neglecting to keep in repair a certain turnpike road, which defendant and another were authorized by private act of the legislature to construct, the court can not take judicial notice of the charter if it is not set out, but must look only to the allegations of the indictment. *Moore v. State*, 26 Ala. 88. See the title CRIMINAL LAW.

Act Validating Rights of Railroad.—An act to validate the rights, franchises, etc., granted to railroads by a certain city, is local and private, and therefore not an act of which the court can take judicial notice; hence, in order to be considered, it must be brought before the court by proper pleading. *City of Mobile v. Louisville & N. R. Co.*, 124 Ala. 132, 26 So. 902.

§ 25. — Charter of Public and Private Corporations.

See, also, ante, "Laws of the State," § 21.

Charter of City.—Courts take judicial notice of the charters of municipal corporations. *Case v. City of Mobile*, 30 Ala. 538; *Albrittin v. Huntsville*, 60 Ala. 486; *City Council v. Hughes*, 65 Ala. 201; *City Council v. Wright*, 72 Ala. 411; *Bessemer v. Carroll*, 154 Ala. 506, 45 So. 419.

The charter of a city is a public act, of which the courts take judicial notice. *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478.

"The charter of the city is a public act of which courts take judicial notice, as though it had been set out in each count in the declaration. *Smoot v. Wetumpka*, 24 Ala. 112; *Albrittin v. Huntsville*, 60 Ala. 486, 492." *Arndt v. Cullman*, 132 Ala. 540, 31 So. 478.

"Courts take judicial knowledge of the charters of municipal corporations. Therefore we judicially know that the charter of the town Athens provides that a person, to be eligible to the office of mayor, must be a qualified voter under the laws of the state at the time of his election or appointment." *Frost v. State*, 153 Ala. 654, 45 So. 203.

Acts Creating Municipal Corporations.—The supreme court will take judicial notice of public acts, local as to territory, creating municipal corporations or amending their charters, and that a particular municipality was created by several local acts which impliedly, if not expressly, authorized it to own and operate electric light plants. *Darby v. Union Springs*, 173 Ala. 709, 55 So. 889.

Provisions of Charters.—Judicial notice is taken of the provisions of municipal charters. *Frost v. State*, 153 Ala. 654, 45 So. 203; *Bessemer v. Carroll*, 154 Ala. 506, 45 So. 419.

"In this case we do not judicially know that defendant corporation was incorporated under the general statutes, or that such statute contained all its charter powers, and therefore conclude that it had no power to engage in the operation of an electric plant." *Darby v. Union Springs*, 173 Ala. 709, 55 So. 889, 890.

The charter of a municipal corporation, and special statutes conferring on it ad-

ditional powers for special purposes, are public statutes, of which the courts will take judicial notice. *City of Wetumpka v. Wetumpka Wharf Co.*, 63 Ala. 611.

Charter Powers Created by Local Acts.—The court will take judicial notice of the charter powers of municipal corporations created by local acts. *City of Columbiana v. J. W. Kelley & Co.*, 172 Ala. 336, 55 So. 526.

Statute Incorporating Bank.—The Alabama statute incorporating the Planters' & Merchants' Bank, at Mobile, is a public statute, and will be noticed judicially by the courts, although not specially pleaded. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

The acts of February 13, 1843, for the final settlement of the affairs of the Planters' & Merchants' Bank of Mobile, and of January 24, 1845, amendatory thereof, are public acts, and will be judicially noticed, though not specially pleaded. *Jemison v. Planters' & Merchants' Bank*, 17 Ala. 754.

Charters of private corporations are not judicially noticed. *Drake v. Flewellen*, 33 Ala. 106 cited in note in 20 L. R. A. 709; *Kelly v. Trustees of Alabama & C. R. Co.*, 58 Ala. 489.

Plank-Road Company.—Judicial notice can not be taken of the charter of an incorporated plank-road company, a private corporation. *City of Montgomery v. Montgomery & W. Plank-Road Co.*, 31 Ala. 76.

Railway charters are generally treated as private acts, of which courts do not take judicial notice. *Perry v. New Orleans, M. & C. R. Co.*, 55 Ala. 413.

§ 26. — Municipal Ordinances.

See, also, ante "Laws of the State," § 21; "Charter of Public and Private Corporations," § 25.

Ordinances Must Be Plead.—Municipal ordinances are not subjects of judicial notice. *Case v. Mobile*, 30 Ala. 538; *Furthman v. City of Huntsville*, 54 Ala. 263.

Courts do not take judicial notice of ordinances of a municipality, but they must be specially pleaded when rights are claimed under them. *Town of Clayton v. Martin* (Ala. App.), 60 So. 963.

Courts of this state do not take judicial notice of municipal ordinances, though residents within a municipality must take

notice of its ordinances, which have the force of laws within the limits of the corporation, and so, where an ordinance is offered in evidence, the court can not assume to know the date on which it became effective as law, where not shown. *Excelsior Steam Laundry Co. v. Lomax*, 166 Ala. 612, 52 So. 347.

"The courts of this state do not take judicial cognizance of municipal ordinances. *Case v. Mobile*, 30 Ala. 538; *Furman v. Huntsville*, 54 Ala. 263; *North Birmingham R. Co. v. Calderwood*, 89 Ala. 247, 7 So. 360. This, although the residents within a municipality must take notice of its ordinances, and such ordinances have the force and effect of laws within the limits of the corporation. *Calderwood's Case*, supra. The recital of the bill of exceptions is in this language: 'Plaintiff here offered in evidence a copy of § 875 of the Code of the city of Birmingham, which was received in evidence and was as follows: [Here follows an ordinance in the language of the complaint.]' The courts, refusing to take cognizance of municipal ordinances, can not logically assume to know the date upon which an ordinance became effective as law. The proof offered was unquestionably sufficient to establish the ordinance as subsisting at the time of the trial; but it failed to show that it had been adopted prior to the time at which plaintiff received her injury. The bill of exceptions distinctly states that it contains all the evidence, and we are without authority to deal with it on any hypothesis to the contrary." *Excelsior Steam Laundry Co. v. Lomax*, 166 Ala. 612, 52 So. 347.

Speed Ordinances.—In order to recover for the death of a person struck by an automobile in a city street, counts charging infraction of a municipal ordinance, and that the ordinance was in force at the time of the accident, must be shown, as the court can not presume such facts. *Adler v. Martin (Ala.)*, 59 So. 597.

§ 27. — Legislative Proceedings and Journals.

Journals.—The supreme court will take judicial notice of the journal of each legislative house. *Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942.

"The constitution requires that each

house shall keep a journal of its proceedings, and of the record thus made, the courts take judicial cognizance. *Moody v. State*, 48 Ala. 115; *Montgomery Beer Bottling Works v. Gaston*, 126 Ala. 423, 28 So. 497." *Crenshaw v. Joseph*, 175 Ala. 579, 57 So. 942, 947.

Courts take judicial notice of the journals of the two houses of the legislature, and are authorized to search them for the purpose of ascertaining whether a particular statute was enacted in accordance with constitutional forms. *Moody v. State*, 48 Ala. 115; *Moog v. Randolph*, 77 Ala. 597.

§ 28. Laws of United States.

Acts of Congress.—Courts take judicial notice of the acts of congress. *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101.

General Statutes of United States.—State courts take judicial notice of a general statute of the United States, so that it is enough for a complaint to aver a statement of facts showing liability thereunder. *Kansas, etc., R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457.

"The land described in the bill is a part of a sixteenth section. The court judicially knows that the title to all sixteenth sections by act of congress was vested in the state for school purposes, and that by an act of the legislature of January 15, 1828 (*Aiken's Dig.*, pp. 378, 383), the school commissioners had the authority to survey and plat into lots, and sell the lots, of his sixteenth section. *Long v. Brown*, 4 Ala. 622; *Roberts v. Matthews*, 137 Ala. 523, 34 So. 624." *Greene v. Boaz*, 157 Ala. 68, 47 So. 255, 256.

Safety Appliance Act.—In an action against a railroad company for the death of a servant caused by defendant's failure to comply with act Congress March 2, 1893, c. 196, 27 Stat. 531 [*U. S. Comp. St.* 1901, p. 3174], the court will take judicial notice of what the act provides, and its introduction in evidence is immaterial. *Mobile J. & K. C. R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395.

"The courts of the country take judicial notice of the act of congress known as the 'Safety Appliance Act,' and where the complaint avers a state of facts which show a failure on the part of the railroad company to comply with the requirements of the statute, this is sufficient; it not be-

ing required to plead specially a general statute. The objection raised to the several counts because of the generality of the averments of negligence is untenable. As said in *Georgia Pac. R. Co. v. Davis*, 92 Ala. 307, 9 So. 252, where many of our cases are cited, and which have been followed in more recent decisions; 'Under our system of pleading, very general averments, little short, indeed, of mere conclusions, of a want of care and consequent injury, leaving out the facts which constitute and go to prove the negligence, meet all the requirements of the law.' When tested by the rule laid down in these cases, the complaint was not to the demurrer on the ground therein stated, and no error was committed in overruling the same." *Kansas, etc., R. Co. v. Flipppo*, 138 Ala. 487, 35 So. 457, 460.

§ 29. Laws of Other States.

Must Be Proved as Facts.—The courts will not take judicial notice of the laws of the other states, but they must be proved in the same manner as other facts. *Sidney v. White*, 12 Ala. 728; *Drake v. Glover*, 30 Ala. 382; *Mobile & O. R. Co. v. Whitney*, 39 Ala. 468; *Bradley v. Harden*, 73 Ala. 70; *Bush v. Garner*, 73 Ala. 162; *Leatherwood v. Sullivan*, 81 Ala. 458, 1 So. 718, cited in note in 21 L. R. A. 472. *Teat v. Chapman & Co.*, 1 Ala. App. 491, 56 So. 267.

The doctrine that a contract is governed by the law of the place can be invoked only by pleading, followed by proof of the laws of a foreign jurisdiction; and the supreme court, on appeal, can not take judicial notice of the decisions of the court of other states. *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752.

"But the doctrine and maxim can be invoked only by appropriate pleading, followed by proof, of the laws of the foreign jurisdiction. We can not take judicial knowledge of the decision of the courts of other states. *Cubbedge, etc., Co. v. Napier*, 62 Ala. 518; *Varner v. Young*, 56 Ala. 260. The South Carolina decision relied on the appellant was not offered in evidence in the court below, and we can not regard it as evidence here. 'It can be consulted by us, as we could consult the opinion of any other reputable supreme court of a sister state; but it does not bind

us as an adjudication.' *Varner v. Young*, supra. The contract, then, must be construed by the principles of the common law, and in the absence of pleading and proof to the contrary we will presume that the common law on the subject in South Carolina is the same that it is in Alabama. 2 Wharton on Conflict of Laws (3d Ed.), p. 1534; *Crandall v. Great Northern R. R. Co.*, 83 Minn. 190, 86 N. W. 10, 85 Am. St. Rep. 458; *Forepaugh v. Delaware R. Co.*, 128 Pa. 217, 18 Atl. 503, 5 L. R. A. 508, 15 Am. St. Rep. 672." *Southern Exp. Co. v. Owens*, 146 Ala. 412, 41 So. 752.

Statute of Louisiana.—The courts of this state may probably know, judicially, that the term syndic in the civil law corresponds very nearly with the term assignee in the common law; but can not take judicial notice of the statute of Louisiana relating to the appointment, powers, and rights of syndics, or to estates of insolvent debtors. *Mobile, etc., R. Co. v. Whitney & Co.*, 39 Ala. 468.

A state court can not take judicial notice of the statute laws of another state; consequently, the appellate court will not look into the Civil Code of Louisiana, when not properly brought before it, to ascertain what the law of that state is. *Drake v. Glover*, 30 Ala. 382.

Rate of Interest in Another State.—The court can not take judicial notice of the rate of interest allowed in another state. *Insurance Co. of North America v. Forcheimer*, 86 Ala. 541, 5 So. 870.

The court can not take judicial notice of the rate of interest in a sister state from the table of interest prepared by the secretary of state and appended to the acts of the legislature, as required by the act of 1848. The rate of interest must be ascertained by a jury, and the table appended to the acts is only prima facie evidence, which may be rebutted by other proof. *Clarke v. Pratt*, 20 Ala. 470.

Law as to Recording of Mortgage.—Mere proof that a chattel mortgage executed in and subject to the laws of a sister state was filed for record in the sister state is not proof of constructive notice to subsequent purchasers, in the absence of proof of the laws of the sister state

governing the recording of mortgages. *Teat v. Chapman & Co.*, 1 Ala. App. 491, 56 So. 267.

§ 30. Laws of Foreign Countries.

Laws of Spain.—As a general rule, the party claiming a benefit from a foreign law must prove its existence; but, when the laws of one state or nation are operative in another, this rule does not apply. The courts of this country will therefore judicially notice the laws of Spain which regulated the conveyance of real property in Mobile and the country adjacent, when the territory was subject to the dominion of that nation, and, under the influence of this principle, are bound to know what documentary evidence of title were records of the province, so as to allow copies to be admitted as evidence. *Farmer's Heirs v. Eslava*, 11 Ala. 1028.

§ 31. Jurisdiction and Powers of Courts.

Establishment of Judicial Tribunals.—All court in the United States takes judicial notice that tribunals are established in the several states for the adjudication of controversies and the ascertainment of rights. In order, therefore, to give the transcript of the record of the probate of a will in a sister state in evidence, it is not necessary to show that probate and registry is required in such state. *Dozier v. Joyce*, 8 Port. 303, cited in note in 5 L. R. A., N. S., 967, 980.

Courts of Record.—The court will not take judicial notice of the fact that a court of another state is a court of record. *Holly v. Bass*, 68 Ala. 206.

Jurisdiction of Foreign Court.—"We can not judicially know that the court of ordinary of Muscogee county, in Georgia, had authority to confer administration, or that these powers were vested in it solely. Indeed, we know nothing whatever as to its jurisdiction or powers; and, in the absence of all evidence as to these points, without any testimony showing the original action of the court in Georgia as to the grant of administration, to admit secondary evidence of such action, would be extending the rule further than is warranted either upon principle or authority." *Shorter v. Urquhart*, 28 Ala. 360, 366.

Justice of the Peace.—The court will take judicial notice of the fact that jus-

tices of the peace have, under Code 1886, § 3378, jurisdiction of unlawful detainer, but not of the fact that a particular justice has jurisdiction in a particular case. *Olmstead v. Thompson*, 91 Ala. 130, 8 So. 755.

§ 32. Existence, Organization, and Terms of Court.

§ 32 (1) Organization.

District to Which City Belonged.—Where, to a prayer for process, the words, "of Mobile" were added to the name of the defendant corporation, held, that the court would take judicial notice to what chancery district "Mobile" belonged. *Alabama Gold Life Ins. Co. v. Cobb*, 57 Ala. 547.

Resignation of Circuit Judge.—The supreme court will take judicial notice of the resignation of a circuit judge. *Ex parte Peterson*, 33 Ala. 74.

Clerks of State Courts.—The circuit court of one county is bound to take judicial notice as to whether a person signing an execution issued by a circuit court of another county is in fact clerk of that court, and may inform itself of that fact in any way it may deem best, but is not required to receive oral evidence to disprove the same. *White v. Rankin*, 90 Ala. 541, 8 So. 118.

"The court committed no error in refusing to receive oral evidence that McNab, who signed the execution, was not the clerk of the circuit court of Barbour county at the time it purports to have been issued. The clerk being a commissioned officer, the court was authorized and bound to take judicial notice that he was clerk, and also of his term of office, when it commenced, and when it expired. *Cary v. State*, 76 Ala. 78; *Bishop v. State*, 30 Ala. 34. If the cognizance extends beyond actual knowledge, the judge may resort to any authoritative source of information, and inform himself of the fact in any way he may deem best in his discretion, but is not required to receive oral evidence to disprove a fact the existence of which is judicially known to the court." *White v. Rankin*, 90 Ala. 541, 8 So. 118, 119.

In *White v. Rankin*, 90 Ala. 541, 8 So. 118, 120, it is said: "The clerk being a commissioned officer, the court was authorized and bound to take judicial knowl-

edge that he was clerk, and also of his term of office, when it commenced, and when it expired. If the cognizance extends beyond actual knowledge, the judge may resort to any authoritative source of information, and inform himself of the fact in any way he may deem best in his discretion; but he is not required to receive oral evidence to disprove a fact, the existence of which is judicially known to the court." And in *Cary v. State*, 76 Ala. 78, it is said: "The dates of these commissions are matters of public record in the executive department of the state government, being accessible to inquiry by all who may be concerned, and the law fixes the duration of each official term." *Casey v. Bryce*, 173 Ala. 129, 55 So. 810, 811.

Clerks of Foreign Courts.—The supreme court will not take judicial notice of the official powers and duties of clerks of foreign courts. *Ex parte Jones*, 66 Ala. 202.

This court can not take judicial notice of the clerks of foreign court, or their powers; and, therefore, can not know that an affidavit, purporting to have been made and subscribed before the "clerk of the common pleas of Richland county, Ohio," or his deputy clerk, was taken before that officer, or that he had authority to administer oaths. *Ex parte Jones*, 66 Ala. 202.

The courts do not take judicial cognizance of the clerks of foreign courts or their powers, and an indorsement on a chattel mortgage, showing that the instrument had been filed for record in the office of the clerk of the circuit court of a sister state, does not show that the mortgage was filed for record as authorized by the laws of the sister state. *Teat v. Chapman & Co.*, 1 Ala. App. 491, 56 So. 267.

Sheriff of County.—A court must judicially know who is sheriff of a particular county, and where the sheriff of Sumpter county annexed to his signature the letters "S. S. C.," the court understood them to mean Sheriff of Sumpter county. *Miller v. McMillan*, 4 Ala. 527.

The court is bound to know who are the sheriffs of the several counties. *Ingram v. State*, 27 Ala. 17.

Expiration of Sheriff's Term of Office.

—The court will take judicial notice of the time at which a sheriff's term of office expired. *Ragland v. Wynn's Adm'r*, 37 Ala. 32.

§ 32 (2) Terms of Court.

Notice by Appellate Court.—Appellate courts take judicial notice of the terms of the circuit court. *Lindsay v. Williams*, 17 Ala. 229; *Rodgers v. State*, 50 Ala. 102.

The appellate court will take judicial notice of the date fixed by law for the commencement of the regular terms of the probate court, though, where the term is not confined by law to a single day, nor to any certain number of days, it can not be judicially known when any particular term ends. *Harrison's Adm'r v. Meadors*, 41 Ala. 274.

"An application is made for a rehearing in this case, to which we deem it proper to make a brief response. It is insisted, that the decree of the probate court can not be affirmed on the principles decided in the case of *Allman v. Owen*, 31 Ala. 167, because it does not appear to have been rendered at a regular term of the court. We judicially know that a regular term of the court was not fixed by law, to commence on the fifteenth of July, 1861, the day on which the decree was rendered; but, in the absence of any entry, or other thing of record, showing that the court held on that day was a special term, we must presume that it was a continuation of the regular term. *Duval v. McLoskey*, 1 Ala. 708. See, also, *Davis v. Davis*, 6 Ala. 611. The regular terms of the probate court are not limited to a single day, but they may be adjourned from day to day, until all the business is disposed of. The record of the present case does not show regular adjournments and meetings of the court, until the day of the rendition of the decree; but not in any wise showing the contrary, we must presume such to have been the case. Otherwise, we should place the court in error by intendment, when error does not affirmatively appear." *Harrison v. Meadors*, 41 Ala. 274, 278.

This court will take judicial notice of the commencement and duration of the terms of the circuit court, and of the coincidence of the days of the week and month, so as to determine that a specified day fell in the second week of the term of

the court below. *Rodgers v. State*, 50 Ala. 102.

The supreme court will take judicial notice that a circuit court convened on a certain day and that its session was limited to a certain time. *McMullan v. Long* (Ala.), 39 So. 777.

Knowledge of Their Own Term.—

Courts are bound to know judicially when their terms are held by public law. *Anderson v. Dickson*, 8 Ala. 733.

Other Court of Same State.—A court will take judicial notice of the terms of other courts of the same state, when they begin and when they end, and the days of the week upon which any particular day of the month may fall. *Ex parte Vincent*, 43 Ala. 402.

§ 33. Judicial Proceedings and Records.

See, generally, the titles COURTS; RECORDS.

§ 33 (1) In General.

Judicial Notice of Partners.—In ejectment, courts are bound to take notice of the real parties litigant. *Doe ex dem. Wilson v. Hammond*, 146 Ala. 687, 40 So. 343; *Etowah Mining Co. v. Henderson*, 127 Ala. 663, 29 So. 79.

Trial Dockets and Minutes.—It is a matter of judicial knowledge that the trial docket is used by the judge for making memoranda of orders and judgments rendered in pending cases, and that judgments are written in the book in which is kept the minutes of each day's proceedings during the term and the orders and judgments in the order in which they are entered, which book is the sole memorial of their existence. *Winn v. McCraney*, 156 Ala. 630, 46 So. 854.

§ 33 (2) Records or Decisions in Same Case.

Notice of Original Record.—The court of appeals on a second appeal will take judicial notice of what is shown by the original record when the case was before the supreme court on a prior appeal. *Bohanan v. Dodd* (Ala. App.), 60 So. 955.

"The appellant, in his application for rehearing, insists that this case should be reversed because the court refused to admit testimony in support of plea No. 5. It is true that the judgment entry on this appeal shows no rulings on the demurrers

to this plea, but we take judicial knowledge of what is shown by the original record when this case was before the supreme court on a former appeal, *Bohanan v. Thomas*, 159 Ala. 410, 49 So. 308, and the record on that appeal show that demurrers to this plea were sustained by an order of the court made on April 19, 1907, and the supreme court in reviewing the case sustained this ruling of the trial court. The record in this case shows that these pleas were not refiled after the court below had, as shown by the record on former appeal, sustained demurrers to them." *Bohanan v. Dodd* (Ala. App.), 60 So. 955, 957.

§ 33 (3) Proceedings in Other Courts.

Courts of Sister States.—The courts of this state will take judicial notice of the facts, that the proceedings of courts of ordinary in a sister state, under the constitutional and statutory provisions in evidence in this case, are lamentably loose, and that their records are made up with peculiar carelessness; and will therefore, in construing the records of those courts, adopt such a construction of the language as will be most favorable to the maintenance and regularity of their proceedings, without supplying what is absolutely wanting. *Jemison v. Smith*, 37 Ala. 185.

The decisions of foreign court, like foreign statutes, must be proved, before they can be made the basis of judicial decisions by our court. In construing a deed of gift executed in Georgia, this court will not be governed, as by an authoritative adjudication, by a decision of the court of last resort in that state, which was not proved and offered in evidence. *Varner v. Young*, 56 Ala. 260.

§ 34. Officers and Officials Position and Authority.

Not Governed by Definite Rule.—
"Speaking to the subject of judicial notice of domestic officials, their identity, and authority, Mr. Wigmore, in his work on Evidence, § 2567, says: 'It is the law that creates offices and attributes certain duties and authorities to the incumbents; but whether the incumbent at a given time and place is a specific person depends on external political action, sometimes recorded and notorious, but sometimes neither. Court have solved this applica-

tion of the principal by considerations of practical good sense and convenience, which are, however, difficult to reduce to a definite rule. All that can be said is that the incumbents of the more important and notorious offices are judicially noticed, and that many of the lesser and local ones are not." *Lucas v. Boyd*, 156 Ala. 427, 47 So. 209, 210.

The receivers of public moneys in the United States land offices are public officers, whose appointments will be judicially recognized in the courts of Alabama. *Bullock v. Wilson*, 5 Port. 338.

Inauguration of Governor.—The supreme court will take judicial notice that C. was inaugurated and installed in the office of governor on January 15, 1907, and that his successor was inaugurated and installed on Monday, January 16, 1911, at 2:15 p. m. *Oberhaus v. State*, 173 Ala. 483, 55 So. 898.

Commissioned Officers of State.—This court will take judicial notice of the commissioned officers of the state and of the terms for which they hold, and the extent of their authority. *Touart v. State*, 173 Ala. 453, 56 So. 211; *Sandlin v. Anderson*, etc., Co., 76 Ala. 403; *Ryan v. Young*, 147 Ala. 660, 41 So. 954; *Williams v. Finch*, 148 Ala. 674, 41 So. 834.

Courts are required to take judicial notice of the various commissioned officers of the state, and to know their official signatures, the extent of their authority, the dates of their commissions, and the expiration of their respective terms of office. *Cary v. State*, 76 Ala. 78.

Officer Issuing Writ of Attachment.—The courts judicially know whether the officer by whom a writ of attachment offered in evidence purports to have been issued was the commissioned officer and know the genuineness of his signature, notwithstanding that between the time of the issuance of the writ and the time it was offered in evidence a successor to the officer who issued it has been elected, and is performing the duties of the office. *Ryan v. Young*, 147 Ala. 660, 41 So. 954.

Notary Public.—The court will take judicial notice that one whose certificate was produced had been commissioned by the governor as a notary public for a cer-

tain length of time. *Cary v. State*, 76 Ala. 78.

The circuit court of a county will take judicial notice of what ward in a city located in the county a notary public has been appointed for. *Russell v. Huntsville Ry., Light & Power Co.*, 137 Ala. 627, 34 So. 855.

Bank Commissioners.—The bank commissioners appointed under the act of Alabama of 1846, whether appointed by the legislature or the executive to fill a vacancy, are public officers, of whom all courts will take judicial notice. *Colgin v. State Bank*, 11 Ala. 222.

Authority of School Commissioners.—Judicial notice will be taken that title to all sections numbered sixteen was vested by act of congress in the state for school purposes, and that by an act of the legislature of January 15, 1828 (*Aiken's Dig.*, pp. 378, 383), the school commissioners had authority to survey and plat such sections into lots and sell the same. *Greene v. Boaz*, 157 Ala. 68, 47 So. 255.

De Facto Officers.—Courts while required to take judicial notice of the commissioned state and county officers are not required to take judicial notice of "de facto officers." *Williams v. Finch*, 148 Ala. 674, 41 So. 834.

Sheriffs of Different Counties.—The courts are bound to know who are the sheriffs of the different counties. But a return that bears no date is defective. *Timberlake v. Brewer*, 59 Ala. 108.

If process is directed to the sheriff of a particular county, and the officer returning the same describe himself as "sheriff" generally, the court, having judicial knowledge of who are the sheriffs of the various counties, will recognize him as the person of the same name who is sheriff of that county. *Snelgrove v. Branch Bank*, 5 Ala. 295.

Mayor of City.—The courts of a county in which a city is situate should take judicial cognizance of who is, or who was, at any time, the mayor of the city. *Lucas v. Boyd*, 156 Ala. 427, 47 So. 209.

"We have been unable, in our research, to find any case in this jurisdiction that holds that our courts will take judicial notice of the various mayors of our cities, or one that holds the contrary. It has

been held, however, that this court will take judicial cognizance of state, county, and federal officers, of less importance, notoriety, and dignity than the mayors of our larger cities. *Whitney v. Jasper Land Co.*, 119 Ala. 503, 24 So. 259." *Lucas v. Boyd*, 156 Ala. 427, 47 So. 209, 210.

§ 35. Elections and Appointments to Office.

Result of General Election.—The courts must take judicial notice of the declared result of a general election, and of the fact that one has been declared elected to the office of sheriff of a county, and has received a commission from the Governor. *Casey v. Bryce*, 173 Ala. 129, 55 So. 810.

"The declared result of a general election is also matter of judicial knowledge. 4 Wigmore on Ev., § 2577, note 3. We therefore judicially know, as did the chancery court, that C. W. Bryce was duly declared elected to the office of sheriff of Cullman county at the general election of November, 1910, and that a commission was duly issued to him therefor by the governor of the state on November 28, 1910." *Casey v. Bryce*, 173 Ala. 129, 55 So. 810, 811.

Issuance of Commission to Public Officer.—The issuance of a commission to a public officer by the governor is a public act of public record of which the courts must take judicial notice. *Casey v. Bryce*, 173 Ala. 129, 55 So. 810.

"The issuance of a commission to a public officer, by the governor of the state, being a public act of public record which is prescribed by law, must be judicially noticed by courts. *White v. Rankin*, 90 Ala. 541, 8 So. 118; *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403; *Cary v. State*, 76 Ala. 78." *Casey v. Bryce*, 173 Ala. 129, 55 So. 810, 811.

§ 36. Official Proceedings and Acts.

Matters of Public Record.—The court must take judicial notice of matters of public record, and the facts disclosed by such record are conclusive. *Casey v. Bryce*, 173 Ala. 129, 55 So. 810.

Acts of Federal Officers.—The courts of this state have no judicial knowledge as to whether the plans and specifications for bridges across navigable streams were

submitted to and approved by the chief of engineers and the secretary of war as required by federal statutes; this being a question of fact and not of law. *Mauldin v. Central, etc., R. Co. (Ala.)*, 61 So. 947.

§ 37. Official Signatures and Seals.

Signatures of Commissioned Officers.—

This court will take judicial notice of the genuineness of the signatures of commissioned officers of the state. *Touart v. State*, 173 Ala. 453, 56 So. 211.

Signature of Justice of the Peace.—

While a court will take judicial notice of who are justices of the peace, where a warrant is signed with the name of a justice of the peace, without his initials of office, the court can not take judicial notice that the signature is that of a justice of the peace, since it can not judicially know that there is but one person by that name. *Reach v. Quinn*, 159 Ala. 340, 48 So. 540.

Since the state courts take judicial notice of its commissioned officers, the extent of their authority, and the genuineness of their signatures, an execution issued by a justice of the peace is admissible as evidence, without any proof of his signature or personal identity. *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403.

§ 38. Effect of Judicial Notice.

A judge is not bound to receive oral evidence to disprove a fact judicially known to the court. *Casey v. Bryce*, 173 Ala. 129, 55 So. 810, 811.

II. PRESUMPTIONS.

§ 39. Nature and Scope in General.

Levy by Sheriff.—Evidence that, several days before levying an attachment, there was more property on hand than the sheriff afterwards levied on, does not of itself create a presumption against a sheriff, so as to shift the burden on him to show that he levied on all the property there was, its probative force being for the jury. *Smith v. Heineman*, 118 Ala. 195, 24 So. 364.

§ 40. Grounds.

Foundation of Presumptive Evidence.—

"Presumptive evidence is founded upon the connection, which is found by experience, between the facts, which are

proved, and those which are intended to be proved. The presumption intended to be drawn from the facts in proof, in this case, is, that from the contiguity of the residence of Green, to the ferry, he knew of the acts of Elliott, in transporting passengers and property over the creek, during high water, and from this knowledge, the further presumption is attempted to be derived, that he would not suffer the use of his property in such a hazardous employment, without a participation in its benefits." *Garner v. Green*, 8 Ala. 96, 97.

§ 41. Identity of Persons and Things.

Identity of Witnesses.—Code, §§ 2111, 2114, require that in proceedings to sell a decedent's land the necessity must be shown by two disinterested witnesses. A record in such proceedings showed that H. S. was the administrator; that as such he filed the petition for an order to sell the lands; and that on the hearing it appeared "to the court by the oaths of H. S. and A. L., disinterested witnesses," etc. Held, that it would not be presumed that H. S., whose testimony was taken to support the petition, was the same person as H. S., the administrator. *Stevenson v. Murray*, 87 Ala. 442, 6 So. 301.

Maker and Indorsers.—Where the name of one of the indorsers of a note is similar to that of the maker, a presumption that the same person is both maker and indorser is not so violent as to amount to prima facie evidence of the fact. *Curry v. Bank of Mobile*, 8 Port. 360.

Payee and Indorsers.—It will be presumed that the payee and indorser of a note is the same person, where the only difference in the names is the insertion of the initial of the middle name in the indorsement. *Hunt v. Stewart*, 7 Ala. 525.

Possession of Letter as Evidence of Identity.—A., in answer to a letter from B., wrote to the latter that he had received from C. a claim of D. on her relations to indemnify him as surety for C.; admitted that he had collected \$300, part of the claim, and stated that more could be collected if certain steps were pursued; insisted on retaining for trouble and expenses of collection, and holding the remainder of the money in hand for his indemnity, as above stated. An action being brought by D. against A. for money had and received, and the letter above de-

scribed being the only evidence adduced, the defendant demurred to the evidence. Held that, although the first name of D. was not expressed in the letter, it would be intended (upon demurrer), from the plaintiff's possession of the letter, that she was the person referred to. *Hardie v. Turner*, 9 Ala. 110.

Person Bearing Same Name.—Where it appears from the process at law that it was served on an individual bearing the same name with complainant in a bill to enjoin a judgment based on the service, who alleged in his bill that it was not served on him, the presumption will be against the truth of the allegation. *Givens v. Tidmore*, 8 Ala. 745.

§ 42. Personal Status and Condition in General.

That Party Was Adult.—As the presumption is that parties are sui juris, without disability, it must be presumed that a party to a cause was an adult, within the recital of the decree that all the adult parties interested consented to its rendition. *Gunter v. Hinson*, 161 Ala. 536, 50 So. 86.

§ 43. Nature and Condition of Property or Other Subject-Matter.

Ownership of Property.—Possession of personalty remaining with the vendor is presumptive evidence of ownership in him; but this presumption may be rebutted by proof. *Hobbs v. Bibb*, 2 Stew. 54.

Right to Possession of Property.—Where property is found in possession of a family composed of several individuals, the law refers the possession to him who has the title. *Lenoir v. Rainey*, 15 Ala. 667.

If two persons be in the joint possession of property, and one alone has the title, the law will refer the possession to the title. *State v. Campbell*, 17 Ala. 566.

§ 44. Innocence.

Degree of Evidence Necessary to Overcome Presumption.—The presumption of innocence is evidentially effective in civil cases where criminal conduct is imputed, and, where the presumption of innocence is a factor in a civil proceeding, the degree of evidence necessary to repel the presumption must be clear and satisfactory, and in such cases it is not required

that the imputation of wrong resented by the presumption of innocence should be refuted beyond a reasonable doubt. *Freeman v. Blount*, 172 Ala. 655, 55 So. 293.

"When misconduct or crime is alleged, whether in a criminal or civil suit, whether in a direct proceeding to punish an offender or in some collateral matter, the accused is presumed to be innocent until proved guilty." *Jones on Ev.*, § 14; *Childs v. Merrill*, 66 Vt. 302, 308, 29 Atl. 532; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 613, 25 Atl. 697; 16 Cyc., p. 1081. In *Stevenson v. Gunning's Estate*, supra, the Vermont court had to deal with forgery asserted as a defense to a civil action to enforce the payment of a note. The trial court was ruled to have erred in refusing to instruct the jury upon the presumption of innocence in the premises. The basis of the presumption, its nature, effect, and the means to overturn it, are thus stated by Greenleaf: 'As men do not generally violate the Penal Code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, as matter of evidence, to the benefit of which the party is entitled.' This doctrine was fully approved, by the supreme court, in *Coffin v. United States*, 156 U. S. 432, 459, 460, 15 Sup. Ct. 394, 39 L. Ed. 481, and in *Wilcox v. Wilcox*, 46 Hun. 32, 40. Its soundness was not reflected upon in *Agnew v. United States*, 165 U. S. 36, 17 Sup. Ct. 235, 41 L. Ed. 624. In this state the presumption has been declared to be matter of evidence in *Newson v. State*, 107 Ala. 133, 18 So. 206; *Amos v. State*, 123 Ala. 50, 26 So. 524; *Harris v. State*, 123 Ala. 69, 26 So. 515; *Bryant v. State*, 116 Ala. 445, 23 So. 40. We know of no decision of this court to the contrary. It has been asserted by learned writers that the presumption is not evidential in nature; but, to us, the unsoundness, in this particular, of our decisions just cited, has not been made to appear." *Freeman v. Blount*, 172 Ala. 655, 55 So. 293, 295.

§ 45. Sanity.

Every Person Presumed to Be Sane.—The law presumes every one sane until

the contrary is proved. *Stanfill v. Johnson*, 159 Ala. 546, 49 So. 223; *Johnston v. Johnston*, 174 Ala. 220, 57 So. 450.

Limitations of Presumption.—"The law presumes everyone to be sane until the contrary is proved; and it is unsoundness, and incapacity to understand the business transacted, as contradistinguished from mere weakness, which must be proved, in order to avoid a conveyance. *White v. Farley*, 81 Ala. 563, 8 So. 215; *Rawdon v. Rawdon*, 28 Ala. 565, 567; *Stubbs v. Houston*, 33 Ala. 555, 567; *In re Carmichael*, 36 Ala. 514, 522; *Kennedy v. Marrast*, 46 Ala. 161, 168, 22 Cyc. 1206; *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687; *Taylor v. Kelley*, 31 Ala. 59, 72; *Knox v. Knox*, 95 Ala. 495, 11 So. 125." *Stanfill v. Johnson*, 159 Ala. 546, 49 So. 223.

§ 46. Knowledge of Law.

See, generally, the title STATUTES.

The presumption that all persons know the law must be confined to presuming that all persons know the law exists, but not that they are presumed to know how the courts will construe it, and whether, if it be a statute, it will or will not be held to be constitutional. *Brent v. State*, 43 Ala. 297.

§ 47. Continuance of Fact or Condition.

§ 47 (1) In General.

Fact Continuous in Its Nature.—When a fact continuous in its nature is proved to exist, its continuance may be presumed until the contrary is shown. *Garner v. Green*, 8 Ala. 96.

"Possession is a fact ordinarily continuous in its nature, and when once established by proof, it must be presumed to continue until a different presumption is raised by contrary proof. 1 *Greenl. Ev.* (14th Ed.), § 41, and note b; *Montgomery, etc., Plankroad Co. v. Webb*, 27 Ala. 618; *Powell v. Knox*, 16 Ala. 364." *Clements v. Hays*, 76 Ala. 280, 284.

Memory of Fact.—The law does not presume that a fact, once known, is never forgotten. *Hall & Brown Wood Working Mach. Co. v. Haley Furniture & Mfg. Co.*, 174 Ala. 190, 56 So. 726.

"If the jury find that the knowledge was present in the agent's mind during the execution of the agency, then they

must find as matter of law that the principal was duly informed, unless they are reasonably satisfied to the contrary from other evidence before them. We do not mean to say that the agent's prior knowledge may not be so remote in point of time, or so lacking in clearness or apparent importance, as to justify the trial court in presuming, *prima facie*, that it has been forgotten. This seems to have been the view taken in *Bessemer Land, etc., Co. v. Jenkins*, 111 Ala. 135, 18 So. 565." *Hall, etc., Mach. Co. v. Haley, etc., Mfg. Co.*, 174 Ala. 190, 56 So. 726, 731.

Possession being continuous in its nature, when its existence is once shown, its continuance will be presumed until the contrary is proved. *Clements v. Hays*, 76 Ala. 280.

Possession of lands is a fact continuous in its nature, and, when once shown, is presumed to exist until the contrary is shown. *Alabama State Land Co. v. Matthews*, 168 Ala. 200, 53 So. 174; *Hollingsworth v. Walker*, 98 Ala. 543, 13 So. 6.

Actual possession under color of title, once shown, is presumed to continue, in the absence of proof of an abandonment. *Buck v. Louisville & N. R. Co.*, 159 Ala. 305, 48 So. 699.

Defendant testified that shortly after such an agreement, he saw the tenant in possession, and that, after an absence of about ten years, he returned, and found the tenant still there. Held, that it would be presumed that such possession under defendant continued during that time. *Alabama State Land Co. v. Kyle*, 99 Ala. 474, 13 So. 43.

Possession of Personal Property.—"And the note, being found among Coleman's papers after his death, was presumptively in his personal possession while living. *Lipscomb v. De Lemos*, 68 Ala. 592; 2 Whart. Ev., §§ 1363, 1364." *Potts v. Coleman*, 86 Ala. 94, 5 So. 780, 781.

"When a party is found in possession of personal property, the law presumes the title to be in him, until it be shown that another has a better title. This better title may be established by proving a prior possession, which is not barred by adverse holding; or the claimant may trace his right to one who had such prior possession; or, he may, in some other way, prove a paramount title in

himself." *Kennington v. Williams*, 30 Ala. 361, 362.

Possession of Funds by Guardian.—When a guardian is shown to have received money at a certain time, and there is also evidence tending to show that she had used it prior to a certain subsequent time, the presumption that it continued in her possession until such subsequent time can not be drawn, either by the court or by the jury, for the purpose of charging a surety with it. *Williams v. Harrison*, 19 Ala. 277.

When money is shown to have come to the hands of a guardian at a particular time, and there is no evidence whatever that any disposition has been made of it, it is the province of the jury to decide whether it continued in her possession until a particular time afterwards. *Williams v. Harrison*, 19 Ala. 277.

Insolvency is presumed to continue for a reasonable time. *Aycock v. Fort Branch Milling Co. (Ala.)*, 62 So. 94.

Continuance of Meretricious Cohabitation.—Illicit character of cohabitation is presumed to continue until there is evidence to the contrary; but, where the parties have manifested a desire to marry, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance, and a marriage may be found from a mere cohabitation, without any apparent change, after the parties became able to contract a valid marriage, though, where they are shown to have preferred a meretricious relation, something more than continued cohabitation after the removal of the impediment to a legal marriage must be shown. *Prince v. Edwards*, 175 Ala. 532, 57 So. 714.

"After a very full review of the authorities, both English and American, Mr. Browne states the following conclusions: First, that an illicit connection is presumed to continue until there is evidence to the contrary. Second, that, where the parties have manifested a desire to form a matrimonial union, the presumption will be rebutted, so as to make the question one of fact, by the slightest circumstance; and that a mere cohabitation, without any apparent change, after the parties have the right to contract a valid marriage will suffice to justify a submission of the question of marriage to a jury, and in

fact require it. Third, that, where the parties are shown to have preferred a meretricious connection, something more than continued cohabitation, after the impediment to a legal marriage has been removed, will be necessary to rebut the inference of the continuance of the original character of the cohabitation; there must be evidence to satisfy the mind of an actual change in the relation between the parties, or at least of a desire for a change. Fourth, that, where there is any evidence to rebut this inference of continuance of an illicit union, the question is one of fact." *Prince v. Edwards*, 175 Ala. 532, 57 So. 714, 715.

Continuance of Single State.—As the single state is the natural and only possible one during early life, and there is no period at which it is necessarily terminated by marriage, the presumption is that celibacy existing during early life continues. *Rucker v. Jackson* (Ala.), 60 So. 139.

"But as the single state is the natural and only possible one during early life, and there is no period at which it is necessarily terminated or merged into marriage, the presumption, in the absence of evidence to the contrary, is that the celibacy which existed during early life continues. 22 Am. & Eng. Encyc. 1285. Besides, this daughter was feeble minded, and the witnesses in referring to her constantly use her maiden name. No conveyance from David Jackson having been shown, the title was in his daughter at the time of Samuel's deed to Jonathan, and upon her death descended to her grandmother, Martha Douglas, from whom, as we have seen, it passed to appellant." *Rucker v. Jackson* (Ala.), 60 So. 139, 141.

Joint Ownership of Property.—A joint ownership being once shown to have existed, its continuance will be presumed until the contrary appear. *Jones v. Sims*, 6 Port. 138.

Proper Tagging of Fertilizer Sacks.—On an issue as to whether sacks of fertilizer purchased by defendant were properly tagged at the time of delivery, evidence that tags were placed on the sacks at the time they were shipped gave rise to no presumption that the tags still remained there when the sacks were deliv-

ered. *Alabama Nat. Bank v. C. C. Parker & Co.*, 146 Ala. 513, 40 So. 987.

"There was no presumption, to be declared by the court, that the tags placed on the sacks at Birmingham remained on them at the time of delivery, and the court did not err in refusing, on plaintiff's request, to charge that such presumption existed. The fertilizer having been bought by the defendants f. o. b. the cars at Albertville, the contract was executory until the commodity was delivered to the purchasers at the point of destination. The carrier became the seller's agent to deliver, and until delivery there was no sale. *Brown v. Adair*, 104 Ala. 652, 16 So. 439." *Alabama Nat. Bank v. Parker & Co.*, 146 Ala. 513, 40 So. 987, 988.

Continuance of Relation as Stockholder.—If a witness is proved to have been a stockholder in an incorporated company three years before the trial, the court will presume that he continued to be a stockholder at the time of trial. *Montgomery Plankroad Co. v. Webb*, 27 Ala. 618.

§ 47 (2) Sanity or Insanity.

Insanity, being proved, is presumed to continue. *Wray v. Wray*, 33 Ala. 187.

§ 47 (3) Existence of Fact or Condition Prior to Time Shown.

Discharge of Attachment.—An attachment, shown to exist more than five years prior to a certain time, is presumed from the lapse of time to have been discharged, so as to determine the lien. *Oliver v. Ellzy*, 11 Ala. 632.

§ 47 (4) Continuance of Law Shown to Exist.

A statute of another state, once properly proved, will be presumed to continue in force; and the burden of showing its repeal is on the party alleging such repeal. *Bush v. Garner*, 73 Ala. 162.

§ 48. Regularity of Course of Business or Conduct of Affairs.

Deposit of Money in Bank.—One who had money in his possession before and at the time he deposited it in bank in the name of his wife was presumptively the owner of the money. *First Nat. Bank v. Taylor*, 142 Ala. 456, 37 So. 695.

"Possession of personal property is prima facie evidence of title in the possessor. This presumption made, plaintiff's claim is left to rest upon the theory that a gift to her was effected by the transaction wherein the money was deposited. To the making of a gift it is essential that there be a delivery, actual or constructive, of the thing, with intent on the part of the donor to divest himself of ownership, and his principle is applicable to deposits in banks made by one to the account of another. *Anniston Nat. Bank v. Howell*, 116 Ala. 375, 22 So. 471; *Matter of Bolin*, 136 N. Y. 177, 32 N. E. 626; *Robinson v. Ring*, Adm'r, 72 Me. 140, 39 Am. Rep. 308; *Broderick v. Waltham Sav. Bank*, 109 Mass. 149; *Davis v. Lenawee County Sav. Bank*, 53 Mich. 163, 18 N. W. 629; *Greene v. Bank (Idaho)*, 64 Pac. 888, 14 Am. & Eng. Ency. Law 1037, 1039." *First Nat. Bank v. Taylor*, 142 Ala. 456, 37 So. 695, 696.

Foreclosure of Mortgage.—In the absence of contrary evidence, it is presumed that the foreclosure of a mortgage under power of sale was regular. *Harton v. Little (Ala.)*, 57 So. 851.

§ 49. Making, Validity, and Genuineness of Writings.

Writing Speaks the Truth.—If a party, deliberately and with full knowledge of its contents, voluntarily executes a written instrument, and acquiesces in its statements for several years, thereby inducing the holder to rest in security on the validity of the contract, a strong presumption arises that the writing speaks the truth. *Blum v. Mitchell*, 59 Ala. 535.

§ 50. Mailing, and Delivery of Mail Matter.

Posting of Letter.—Evidence that a letter was duly posted raises the presumption that it was received. *Steiner v. Ellis (Ala.)*, 7 So. 803.

"In 1 Greenl. Ev., § 40, and note a, it is said: 'If a letter is sent by the post, it is presumed, from the known course in that department of the public service, that it reached its destination at the regular time, and was received by the person to whom it was addressed, if living at the place, and usually receiving letters there.' So, in 2 Whart. Ev., § 1323, is this lan-

guage: 'The mailing a letter properly addressed and stamped, to a person known to be doing business where there is established a regular delivery of letters, is prima facie proof of the reception of the letter by the person to whom it is addressed.' Each of these standard authors cites many authorities in support of their several propositions. We adopt this rule as eminently convenient in commercial transactions, and hold that if Richard A. Jones wrote and mailed letters, one or more, as he testified he did, this was prima facie proof of notice to them of the contents of the letters. Of course, this presumption could have been overturned by proof that the letters were never received.'" *De Jarnette v. McDaniel*, 93 Ala. 215, 9 So. 570, 573.

The fact that a relative of the landlord, who lived near the land, wrote a letter to such landlord notifying him of his tenant's attornment, and placed it in the postoffice addressed to the landlord at the place where he was accustomed to receive letters, is prima facie proof of notice to the landlord of the attornment. *De Jarnette v. McDaniel*, 93 Ala. 215, 9 So. 570.

Genuineness of Reply.—Where a letter, properly stamped and mailed, was addressed to a party at his postoffice address, and a reply thereto, purporting to be from the party to whom the original letter was sent, was received by the sender in due course of mail, the rule is that such facts are prima facie sufficient evidence of the genuineness of the reply letter. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369, cited in note in 17 L. R. A., N. S., 229.

"We are aware of the general rule that when it is shown that a letter of notice was put in an envelope, and that it was properly addressed, stamped, and mailed, the presumption is that the addressee received it in the usual course of mail, yet, this is merely a rule of presumption, and is indulged in cases where the addressee would have an opportunity of denying the truth of the fact presumed if the presumption were not correct. In such case his failure to deny that he received the letter is conclusive of the correctness of the presumption. Here no such opportunity is afforded the addressee. Unless

he did receive the letter, he would probably never hear of the proceeding until the matter was acted on it in this court. The proof is not sufficient that he did receive it. The case would be different if the letter had been registered to him and a return receipt to be signed by him on delivery had been demanded, obtained, and introduced in evidence, together with proof of his signature and of the contents of the notice registered." *Cleghorn v. State* (Ala.), 62 So. 329, 330.

Application of Presumption to Depositions.—The general rule that it will be presumed that a letter addressed, stamped, and mailed was delivered in due course does not apply to a notice of taking depositions for the establishment of a bill of exceptions mailed to a solicitor who has no opportunity to deny its receipt. *Cleghorn v. State* (Ala.), 62 So. 329.

Modification of General Rule.—The general rule that it will be presumed that a letter addressed, stamped, and mailed was delivered in due course does not apply in such a case where the solicitor has no opportunity to deny the receipt of the notice, if the presumption were not correct. *Cleghorn v. State* (Ala.), 62 So. 329.

A package containing a deposition taken in Texas, bore a certificate purporting to be made by the postmaster at Richmond, Tex., to the effect that it was deposited in his office by one of the commissioners. It was postmarked, "Richmond, Texas," and the word "ship" was printed on the envelope, and addressed to the clerk of the circuit court of Dallas county, Cahwaba. It was also postmarked New Orleans, and it reached its destination without any mark of violence. Held prima facie evidence that it was fairly transmitted. *Babcock v. Huntington*, 9 Ala. 869.

§ 51. Evidence Withheld or Falsified.

§ 52. — In General.

Failure to Produce Evidence.—The failure to produce evidence within a party's control raises the presumption that, if produced, it would operate against him; and every intendment will be in favor of the opposite party. *Mordecai v. Beal*, 8 Port. 529; *Blakey v. Blakey*, 9 Ala. 391; *Roney v. Moss*, 74 Ala. 390.

Failure to Prove Fact.—A fact impor-

tant to be proved for the defense, capable of proof, and not proven, will be presumed not to exist. *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 13 So. 948; *Roney v. Moss*, 74 Ala. 390.

Nonproduction of Letters.—The nonproduction by a witness of a letter spoken of by him, which he is required by the interrogatory to attach to his answer, does not justify any inference prejudicial to the party by whom his deposition was taken. Its nonproduction after notice would only justify parol proof of its contents. *Jewell v. Center*, 25 Ala. 498.

Correctness of Deed.—Where the difference between the record of a deed sought to be proved by plaintiff and the certified copy taken from it consisted in a scroll or written seal, found in the copy but not on the record book when produced in court, it was not error to leave it for the jury to say whether the copy was not correct when taken, where the original deed was in court in possession of defendant, who declined to produce it, since from the latter's conduct a strong presumption arises that a production of the original would establish that it was a deed. *Congregational Church v. Morris*, 8 Ala. 182.

§ 53. — Failure of Party to Testify or Giving Evasive Answers.

See, also, the title WITNESSES.

Inference for Jury.—An instruction that defendant's failure to testify should not be considered to his detriment was properly refused. *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

When Failure to Testify Does Not Raise Presumption.—The fact that defendant, a junior mortgagee, did not testify in his own behalf that he had no notice of the senior mortgage (plaintiff's) would give rise to no presumption that he had such knowledge, as he could not be required to negative a fact essential to plaintiff's recovery until the latter had made a prima facie case, especially as his attorney, to whom notice alone was alleged to have been given, had testified that he received no such notice. *Pollak v. Davidson*, 87 Ala. 551, 6 So. 312.

"In the argument of the cause before the jury, counsel for plaintiff contended that they had the right to infer, from the

failure of the defendant to testify, that, if examined, he would testify that he had notice of the prior mortgage. To meet this defendant requested the court to instruct the jury that the fact that defendant had not been examined as a witness is no evidence that he had any notice of the prior mortgage. The rule in such case is thus stated by Mr. Wharton: "The refusal of the party, under any circumstances, to testify as to any facts with which he is familiar, must lead to the presumption which ordinarily holds against a party who withholds explanatory evidence in his favor." 1 Whart. Ev., § 486. To bring a party within the operation of such an unfavorable presumption, he must occupy a position analogous to that of a party who withholds clearer and more satisfactory evidence of the matter in dispute, which is in the power to produce, than that which is offered. The facts to which the witnesses on the part of the adverse party have testified must be apparently or presumably within his knowledge. When the evidence is conflicting or circumstantial, and it appears to be in the power of a party to contradict or explain, a presumption can and should be indulged against him should he fail to testify without satisfactory reason. In *McGar v. Adams*, 65 Ala. 106, after declining to decide whether an unfavorable presumption should be indulged under the circumstances last stated, the court said: "But we do affirm that a presumption can not and ought not to be indulged against a party who does not introduce and examine himself as a witness, merely to support the uncontradicted evidence, favorable to him, which his adversary introduces." Neither should such presumption be indulged against defendant for not introducing himself to disprove facts essential to plaintiff's recovery, which he has failed to prima facie establish." *Polak v. Davidson*, 87 Ala. 551, 6 So. 312, 314.

When an agent is found, recently after his sale, to have acquired a beneficial interest in the property under the purchaser, a strong presumption of evasion arises, which he is required to remove by convincing evidence; but when, in an action brought against him by his principal, the uncontradicted testimony of plaintiff's

witnesses exonerates him, no presumption against him can be indulged from his mere failure to testify as a witness for himself. *McGar v. Adams*, 65 Ala. 106.

§ 54. — Failure to Call Witness.

See, also, the title WITNESSES.

§ 54 (1) In General.

Cumulative Evidence.—There can be no unfavorable inference against a party failing to produce his wife as a witness to a fact, where he and his daughter had both testified thereto, as the wife's testimony would be merely cumulative. *Jordan v. Austin*, 161 Ala. 585, 50 So. 70.

"Nor can there be an unfavorable inference against a party for the failure to produce a witness whose testimony would be simply cumulative. *Jones on Evidence*, § 18. The defendant and his daughter had both testified to the warranty and the failure of the mare to work, and the testimony of his wife on the subject would have been only cumulative. Counsel should not have commented on the failure of the defendant to prove these facts by his wife also, and the trial court erred in not sustaining the defendant's objection to this argument. It may do that when the comment relates to a nonproduced witness, who could only support an examined witness as to an immaterial fact, it would be error without injury. *Lide v. State*, 133 Ala. 43, 31 So. 953. The absent witnesses referred to, however, in the present case, and their testimony as charged in the argument, related to material facts in the case." *Jordan v. Austin*, 161 Ala. 585, 50 So. 70, 72.

Witness' Whereabouts Unknown.—It is proper to refuse to allow a witness, who has testified that he did not know the whereabouts of defendant's engineer whose train ran into plaintiff, to be questioned as to what efforts he had made to find him; it being immaterial as to whether he had made any such efforts, as no inference could be drawn against defendant for not producing the engineer. *Southern Ry. Co. v. Hobbs*, 151 Ala. 335, 43 So. 844.

Plaintiff Relying on His Own Testimony.—Where plaintiff, in trespass for attaching goods claimed to have been purchased by him from the attachment debtors, relies on his own testimony to

prove that he was a purchaser in good faith, it is not error for the court to refuse to charge that the failure of plaintiff to produce the sellers as witnesses to prove the consideration is a circumstance of suspicion for the jury to consider. *Pol-lak v. Harmon*, 94 Ala. 420, 10 So. 156.

Failure to Introduce Vendor of Prop-erty.—In an action involving the issue whether a sale of goods was made in fraud of the vendors' creditors, the court properly refused to charge that the jury, in considering the bona fides of the sale, must take into consideration the fact that one of the vendors was not introduced by the purchasers as a witness, as it was predicated on nothing to render it legal. *Smith v. Collins*, 94 Ala. 394, 10 So. 334, cited in note in 52 L. R. A. 839, 53 L. R. A. 534.

§ 54 (2) Witnesses Equally within Reach of the Parties in General.

Variation of General Rule.—"While, as a rule, there may be an inference unfavorable to the withholding of evidence, this rule does not obtain where the evidence is equally as accessible to both parties. *Ethridge v. State*, 124 Ala. 106, 27 So. 320; *Mann v. State*, 134 Ala. 1, 32 So. 704; *Bates v. Morris*, 101 Ala. 282, 13 So. 138." *Jordan v. Austin*, 161 Ala. 585, 50 So. 70, 72.

The rule that there may be an unfavorable inference where evidence is withheld does not obtain where the evidence is equally accessible to both parties. *Jordan v. Austin*, 161 Ala. 585, 50 So. 70.

Witness Present in Court.—Where a person whose evidence would be competent for either party to an action was in court during the trial, and equally accessible to both parties, it is error to charge that the jury could draw an unfavorable inference against one of the parties for failing to call such person as a witness. *Bates v. Morris*, 101 Ala. 282, 13 So. 138.

Fraudulent Conveyances.—On an issue of fraud as to creditors in a transfer to plaintiff, plaintiff's failure to call his vendor as a witness, he being equally accessible to the attacking creditor, raised no presumption against plaintiff. *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435. See, generally, the title FRAUDULENT CONVEYANCES.

In trespass for attaching goods, which plaintiff alleged and testified that he had bought from the attachment debtors, the fact that two members of the debtor firm were present as witnesses, but were not examined, can not be considered by the jury as an unfavorable circumstance against plaintiff, since the witnesses were subject to the call of either party, and there was nothing to show that their testimony would have been other than cumulative. *Haynes v. McRae*, 101 Ala. 318, 13 So. 270.

§ 54 (3) Attorneys or Physicians as Witnesses.

Physician.—On the trial of an action for the false warranty of a slave, plaintiff introduced as a witness a physician who had been practicing eleven or twelve years, and who testified that he had prescribed for the slave for a month or two, and had given him a thorough examination, and that his opinion, formed from such examination, was that he was unsound at the time of the sale. It also appeared that another physician, who had been practicing seventeen or eighteen years, had been called in to the slave, about two months before the witness, and had attended him for a time, but had removed to an adjoining county. Plaintiff did not call him as a witness, nor was any reason assigned for the failure to call him. Held, that the court properly refused to instruct the jury, on the request of defendant, "that if they believed plaintiff had a skillful physician attending the slave before witness was called in to him, and his attendance at court could have been obtained, but plaintiff had not procured it, nor given any reason why he had not done so, this was a circumstance which they ought to consider in determining whether or not the testimony of that physician, if he had been produced, would not make against the plaintiff." *Patton v. Rambo*, 20 Ala. 485.

§ 55. — Suppression or Spoliation of Evidence.

Destruction of Evidence.—"A party who destroys the evidence by which his claim or title may be impeached thereby raises a strong presumption against the validity of his claim. *Greenleaf on Evidence* §§ 31, 37." *Kyle v. Slaughter*, 158 Ala. 16, 48 So. 343, 344.

The spoliation of evidence, which is unfavorable to a party, may constitute a fraud, just as the manufacture of evidence that is favorable to him, and justifies the same presumptions against him. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

§ 56. Laws of Other States.

§ 56 (1) In General.

Corresponds to Law of Forum.—In the absence of proof as to the law of those states in which the common law is not presumed to prevail the law will be presumed to correspond with that of the state in which the cause is tried. *Kennebrew v. Southern Automatic Electric Shock Mach. Co.*, 106 Ala. 377, 17 So. 545.

"It is generally held that where there is no proof of the law of another state, nor judicial knowledge of the original of such state which would raise up a presumption that the common law prevails there, it will be presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration. *Kennebrew v. Southern, etc., Shock Mach. Co.*, 106 Ala. 377, 17 So. 545; *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711; *Brown v. Wright*, 21 L. R. A. 467, 58 Ark. 20, 22 S. W. 1022, and numerous authorities in note on page 369." *Watford v. Alabama, etc., Lumber Co.*, 152 Ala. 178, 44 So. 567, 568.

"There is a dictum in the case of *Castleman v. Jefferies*, 60 Ala. 380, 388, to the effect that there is no presumption as to what the law is in a state which is not of common law origin, the court saying: 'No proof had been made of the laws of Texas bearing on this question. If Texas had had a common origin with this and the other older states, we would presume the common law prevails there. But Texas did not have a common origin with these older states, as to which this presumption is indulged. Hence we are left without proof and without presumption as to what are the laws of Texas which govern the transmission of property, and the effect of marriage upon its title and enjoyment.' We say this was 'dictum' because the question in the case, in connection with which the laws of Texas were spoken of, was decided according to the laws of Alabama, and this upon considerations which would have

obtained even though different laws of Texas had been in proof. This dictum is opposed to the overwhelming weight of authority. It is almost universally held that where there is no proof of the law of another state, nor judicial knowledge of the origin of such state, which would raise up a presumption that the common law prevails there, it will be presumed that the law of the forum in which the issue is being tried is the law of that state on the question under consideration. *Brown v. Wright* (Ark., 22 S. W. 1022), 21 Lawy. Rep. Ann. 467, and the numerous authorities cited in note thereto; especially *Sandmeyer v. Insurance Co.*, 2 S. D. 346, 50 N. W. 353; *Southern Ins. Co. v. Wolvorton Hardware Co.* (Tex. Sup.), 19 S. W. 615; *Bradley v. Insurance Co.*, 3 Lans. 341; *Garner v. Wright*, 52 Ark. 385, 12 S. W. 785; *James v. James*, 81 Tex. 373, 16 S. W. 1087; 3 Am. & Eng. Enc. Law, p. 539, note 2; *Gray v. Jackson*, 12 Am. Rep. 1." *Kennebrew v. Southern etc., Shock Mach. Co.*, 106 Ala. 377, 17 Ala. 545.

Where there is no proof of the law of another state, nor judicial knowledge of the origin of such state, which would raise the presumption that the common law prevails there, it will be presumed that the law of the forum is the law of such state on the question under consideration. *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711. But, see, *Downs v. Minchew*, 30 Ala. 86.

"The rule is well established that, in the absence of an averment and proof to the contrary, the courts of a state will presume that the common law prevails in other states. Authorities above cited; *Cressey v. Tatam*, 9 Or. 545; 13 Am. & Eng. Ency. Law, 1063. This rule prevails in all states having a common origin, formed by colonies which constituted a part of the same empire and which recognize the common law as the source of their jurisprudence. 'But no such presumption can apply to state in which a government already existed at the time of their accession to the country, as Florida, Louisiana, and Texas. * * * With them there is no more existence of the common law than of any other law.' *Norris v. Harris*, 15 Cal. 252; *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711." *Watford*

v. Alabama, etc., Lumber Co., 152 Ala. 178, 44 So. 567, 568.

Special Statutory Enactment.—The statute of this state, prohibiting a recovery for medical services rendered by an unlicensed physician (Code, § 977), does not prevent a recovery here for services rendered in another state; nor can our courts presume that a similar statute exists elsewhere. *Downs v. Minchew*, 30 Ala. 86.

§ 56 (2) Common Law.

Common Law Presumed to Prevail.—

In Alabama the courts will presume that in another state of common origin with it the common law prevails on the question under consideration, in the absence of proof to the contrary. *Peet v. Hatcher*, 112 Ala. 514, 21 So. 711; *Reese v. Harris*, 27 Ala. 301, 306, cited in note in 21 L. R. A. 472; *Connor v. Trawick*, 37 Ala. 289, cited in note in 21 L. R. A. 472; *Jaffrey v. McGough*, 83 Ala. 202, 3 So. 594, 595, cited in note in 21 L. R. A. 473; *Roach v. Privett*, 90 Ala. 391, 7 So. 808, 809, cited in note in 21 L. R. A. 473; *Louisville, etc., R. Co. v. Williams*, 113 Ala. 402, 21 So. 938; *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806; *Wilkerson v. Buster*, 124 Ala. 574, 26 So. 940; *Warrior Coal, etc., Co. v. National Bank (Ala.)*, 53 So. 997; *Teat v. Chapman & Co.*, 1 Ala. App. 491, 56 So. 267; *Corinth Bank, etc., Co. v. King (Ala.)*, 62 So. 704; *Goodman v. Griffin* 3 Stew. 160.

"The rule is established here that, when the contrary is not shown, it will be presumed that the common law prevails in states which are judicially known to be of common origin with this state. *Inge v. Murphy*, 10 Ala. 885; *Connor v. Trawick*, 37 Ala. 289, *Bradley v. Harden*, 73 Ala. 70; 1 Brick. Dig., p. 349, § 9. The case of *Kennebrew v. Southern, etc., Shock, Mach. Co.*, 106 Ala. 377, 17 So. 545, cited as being opposed to this rule was ruled with express reference to the peculiar legal system of Louisiana, and is not in conflict with the rule stated. Tennessee having an origin common with that of the older states, and nothing appearing in the bill to destroy the presumption of the reign there of common law, we apply it in determining this case." *Birmingham Waterworks Co. v. Hume*, 121 Ala. 168, 25 So. 806, 807.

The presumption is, the common law prevails in those states of common origin with our own, and it rests with the party asserting a change or modification to show it. To show such a change or modification, the decisions of their courts must be looked to, as we look to our own, in the event witnesses are examined who rest their opinion on decided cases, and notwithstanding disagree as to the conclusions to be drawn. *Inge v. Murphy*, 10 Ala. 885, cited in note in 25 L. R. A. 449, 451, 452, 546.

"The presumption is that the common law prevails in each of the states having a common law origin with our own. If there was any statute in Georgia modifying or changing the common law as to the marital rights of the husband or the condition of the wife's property, it is neither averred in the pleading nor shown by the evidence." *Jaffrey v. McGough*, 83 Ala. 202, 3 So. 594, 595, cited in note in 21 L. R. A. 473.

State Not Recognizing Common Law as Source of Jurisprudence.—In an action brought in Alabama for a tort committed in Florida, the Alabama court, in the absence of proof of the Florida law, could not presume that the common law enforceable in Alabama prevailed in Florida; that state not being one recognizing the common law as the source of its jurisprudence. *Watford v. Alabama & Florida Lumber Co.*, 152 Ala. 178, 44 So. 567.

The presumption, in which the courts of this state indulge, as to the existence of the common law in other states having the common origin, does not apply to Texas, whose origin was different. *Castleman v. Jefferies*, 60 Ala. 380.

Application of Rule to Virginia.—"At common law, neither the creditors nor next of kin were entitled to the personal property of an intestate. We must presume that law to be in force in Virginia, except so far as it has been repealed or amended by the statute of the state. Those statutes, shown in the present record, did not cast the title of an intestate to personal property upon his next of kin, but upon his personal representative. The right given by those statutes to the next of kin, as to the personal property, of the intestate, is a right to distribution; and

that right is given sub modo. The personal representative is authorized and required to pay the debts of the estate, expenses, etc., etc.; and, if necessary for such purposes, to sell all the personal property. Before any administration granted or distribution made, the right of a sole distributee, who has never had possession, to the personal property of the intestate, under these statutes, is not such a right as can entitle such distributee to recover such property in detinue. *Jones v. Tanner*, 7 Barn. & Cress. 542; 3 Wms. on Ex'rs, 1187; *Vanderveer v. Alston*, 16 Ala. 494." *Reese v. Harris*, 27 Ala. 301, 306.

Application of Rule to North Carolina.—In the absence of proof, it will be intended by the courts of this state, that the common law is in force in North Carolina. *Averett v. Thompson*, 15 Ala. 678, cited in note in 21 L. R. A. 472.

Rule as to Florida.—"Indeed, the writer has failed to find, from the examination of the authorities in this and other jurisdictions, that the foregoing rule has been applied in cases of tort, but is confined to the enforcement of contracts and in sustaining the title to property within the state in which the action was brought. Nor are we willing to extend the rule to the case at bar, but hold that in so much as the injury was sustained in the state of Florida, a state in which we can not presume the existence of the common law, it was incumbent upon the plaintiff to aver and prove a cause of action under the law of Florida." *Watford v. Alabama, etc., Lumber Co.*, 152 Ala. 178, 44 So. 567, 568.

"The Kansas court, in the case of *McCarthy v. Ry. Co.*, 18 Kan. 46, 26 Am. Rep. 742, rather sustains the distinction drawn by us in the following language: And a very different principle is involved between presuming the laws of sister states like our own to sustain title to property within this state in litigation, and in holding that the laws of other states are similar to ours in enforcing either the penal or remedial statutes of some other state. Florida not being of common origin with Alabama, I think that, when a person sues in the courts of this state for injuries received in the state of Florida, he should aver the laws of that state and show that he has a cause

of action, and that, as the complaint fails to set out a cause of action, it would not support a judgment, and, if the trial court committed any errors upon the trial, they were innocuous to the plaintiff. *Louisville & N. R. Co. v. Williams*, 113 Ala. 402, 21 South. 938." *Watford v. Alabama, etc., Lumber Co.*, 152 Ala. 178, 44 So. 567, 569.

Right of Set-Off.—A set-off could not be pleaded at common law and this will be presumed to be in force in Tennessee by the courts of Alabama. *Roach v. Privett*, 90 Ala. 391, 7 So. 808, 810, cited in note in 21 L. R. A. 473.

Liability of Master to Servant.—It will be presumed that the common law is the same in another state as in the state in which the court is sitting, in regard to the liability of master to employee for negligence of coemployee. *Alabama, etc., R. Co. v. Carrol*, 97 Ala. 126, 11 So. 803, cited in note in 21 L. R. A. 472.

Right to Record Chattel Mortgage.—In the absence of evidence of the laws of a sister state, the court will presume that the common law prevails there, and that there is no law there which authorizes a mortgagee to record a chattel mortgage. *Teat v. Chapman & Co.*, 1 Ala. App. 491, 56 So. 267.

Property Rights of Husband and Wife.—The common law will be presumed to exist in other states as to the property rights of husband and wife instead of a statute of the forum which changes the common law rule. *Bangs v. Edward*, 88 Ala. 382, 6 So. 764, cited in note in 21 L. R. A. 469.

Interest on Judgments.—The common law rule that judgments do not carry interest will be presumed to be in force in other states. *Hudson v. Daily*, 13 Ala. 722, cited in note in 21 L. R. A. 471.

Right of Nonresident to Act as Administrator.—In Alabama it will be presumed that the common law as to an administrator not losing his office by becoming a nonresident prevails in Georgia. *Bradley v. Harden*, 73 Ala. 70, cited in note in 21 L. R. A. 472.

§ 57. Laws of Foreign Countries.

Same as Domestic Law.—In the absence of proof of a foreign law, it will be presumed to be the same as the domestic

law. *Sharp v. Sharp*, 35 Ala. 574, cited in note in 21 L. R. A. 470.

Laws of Germany as to Labor on Sabbath.—A message was delivered to a telegraph company on Saturday, and required to be delivered to the addressee in Germany on the following day. Held, that the contract was completed on Saturday, and not within Code, § 2138, declaring contracts made on Sunday void, and, in the absence of evidence, it would not be presumed that Sunday delivery was prohibited by the laws of Germany. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

§ 58. Judicial Proceedings.

Presumption as to Regularity of Proceedings.—Everything is to be presumed in favor of the regularity of the proceedings of a court of justice. *Barnett's Ex'r v. Tarrence*, 23 Ala. 463; *McLendon v. Dodge*, 32 Ala. 491; *Thrasher v. Ingram*, 32 Ala. 645; *Gunn v. Howell*, 35 Ala. 144.

Failure of Record.—Where it does not appear, from the record of a former suit or by parol evidence, that a particular demand was passed on, it can not be presumed that it was so passed on, especially if the demand be of such a character as prima facie to authorize the conclusion that it could not have been tried in the former suit. *Strother v. Butler*, 17 Ala. 733.

Acts of Probate Court.—A probate court dealing with its own record in appointing an administrator must be presumed to have been informed of the facts, and all intendments must be indulged in favor of its records. *Milbra v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 62 So. 176.

The courts of this state will presume, in favor of the regularity of the foreign probate of a will, which was admitted to probate as a valid will of personality, after the trial of an issue devisavit vel non, that there was a good and valid reason for the particular verdict and judgment rendered. *Thrasher v. Ingram*, 32 Ala. 645.

Judgment of Appellate Court.—"In the absence of proof of any law in Tennessee to the contrary, we must intend, not only that the judgment of the appellate tribunal is in accordance with the law of that state, but that it is the only judgment in

force in the case in which it was rendered. *Hassell v. Hamilton*, 33 Ala. 280." *Roach v. Privett*, 90 Ala. 391, 7 So. 808, 809, cited in note in 21 L. R. A. 473.

Justice of Peace Courts.—This state will not presume that justices courts, in a sister state, are courts of record. *McGee v. Sheffield*, 3 Stew. & P. 351.

§ 59. Official Proceedings and Acts.

§ 59 (1) In General.

General Rule.—It is presumed that an officer does his duty, and that his proceedings are regular. *Brandon v. Snows*, 2 Stew. 255; *Guesnard v. Louisville, etc., R. Co.*, 76 Ala. 453.

Between third persons, the presumption is that public officers have done their duty. Therefore a purchaser of personal property at sheriff's sale, need not prove that the sale was duly advertised, nor that it was regular. It devolves on the opposite party to show its illegality. *Brandon v. Snows*, 2 Stew. 255.

Receipt of Sheriff's Deed.—A bank having had property sold on execution sixty years ago, and having bought it at the sheriff's sale, and having subsequently recovered it in ejectment, it will be presumed it received a deed from the sheriff. *Coulson v. Scott*, 167 Ala. 606, 52 So. 436.

Good Faith in Performance of Official Duty.—The Smith Bill (Laws 1911, pp. 255, 260), §§ 8, 9; 15, having given the excise commissioners power of the selection of licensees to sell intoxicants, it will not be presumed that the commissioners will, by subterfuge, undertake to defeat the operation of the law. *State v. Montgomery (Ala.)*, 59 So. 294.

"The law presumes that public officers discharge their duty, nothing to the contrary appearing; and it must therefore be presumed that the trustees issued the certificate of purchase upon the acceptance by them of the notes, and this presumption is strengthened by the lapse of over fifty years since the transaction." *Barry v. Stephens (Ala.)*, 57 So. 467, 468.

Payment of Illegal Warrants.—Where it is the duty of a county treasurer to pay only legal warrants, it will be presumed, in the absence of a showing to the contrary, that he will not pay an illegal warrant. *Alston v. Dunn (Ala.)*, 58 So. 300.

Levy by Sheriff.—The presumption being that a sworn public officer has done his duty, one seeking to hold a sheriff liable for failure to make a levy has the burden of showing that there was property subject to levy which the sheriff neglected to seize. *Smith v. Heineman*, 118 Ala. 195, 24 So. 364.

"But where the sheriff actually makes a levy upon property as that of an execution debtor, this is a solemn admission, we may say an official affirmation, of the fact of ownership by the debtor, and the levy, as shown by the return, is admissible in evidence against the sheriff and his sureties to prove such ownership. It is not conclusive, but only *prima facie*, evidence, however, and may be explained or rebutted by the sheriff. But the onus is on him to show a legal excuse for releasing such levy, or failing to sell the property as the defendant's. *Wilson v. Brown*, 58 Ala. 62; *Union Bank v. Benham*, 23 Ala. 143; *Governor v. Gibson*, 14 Ala. 326; *Smith v. Leavitts*, 10 Ala. 92." *Smith v. Castellow*, 88 Ala. 355, 6 So. 750.

§ 59 (2) Of Officers in Land Department of State or Federal Government.

Certificate of Trustees of School Lands.—Under Code 1852, § 538, which required trustees of school lands to issue certificates to purchasers, it must be presumed, in the absence of a contrary showing; and especially after a lapse of more than fifty years, that a certificate for particular land was issued as required by that section, since the law presumes that public officers do their duty. *Barry v. Stephens* (Ala.), 57 So. 467.

§ 59 (3) Of Clerks of Courts.

Failure to Insert Execution in Transcript.—The execution which should have appeared in the transcript was not inserted. It was presumed, the contrary not appearing, that the clerk was unable to insert it by reason of its accidental loss, and not that it was fraudulently suppressed. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

§ 60. Particular Facts.

Education of Infant.—An infant, having no guardian, living with his mother, a widow, and going to a school in the neighborhood, will be presumed to be

sent by her, if the contrary is not shown. *Tilton v. Russell*, 11 Ala. 497.

§ 61. Rebuttal of Presumptions of Fact.

Presumption That Directors Have Done Their Duty.—The presumption that directors of a corporation will do their duty is overcome by the presence of causes sufficient to influence them to do otherwise. *Montgomery Traction Co. v. Harmon*, 140 Ala. 505, 37 So. 371.

Service of Writ of Injunction.—Where it is shown that complainant, in a bill to enjoin enforcement of a judgment against him based on a note, was not a party to the note, but that it was made by another person of the same name, residing in the same county, the presumption arising from the writ that it was served on complainant is repelled, and the onus of showing that the writ was executed on him devolves on defendant. *Givens v. Tidmore*, 8 Ala. 745.

Gift of Slave.—The presumption that slaves sent by a father to his daughter's home on her marriage were intended as an advancement can only be rebutted by proof of different intentions, clearly and distinctly avowed by the donor at or before the time of the delivery. *Rumbly v. Stainton*, 24 Ala. 712.

Insufficient Evidence.—Where, on appeal from the refusal of the court to vacate the return of the sheriff, showing service of a copy of a complaint on a defendant, the bill of exceptions states that defendant's testimony "tended to show" that the summons and complaint were never served on him, it is insufficient to overcome the presumption of the verity of the officer's return. *Paul v. Malone*, 87 Ala. 544, 6 So. 351.

III. BURDEN OF PROOF.

§ 62. Party Asserting or Denying Existence of Facts.

General Rule.—The burden of proof is on the party holding the affirmative. *Givens v. Tidmore*, 8 Ala. 745; *Lucas v. Stonewall Ins. Co.*, 139 Ala. 487, 36 So. 40, 41; *Heydenfeldt v. Mitchell*, 6 Ala. 70; *Jones v. Jones*, 18 Ala. 248; *Kennington v. Williams*, 30 Ala. 361, 362.

"It is well settled, that a conveyance or transfer of property made to a wife by a

third person, at the instance of her husband, who paid the purchase money, is void as against the latter's existing creditors, and when assailed by them, the burden is on the wife of proving that the consideration did not move from the husband, but was paid by her separate money. *Kelley v. Connell*, 110 Ala. 543, 18 So. 9. 'To the lifting of such burden, affirmative averment of the facts relied on as constituting the consideration is as essential as convincing proof of their existence.' * * * *First Nat. Bank v. Smith*, 93 Ala. 97, 9 So. 548. Furthermore, 'in a contest between creditors and the wife, there is and should be a presumption against her which she must overcome by proof.' *Seitz v. Mitchell*, 94 U. S. 580, 24 L. Ed. 179; *Kelley v. Connell*, 110 Ala. 543, 18 So. 9; *Wood v. Pebbles*, 121 Ala. 100, 25 So. 723." *Wimberly v. Montgomery Fertilizer Co.*, 132 Ala. 107, 31 So. 524, 526.

"Such is the case in civil and criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor. So where the negative allegation involves a charge of criminal neglect of duty, whether official or otherwise; fraud, or wrongful violation of actual lawful possession of property, making the party the allegation must prove it. So where infancy is alleged, illegitimacy (under some circumstances), insanity, or death, where the presumption in favor of the latter can not be indulged from lapse of time; the burden of proof is on the party making the allegation, notwithstanding its negative character. *Greenl. on Ev.* 89 to 92; *Gresly's Eq. Ev.* 288-9; *C. & H.'s Notes to Phil. Ev.* 483 to 486, 490-1, 544-5; *Carpenter v. Devon*, 6 Ala. 718." *Givens v. Tidmore*, 8 Ala. 745, 751.

Burden upon Complainant.—The burden is on complainant to prove material allegations of his bill, the answer seeking no affirmative relief. *Robinson v. Griffin*, 173 Ala. 372, 56 So. 124.

Where a contract in the nature of a vendor's lien is sought to be enforced against a husband and wife, and the contract is denied by them, though not under oath, and the denial is expressed in equivocal terms, the burden of proof is

on the complainant. *Carver v. Eads*, 65 Ala. 190.

Burden on Plaintiff.—A plea of the general issue, as to which there was and could be no special replication, placed the burden on plaintiff to prove the averment of his complaint, before he was entitled to a verdict, or before one could be rendered against defendant. *Alexander v. Woodmen of the World*, 161 Ala. 561, 49 So. 883.

A plea of the general issue merely denying the allegations of the complaint, as to which there was and could be no special replication, placed the burden on plaintiff to prove the averment of his complaint, before he was entitled to a verdict, or before one could be rendered against defendant. *Alexander v. Woodmen*, 161 Ala. 561, 49 So. 883.

In an action against a principal to recover the value of goods sold to an agent for use in a hotel, the burden is on plaintiff to show that the goods sold are of such character as the nature of the business authorized the agent to purchase. *Wallis Tobacco Co. v. Jackson*, 99 Ala. 460, 13 So. 120.

Where an insolvent debtor, after the levy of attachments by certain of his creditors upon his stock of goods, makes a deed of assignment for the benefit of his creditors, upon a bill filed by other creditors of such debtor, which avers that said attachments were collusive, fraudulent, and void, that they and the deed of assignment were parts of one and the same transaction, and which prays that said writs of attachment be treated and declared as part of said general assignment, and constituting therewith one conveyance of general assignment for the equal benefit of the creditors of said debtor, and that the preference attempted to be created by the suing out of the collusive and fraudulent attachments be declared null and void, the burden rests upon the complainants to show that said attachments were the result of fraudulent collusion between the plaintiffs in attachment and the common debtor; and upon such a bill there can never be any shifting of the burden of proof to the respondent. *Claffin Co. v. Muscogee Mfg. Co.*, 127 Ala. 376, 30 So. 555.

Burden upon Sheriff.—"Although such

evidence is not conclusive of title in the defendant in execution, yet it tends to make out, *prima facie*, such an interest as the sheriff might have levied upon, and was consequently admissible. Under such circumstances, if the sheriff return the *fi. fa.* 'no property found,' as is the case here, he assumes the burden of proving that the property in the possession of the defendant, which he could have levied upon, is not liable to the execution. *Governor v. Campbell*, 17 Ala. 566." *Whitsett, etc., Co. v. Slater*, 23 Ala. 626, 632.

Burden on Defendant.—The burden of disproving it, or of showing the mortgage is invalid, is on the party seeking to avoid it. *Bufford v. Raney*, 122 Ala. 565, 26 So. 120.

"A party pleading or relying on payment has the burden of proof resting upon him, for, if the fact exists, it lies peculiarly within his knowledge. In all civil causes, if the testimony be evenly balanced, or in equilibrium, which is the same thing, then the verdict must be against the party on whom the burden of proof rests. *Vandevanter & Co. v. Ford*, 60 Ala. 610; *Lehman Bros. v. McQueen*, 65 Ala. 570. This is the proposition underlying the first instruction given at the instance of the plaintiff, and in the giving of it the court below did not err." *Turrentine v. Grigsby*, 118 Ala. 380, 23 So. 666, 667.

"The burden was on the plaintiff as purchaser of the mortgaged property, to show that the mortgage debt was paid, and, therefore, the title was no longer in defendant. 3 *Brick. Dig.*, p. 641, § 111." *Bufford v. Raney*, 122 Ala. 565, 26 So. 120, 122.

Fraud in Insurance.—"This accords with the general doctrine on the subject. The burden of proof of fraud is on the insurer, who sets it up, and he will not be allowed by the form of his plea, to shift it. Of course, the question whether the facts show a willful and intentional misstatement of facts, made for the purpose of defrauding the insurance company, is one for the jury. 1 *Bid. Ins.*, § 442." *Tubb v. Liverpool, etc., Ins. Co.*, 106 Ala. 651, 17 So. 615, 617.

When the debtor in his testimony, admits the correctness of the account, but says that he has paid it, the burden is

on him to prove the payment. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834, cited in note in 52 L. R. A. 598.

In an action of ejectment against trespassers who claim title by adverse possession, where the plaintiff claims actual possession of a part of a tract, and introduces in evidence deeds purporting to convey the entire tract of the land sued for, he makes out a *prima facie* case, and the burden of proof is then shifted upon the defendant to establish his title by adverse possession. *Bowling v. Mobile, etc., R. Co.*, 128 Ala. 550, 29 So. 584.

§ 63. Proof of Negative.

Party Holding Negative.—Where the party holding the affirmative shows a state of facts raising a presumption in his favor, or otherwise makes out a *prima facie* case, the burden of proof is cast on the opposite party. *Tarvers' Ex'rs v. Boykin*, 6 Ala. 353; *Haney v. Conoly*, 57 Ala. 179.

Action Based on Negative Averment.—While it is a general rule that negative averments in a pleading need not be proved, yet, where the party grounds his action on a negative averment, he must establish it, unless the subject-matter of the averment lies peculiarly within the knowledge of the other party, when the averment, unless disproved, is taken to be true; and, where a negative averment involves fraud, the burden is on the party making the charge. *Freeman v. Blount*, 172 Ala. 655, 55 So. 293.

"The generally similar doctrine was previously announced, though more amply, in *Givens v. Tidmore*, 8 Ala. 745, *Collier, C. J.*, writing, in this language: 'It is the general rule that the party holding the affirmative of the issue must sustain it by proof; but there are some exceptions in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions, it is said, includes those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in this case. But, where the subject-matter of the negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless dis-

proved by that party.' The doctrine of *Givens v. Tidmore*, supra, is generally accepted by courts and text writers. *Kerr v. Freeman*, 33 Miss. 292, 298; *Colorado Coal Co. v. United States*, 123 U. S. 307, 317-319, 8 Sup. Ct. 131, 31 L. Ed. 182; 1 Green. Ev., §§ 78, 80; 6 Cyc., p. 334; 2 Ency. Ev., pp. 802, 803; *Jones on Ev.*, §§ 12, 180." *Freeman v. Blount*, 172 Ala. 655, 55 So. 293, 295.

Where the bill alleges a negative, for example, that complainant had no notice of the assignment of a note against which he seeks to establish an equitable set-off, and the answer avers notice, the burden of proof is on the defendant. *Carroll v. Malone*, 28 Ala. 521.

Action on Account.—Though as a general rule the burden of proving a negative averment is not on plaintiff, still in an action on an open account plaintiff does not overcome the burden by merely showing the rendition of service and value of same, but must offer some proof that it was not paid. *Pollak v. Winter*, 166 Ala. 255, 51 So. 998, judgment affirmed on rehearing, 52 So. 829; S. C., 53 So. 339.

A settlement of accounts, like payment, is an affirmative defense, which must be proved by the party relying on it; and a charge, asserting that "the burden of proving a settlement is on the defendant," can not be held erroneous, in the absence of special facts affirmatively shown. *Killen v. Lide*, 65 Ala. 505.

"As a general rule the burden of proving a negative averment is not upon the plaintiff, but this rule does not seem to prevail in actions upon an open account, as distinguished from the stated or uncontraverted one; and when suit is brought upon an open account the plaintiff does not overcome the burden by merely showing the rendition of service and the value of same, but must offer some proof that it was not paid for when rendered or when due. *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Cook v. Malone*, 128 Ala. 662, 29 So. 653; *Ennis v. Harris*, 103 Ala. 330, 15 So. 834, 16 Encyc. of Pl. & Pr. 174-179; *Van Giesen*, 10 N. Y. 316; *Lent v. New York, R. R. Co.*, 130 N. Y. 504, 29 N. E. 988; *Great Western Railroad v. Bacon*, 30 Ill. 347, 83 Am. Dec. 199. All the authorities seem to agree that payment after a breach is new matter, to be specially

pleaded and proven by the defendant, and, while they are divided as to whether or not the plaintiff must prove nonpayment when due or at maturity, the way is with the holding of this court, and seems to proceed upon the theory that the plaintiff must prove a breach of the contract sued on, and in order to do this he must show that his debt was not paid when contracted or at maturity. After the plaintiff shows a breach of contract, and the defendant relies upon payment subsequent to said breach, he must plead and prove payment, which said subsequent payment can not be shown under the general issue." *Pollak v. Winter*, 166 Ala. 255, 51 So. 998, 999.

§ 64. Extent of Burden in General.

Overcoming Fraud.—Where plaintiff and defendant both claim under purchases from the same person, by conveyances valid on their face, the party alleging fraud in the purchase of the other is bound to prove it; but, when one of them is impeached for fraud, the burden of proof is changed, and the evidence of fraud as to that purchase must be overcome by counter evidence of bona fides. *Hair v. Little*, 28 Ala. 236, cited in note in 20 L. R. A. 113.

Admission of Husband Casting Burden on Wife.—When there is an unsettled account between the wife and another party, for transactions when she was a feme sole, the admissions of her husband, in a conference with the other party respecting settlements, that nothing was due to the wife, is sufficient to cast the burden on her of showing that the parties were mistaken in the conclusion then had. *Powell v. Powell*, 10 Ala. 900.

Deed as Prima Facie Evidence.—Defendants put in evidence a deed from them to plaintiffs, in which the consideration was recited in one place as \$800, and in another \$458.23, and testified that \$458.23 was all that was paid. Plaintiffs gave evidence that that was all they were to pay. Held the deed did not make out a prima facie case, and cast on the plaintiffs the burden of showing that \$800 was not the true consideration. *Hall v. Loveman*, 85 Ala. 284, 3 So. 767.

§ 65. Matters of Defense and Rebuttal.

§ 65 (1) In General.

Pleas setting up affirmative defenses im-

pose the burden of proof as to such defenses on defendant. *Edmonds v. Edmonds*, 1 Ala. 401; *Hudson v. Crow*, 26 Ala. 515; *Ware v. Jones*, 61 Ala. 288; *Killen v. Lide's Adm'r*, 65 Ala. 505; *Thweatt v. McCullaugh*, 84 Ala. 517, 4 So. 399.

Contract as Defense.—The burden of proving a contract is on the party who sets it up and relies thereon as a defense. *Land Mortgage, Investment & Agency Co. of America v. Preston*, 119 Ala. 290, 24 So. 707.

§ 65 (2) Matters of Set-Off, Counterclaim, or Reconvention.

Burden upon Defendant as to Set-Off.—The burden of proving a set-off or counterclaim is on defendant. *O'Neal v. Curry*, 134 Ala. 216, 32 So. 697.

Where issue is joined on pleas of payment and set-off, an instruction to find for defendant, if the evidence is evenly balanced, is properly refused. *Brigham v. Carlisle*, 78 Ala. 243.

When set-off is pleaded, the burden of establishing the truth of such plea rests on the defendant; and when, to establish such plea, the defendant introduced evidence tending to prove that the plaintiffs owed him for the price of cotton sold, and the plaintiffs' evidence tends to show that when they bought the cotton they paid the defendant for it in cash, a charge is free from error which instructs the jury that the burden of proof is on the defendant to establish the fact that the plaintiffs bought the cotton, and that they had not paid the defendant for said cotton. *Cook v. Malone*, 128 Ala. 662, 29 So. 653.

"The burden of proving a prima facie case for allowance of the set-off was certainly on the defendants. *Brigham v. Carlisle*, 78 Ala. 243. To make such a case, it was incumbent on them at least to show not merely a sale of the cotton claimed for, but such a sale as brought the plaintiffs in debt to them, and this called for proof that cash payment was not made. For the same reasons, the charge requested by the defendants was properly refused. Dorsey's statement in evidence was admissible, being corroborative of other testimony upon a material and disputed point. The judgment will be affirmed." *Cook v. Malone*, 128 Ala. 662, 29 So. 653, 654.

In an action on a garnishment bond to recover for the wrongful suing out of the garnishment, defendant having pleaded a set-off of the statutory penalty for cutting trees on defendant's land originally sued on by it, the burden is upon defendant to show that the plaintiff had willfully and knowingly cut the trees or had them cut. *Alabama State Land Co. v. Reed*, 99 Ala. 19, 10 So. 238.

Defendant Must Prove Recoupment.—The burden of proving all the material allegations of a plea of recoupment is on defendant. *Moore v. Barber Asphalt Pav. Co.*, 118 Ala. 563, 23 So. 798.

Statutory recoupment is not, as at common law, a new suit by defendant against plaintiff; and a joinder of issue thereon places the burden of proof as to such special plea upon defendant, though the general issue is also pleaded. *Carolina Portland Cement Co. v. Alabama Const. Co.*, 162 Ala. 380, 50 So. 332.

§ 66. Failure to Sustain Burden.

Evidence Equally Balanced.—Where the burden of proof of a particular fact has devolved upon a party, and he fails to give evidence of such fact, its nonexistence will be assumed. *McWilliams v. Phillips*, 71 Ala. 80.

Where no conclusion can be drawn from testimony because it is so equally balanced, the jury must decide against the party who holds the affirmative of the issue. *Shulman v. Brantley*, 50 Ala. 81; *Garrett v. Garrett's Adm'r*, 64 Ala. 263.

When the burden of proving a particular fact is cast upon a party, if he fails to give evidence of it, or if the evidence in reference thereto is equally balanced, or does not generate a rational belief of the existence of the fact, leaving the mind in a state of doubt and uncertainty, he must fail for want of proof. *McWilliams v. Phillips*, 71 Ala. 80.

When the plea of payment is interposed, in an action on an open account, the burden of proof is on the defendant; and if the evidence on that point is equally balanced, the plaintiff is entitled to a verdict. *Shulman v. Brantley*, 50 Ala. 81.

Fact Left in Doubtful State.—When the onus of proving a fact is on a party, if the proof adduced leaves it in a state of doubt or uncertainty, the fact can not be

considered established. *Brandon v. Cabiness*, 10 Ala. 155.

When the evidence leaves a disputed question of fact in a state of doubt and uncertainty, the fact can not be regarded as established, and the issue must be found against the party on whom the onus rested. *Garrett v. Garrett*, 64 Ala. 263.

Testimony of Two Witnesses Diametrically Opposed.—In a suit to enforce a vendor's lien, which is defended on the ground of misrepresentations by complainant, the burden of proof being on defendant, the misrepresentations are not established where there are only two witnesses, and their testimony is diametrically opposed. *Joseph v. Seward*, 91 Ala. 597, 8 So. 682.

IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

(A) FACTS IN ISSUE AND RELEVANT TO ISSUES.

§ 67. Relevancy in General.

§ 67 (1) Rule Stated and Applied.

What Constitutes Relevancy.—The general rule of the relevancy of evidence is that all facts are admissible in evidence which logically tend to prove or disprove the fact in issue. *Alabama, etc., R. Co. v. Guest*, 144 Ala. 373, 39 So. 654.

"It is a cardinal rule in the law of evidence that facts and circumstances which, if proved, are incapable of affording a just, reasonable inference or presumption in relation to a material fact involved in the issue on which the jury are to pass, are irrelevant and inadmissible. Testimony to be admissible, must relate to and be connected with the transaction it is intended to elucidate, and the connection with it must not be remote, or a forced, strained, or mere conjectural conclusion. It must have a reasonable tendency to prove or disprove a material fact in issue. Of itself, it may not be full proof or disproof. It may be but a single fact, or a collection of facts, or a single link in a chain of circumstances, or it may be merely corroborative. When it is without either of these properties, when it is of remote and collateral facts, from which no fair and reasonable inference

can be drawn, it is inadmissible, since, as is said by Starkie, it is 'at least useless, and may be mischievous and may tend to distract the attention of the jury, and frequently to prejudice and mislead them.' *Govenor v. Campbell*, 17 Ala. 566; *Seals v. Edmondson*, 71 Ala. 509; *State v. Wisdom*, 8 Port. 511." *Karr v. State*, 106 Ala. 1, 17 So. 328, 330.

"As a general rule, facts are deemed relevant as evidence which logically tend to prove or disprove the fact in issue, yet the rule does not require the admission of facts bearing so remotely upon the issue that they afford merely a conjectural inference concerning the main fact.' *Steen v. Swadley*, 126 Ala. 616, 28 So. 620. 'There must be a plain and manifest connection between the issue in controversy and the collateral facts introduced to sustain or rebut it. The evidence must have a proximate tendency to establish or rebut it. The evidence must have a proximate tendency to establish the proof or disproof of this principal issue, and must not be so indefinite or speculative as to be incapable of affording the jury a reasonable presumption or inference of its truth or falsity.' *Brewer v. Watson*, 63 Ala. 88; *First National Bank v. Stewart*, 144 U. S. 224, 5 Sup. Ct. 845, 29 L. Ed. 101." *Wells Amusement Co. v. Means*, 2 Ala. App. 574, 56 So. 594.

Relevant Evidence Always Admissible.

—"Any evidence relevant to the issues, which tends to establish their relation to each other of cause and effect, is admissible." *East Tennessee, etc., R. Co. v. Lockhart*, 79 Ala. 315, 318.

Weight and Sufficiency of Relevant Evidence Immaterial.—Evidence which is relevant to the issue is admissible without regard to its weight or sufficiency. *Williams v. Haney*, 3 Ala. 371; *Jones v. Sterns*, 28 Ala. 677; *McCreary v. Turk*, 29 Ala. 244; *Sanders v. Stokes*, 30 Ala. 432; *Jones v. Sterns*, 28 Ala. 677.

Application of Rules to Civil and Criminal Cases.—The rules as to the relevancy of evidence are generally the same both in civil and criminal proceedings. *Bell v. Troy*, 35 Ala. 184.

Irrelevant Evidence Inadmissible.—Matters irrelevant to the issue can not be received in evidence. *Magee v. Billingsley*, 3 Ala. 679.

Facts Incapable of Supporting Reasonable Inference.—The rule in regard to the relevancy of testimony is that facts and circumstances which, when proved, are incapable of affording any reasonable presumption or inference in reference to a material fact or inquiry involved in the issue, can not be given in evidence. *State v. Campbell*, 17 Ala. 566.

Must Shed Light on Matter in Dispute.—“One of the fundamental laws of evidence is, that facts which shed some light on the matter in dispute can alone be given in evidence. You can not prove independent, disconnected facts, as a basis for instituting comparisons, or commenting on analogies. 1 Best Ev., §§ 87, 90; 1 Greenl. Ev., § 52; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621.” *South, etc., R. Co. v. Wood*, 72 Ala. 451, 453.

§ 67 (2) Specific Examples.

Financial Standing of Defendant.—On an issue as to whether the defendant executed the contract in controversy, evidence that the defendant, at the time the contract was made, was financially irresponsible and insolvent, was irrelevant. *Steen v. Swadley*, 126 Ala. 616, 28 So. 620.

Relevancy of Question Should Appear.—In ejectment, the question to a witness, “Did he do some writing for you Saturday?” the relevancy of which was not made to appear, and which referred to a time long after the commencement of the suit, was properly excluded. *Beddow v. Bagley* (Ala.), 39 So. 773.

Breach of Contract.—In an action to recover damages for a breach of one of the stipulations of a contract, evidence showing the defendant's performance of another distinct stipulation is irrelevant. *Fail v. McRee*, 36 Ala. 61.

Corroborative Testimony.—Where, on the trial of a case, the evidence is conflicting as to a material fact under the issues as formed, testimony which of itself is not relevant to any issue in the case, but which is corroborative of other testimony upon a disputed point is admissible. *Cook v. Malone*, 128 Ala. 662, 29 So. 653.

Action to Recover on Altered Check.—In an action by a bank to recover the amount paid to the payee and indorser of a check claimed to have been fraudulently altered as to amount, evidence of the de-

falcation of the cashier of the bank which drew the check is inadmissible. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304, 310.

Where the right of a bank to recover the amount paid to the payee and indorser of a check depended solely on its proving that the check had been fraudulently raised, it was error to admit evidence that the bank was, at the time of trial, out of business. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304, 310. See the titles BANKS AND BANKING; BILLS AND NOTES.

Term of Contract Not Sued upon.—Where a written contract refers to the terms of another contract as one of its stipulations then agreed on, proof may be made of what the terms so referred to were. *Casey v. Holmes*, 10 Ala. 776.

Action to Recover Money.—Where, on the trial of the issue whether A. is indebted to B., it is shown that A. agreed if B. would go to Mississippi, and take three slaves, and deliver them to him in Mobile, he would give him one of them, or a sum equal to one-third the value of the three, and that B., in pursuance of the contract, went to Mississippi, and brought and delivered two of the slaves to A., and that A., with the assistance of B., afterwards obtained possession of the third, proof that A. subsequently filed a bill against McC., D., and E. for the recovery of said slaves, and compromised the suit by receiving from them \$1,800, is not irrelevant, as it tends to show that the slaves were the property of A., and under his control, and that he had disposed of them as his own, and also to show an election on the part of A., if anything was due to B., to pay him in money, rather than in one of the slaves. *Wolfe v. Parham*, 18 Ala. 441.

Trial of Right of Property.—Where, on a trial of the right of property, the question at issue is whether the property in controversy was purchased and paid for with the funds of the defendant in execution, it is admissible to prove, as a circumstance from which an inference may be drawn, that a note which had belonged to the defendant was found, after the death of the vendor, in the hands of his

executors. *Lanier v. Branch Bank at Montgomery*, 18 Ala. 625.

Relation between Debtor and Wife.—Evidence that the debtor's wife was on good terms with him when he left, and went with him, is irrelevant. *Cofer v. Scroggins*, 98 Ala. 342, 13 So. 115.

Employment of Detective.—Evidence that plaintiff had employed a detective to look up evidence in the case is properly excluded, where it does not appear that any fact brought to light by the detective is in evidence before the jury. *Hudson v. Bauber Grocery Co.*, 105 Ala. 200, 16 So. 693.

Acts of Other Persons.—In an action against a railroad for wrongfully ejecting plaintiff from a car, testimony that on entering the car plaintiff went to his son, who was sitting down, and asked him to lend him fifteen cents; that cursing or profane language was used by others who were on the outside of the car, and after receiving the injuries plaintiff requested a witness to take care of him, was irrelevant. *Moore v. Nashville, etc., Railway*, 137 Ala. 495, 34 So. 617.

Previous Controversy between Same Parties.—Evidence as to a previous controversy between the parties as to cutting of trees on other land was properly excluded, it not being shown that such controversy had any bearing on the cutting involved in the case. *Jernigan v. Clark*, 134 Ala. 313, 32 So. 686.

Anticipating Defense of Other Party.—In detinue by the seller of a steam shovel, there was no error in admitting the testimony of a witness denying a contemporaneous oral agreement as the right of defendant to the possession of the shovel after an exchange of it for another one, where such testimony was by disposition and merely anticipation of defendant's claim of such an agreement in defense. *Roquemore v. Vulcan Iron Works Co.*, 160 Ala. 311, 49 So. 389.

Ownership by Witness of Stock in Corporation.—On an issue as to whether defendant performed service for plaintiff in settling, as an attorney, litigation which plaintiff had with a land company, and as to whether plaintiff had indorsed a check to defendant in payment therefor, evidence that a witness who claimed to have acted as an attorney for the company in

making the settlement, owned fifteen shares therein, and paid twenty-five per cent on his subscription, and sold his stock before the compromise with plaintiff was effected, is irrelevant. *Brown v. Prude*, 97 Ala. 639, 11 So. 838.

Action on Official Bond.—Where, in an action on the official bond of a county treasurer, the breaches assigned are his failure to account for money received in his official capacity, and to pay it over to his successor, evidence as to what use he made of the moneys collected, the place at which it was kept, his failure to keep it safely, and as to his having it on hand at the expiration of his official term, is irrelevant and inadmissible. *Lewis v. Lee County*, 73 Ala. 148.

Value of Bank Bills.—Where the defendant was, according to his contract, authorized to discharge a note in bills of a certain bank, within a fixed period, and he fails to show on the trial a compliance or offer to comply with its terms, testimony tending to show the value of such bank bills is irrelevant and immaterial. *Weaver v. Lapsley*, 42 Ala. 601.

Action on Penal Bond.—In a suit on a penal bond against the surety of the secretary of a corporation to recover the amount of the principal's embezzlement, the fact that the corporation had previously aided in the prosecution of the principal for the alleged forgery of the name of another surety to the bond being relevant as an admission by plaintiff of the principal's guilt, the indictment in such action, drawn by the attorney for the corporation at its instance, was admissible to identify bills and notes therein described as the subject-matter of the implied admission. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

Record in Another Action.—Where plaintiff's slaves are taken under a writ of seizure issued out of chancery on a bill for divorce by the wife, and, the bill being dismissed for want of prosecution, plaintiff brings suit on the indemnity bond to recover damages, the record of a second suit, commenced by the wife for the same purposes as the first, and still pending, is admissible for defendant, if it is shown that the slaves seized in the first suit, after the institution of the second, were in the custody of the law, or of one

of the suitors in the chancery court, by its order; but, if no writ of seizure was issued in the second suit, such record is inadmissible. *Zeigler v. David*, 23 Ala. 127.

Where plaintiff's slaves were taken under a writ of seizure issued out of chancery on a bill for divorce by his wife, and the bill was dismissed for want of prosecution, a transcript of the record of the chancery court showing the dismissal for want of prosecution is prima facie evidence, in a suit on the indemnity bond to recover damages, that the writ of seizure was wrongfully obtained. *Zeigler v. David*, 23 Ala. 127.

Final Settlement of Executor.—The record of an executor's final settlement is inadmissible in his favor in an action against him by one neither a party nor privy to such settlement. *Wharton v. Thomason*, 78 Ala. 45.

Use Made by Defaulter of Money.—Evidence as to what use a defaulting county treasurer has made of money received by him as such officer, and of his manner of keeping it, is admissible in an action on his official bond for failure to account for such money to his successor. *Lewis v. Lee County*, 73 Ala. 148.

Ownership of Property.—Where the slaves in controversy lived and worked on the plantation of the claimant, and constituted part of his family, the fact that he furnished the family with necessities is evidence tending to prove ownership. *Thomas v. De Graffenreid*, 27 Ala. 651.

Agreement to Insure Cotton.—In an action on a parol agreement to insure cotton shipped from Mobile to New Orleans, the terms of the contract being in issue, the fact that the consignees had a general policy which could cover the cotton from the time of its reaching New Orleans is irrelevant and inadmissible. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711.

No Connection between Facts.—In an action brought by an administratrix, in which a witness for defendant testified that a particular time and place, in his presence, plaintiff's intestate and defendant had a full accounting and settlement, evidence of another witness, in corrobora-

tion, that the three persons were together at the time and place mentioned, is immaterial. It admits a doubt whether there is sufficient connection between the settlement sought to be proved and the fact offered as corroboration to authorize proof of the latter to be made. *Killen v. Lide's Adm'r*, 65 Ala. 505.

Ownership of Hogs.—In an action on the case to recover damages for injuries done to plaintiff's hogs, defendant's declaration "that plaintiff's hogs were in the habit of running in his field, and that they should not do it any more," is admissible evidence for plaintiff, because it tends though remotely, to show that the hogs which were injured belonged to plaintiff. *Smith v. Causey*, 28 Ala. 655.

Evidence Supporting Inference.—The transcript of the record of a suit is inadmissible to show a fact deducible therefrom only by inference from the character and objects of the suit. *McCravey v. Remson*, 19 Ala. 430.

Execution and Delivery of Deed.—In an action on a special contract, whereby defendant promised to pay in consideration that plaintiff, as agent and attorney in fact of another, would make him a good title to his principal's interest in a certain tract of land, plaintiff having proved that he afterwards delivered a deed for the land to the clerk for registration, it is competent for the defendant to show that the deed was in fact executed by the principal, and delivered to the plaintiff for the defendant, long before the making of the contract declared on, and had been wrongfully withheld and concealed by the plaintiff until after the making of the contract; and as tending to prove this, an instrument previously executed by the principal, and attested by the plaintiff, in form a deed, but inoperative as a conveyance for want of a seal, is not wholly irrelevant. *Adams v. Adams*, 29 Ala. 433.

§ 68. What Law Governs.

Rules of Evidence Prescribed by Code.—In all civil actions commenced since the adoption of the code, though founded on contracts whose validity must be determined by the former law, the rules of evidence prescribed by the Code must govern. *Mays v. Williams*, 27 Ala. 267.

§ 69. Identity of Persons and Things.

Oral Evidence to Show Real Party.—

In view of the fact that one may go into court under an adopted name, oral evidence is admissible to show the real party directing or controlling litigation. *Milbra v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 62 So. 176.

Proof of Christian Name.—In an action of ejectment, where defendant relied on a claim of adverse possession by his father and himself, there was evidence of an admission on the part of the father that the title to the land in question was in a certain Alfred Moore. Plaintiff's name was Frederick B. Moore, and plaintiff offered evidence that for several years there had been only one family of the name of Moore in the town; that in this family there were several boys, of which plaintiff was one; and that no member of the family was named Alfred. Held admissible for the purpose of establishing the identity of plaintiff as the person mentioned by the father in the admission testified to. *Savery v. Moore*, 71 Ala. 236.

§ 70. Personal Status and Condition.

Ability to Ride Horseback.—In an action for injuries to a passenger, a question asked of plaintiff, "Have you ever ridden horseback or muleback since you got hurt?" was properly disallowed as calling for irrelevant evidence. *Southern Ry. Co. v. Cothran*, 149 Ala. 673, 42 So. 100.

Illness at Time of Executing Contract.—When defendant admits the execution of a contract in controversy, evidence that he was quite sick at the time it was executed was irrelevant. *Bradford v. Daniel*, 65 Ala. 133.

Profitability of Business.—In an action on a bill of exchange, where the issue was whether a person was engaged in the business of a private banker and exchange broker, or was acting as agent for a foreign bank, for the purpose of determining whether the bill was discounted in violation of the laws of the state or not, evidence that one business was more profitable than the other is of doubtful admissibility. *Storey v. Union Bank*, 34 Ala. 687.

Expertness and Carefulness of Ferryman.—In an action against the owners

of a steamboat to recover damages for the loss of stage, occasioned by a collision between the steamboat and a ferry flat, on board of which was the stage, evidence of the expertness and carefulness of the ferryman is irrelevant to the issue, and inadmissible for the plaintiff. *Otis v. Thom*, 23 Ala. 469, cited in notes in 42 L. R. A., N. S., 927, 8 L. R. A., N. S., 622.

§ 71. Personal Relations.

Head of Family.—To show that one was the head of a family, evidence that her orphan grandchild resided with her, and that she bought clothes for him, is admissible. *Rowland v. Ladiga's Heirs*, 21 Ala. 9.

To show that she was "the head of a family," plaintiff had proved that her grandchild, a boy whose parents were dead, resided with her; and then offered to prove that she bought clothes for him, to which proof defendant objected. Held; that the evidence was admissible. *Rowland v. Ladiga*, 21 Ala. 9.

§ 72. Nature and Condition of Property or Other Subject-Matter.

Low Bridge.—In an action for injuries received by a brakeman from contract with a bridge while on top of a car, evidence is inadmissible to show that the bridge had the reputation of being too low. *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

Prevalence of Fog.—In an action against a railroad company for stock killed on its track in the nighttime, the engineer testified that the accident occurred near a creek, where a heavy fog prevailed. Held, that evidence showing equally or more favorable conditions for the formation and prevalence of fog at other places, where none in fact had formed in proximity to the place of the accident, was admissible and relevant as showing that there was none at such place. *Central Railroad & Banking Co. v. Ingram*, 98 Ala. 395, 12 So. 801.

Neither can defendant complain of the instruction of evidence by plaintiff showing that the conditions for fog were more favorable at other creeks than at the place of the accident, since its introduction was justified by the course defendant had pursued. *Central R., etc., Co. v. Ingram*, 98 Ala. 395, 12 So. 801.

In an action against a railroad company for stock killed on its track in the nighttime the engineer testified that the accident occurred near a creek, where a heavy fog prevailed; but he admitted that no fog prevailed at other creeks in the vicinity crossed by his train. Held, that defendant, after examining the engineer to show that the conditions for fog were more favorable at the place of the accident than at other creeks, and after receiving unfavorable answers, was not entitled to have such answers stricken out for relevancy. *Central R., etc., Co. v. Ingram*, 98 Ala. 395, 12 So. 801.

Making of Unmarketable Bricks.—In action on a note which defendant alleges was given in consideration of the purchase of a brickyard and that the vendor agreed, in consideration of the sale, not to make bricks in that town, testimony that the bricks made by defendant were not marketable would be admissible on the part of plaintiff to show that defendant had sustained no injury by plaintiff's breach of the contract; but he could not show merely that his bricks were of better quality than those of defendant. *Comelander v. Bird*, 11 Ala. 913.

Effect of Use of Fertilizer.—In an action to recover damages for the breach of an agreement to deliver cotton in payment of the price of a fertilizer represented to be "sea-fowl guano," and greatly beneficial to crops, the defendant, who resisted recovery on the ground that the article purchased was not what he ordered, and was worthless, was properly allowed to testify as to the manner and effect of his use of it in the cultivation of crops. *Claghorn v. Lingo*, 62 Ala. 230.

Prayer of Slave.—In an action on a warranty, evidence that the slave began to pray is not competent as showing that he was at the point of death. *Blackman v. Johnson*, 35 Ala. 252.

§ 73. Character or Reputation.

§ 73 (1) In General.

General Reputation.—Testimony that the plaintiff's general reputation was bad, and his only occupations gambling and horse racing, is competent in an action to recover damages for malicious prosecution, and should be received notwithstanding he disclaims all right to recover for

damages to character. *Martin v. Hardesty*, 27 Ala. 458, cited in note in 14 L. R. A., N. S., 755.

Evidence of good character is not admissible to repel the reputation of fraud in civil proceedings. *Ward v. Herndon*, 5 Port. 382.

Character and Reputation of Watchman.—Where a ditch dug by defendant in a public highway was a nuisance, and plaintiff fell into it without fault on his part, evidence of the care used by defendant in hiring a watchman to warn persons approaching the ditch, or his general character and reputation as a watchman at the time of his employment, is immaterial. *South & N. R. Co. v. Chappell*, 61 Ala. 527.

§ 73 (2) Chastity and Temperance.

Immoral Relations in Action on Account.—In an action on an account, evidence of the existence of immoral relations between the defendants, not to impeach their testimony, but to prejudice the jury, was incompetent. *Lord v. Calhoun*, 162 Ala. 444, 50 So. 402.

§ 73 (3) Right to Prove Specific Facts.

Specific Offenses.—A man's character must be testified to from a general knowledge of the neighborhood in which he lives, and special offenses can not be proven by a witness. *Rutledge v. Rowland*, 161 Ala. 114, 49 So. 461.

§ 74. Pecuniary Condition.

Tax Assessor's Book.—The tax assessor's books are not competent evidence of the amount of property belonging to a person assessed. *Lockhart v. Woods*, 38 Ala. 631, cited in note in 52 L. R. A. 919.

Action on Note.—In an action on a note alleged to have been given by defendant's intestate for a loan by plaintiff, the execution of which was denied, evidence that plaintiff, between the time of the making of the note and decedent's death, tried to borrow money, was competent; his pecuniary condition and ability to lend the money to decedent being a subject of legitimate inquiry. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, cited in note in 63 L. R. A. 986.

In assumpsit to recover money overpaid by plaintiff to defendant, for the purpose of showing plaintiff's inability to make

such overpayment, an unsatisfied mortgage previously executed by plaintiff is admissible as a circumstance, the weight of which must be determined by the jury. *Rutherford v. McIvor*, 21 Ala. 750.

Insolvency of Debtor.—The fact that a creditor was unable to collect his debt is evidence tending to show the insolvency of the debtor, and is admissible for that purpose; but it may be explained by showing that the inability to collect did not result from the debtor's inability to pay. *Bilberry v. Mobley*, 20 Ala. 260.

Issue as to Conditional Sale of Property.—The issue being whether claimant had sold the property, absolutely or conditionally, to the execution defendant, evidence as to defendant's financial standing and ownership of property at the time or sale is irrelevant. *Langworthy v. Goodall*, 76 Ala. 325.

Action to Recover Bonds.—It was competent for an administrator, suing to recover bonds alleged to belong to the estate, to prove that, a short time before the intestate's death, he received a large sum of money, and that no money was found in his possession at the time of his death; such evidence tending to strengthen the probability of his having invested the money in the bonds in controversy. *David v. David's Adm'r*, 66 Ala. 139.

Existence of Bank Account.—Evidence on the trial of a claim of exemption, that defendant had a "large" bank account about two and one-half years before the claim of exemption was made, is not too remote to be relevant, there being no presumption that the money was spent without acquiring a quid pro quo. *Davis v. Hays*, 89 Ala. 563, 8 So. 131.

§ 75. Motive and Intent.

Uncommunicated intentions are not the subject of proof by direct testimony, but are for the jury to ascertain from the facts and circumstances. *Wheless v. Rhodes*, 70 Ala. 419, cited in note in 23 L. R. A., N. S., 368.

"A witness can not testify to the uncommunicated intention with which he did an act. *Wheless v. Rhodes*, 70 Ala. 419; *Burke v. State*, 71 Ala. 377; *Whizenant v. State*, 71 Ala. 383; *Stewart v. State*, 78 Ala. 436; *Fonville v. State*, 91 Ala. 39, 8 So. 688; *Baldwin v. Walker*, 91 Ala. 428,

8 So. 364; *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615, 8 So. 349." *Lewis v. State*, 96 Ala. 6, 11 So. 259, 261, cited in note in 23 L. R. A., N. S., 369.

"It is well settled in this state, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief, or intention, when secret and uncommunicated; such mental status, when relevant, being a matter of inference to be determined from the circumstance of the case by the jury. *Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. State*, 71 Ala. 383; *Burke v. State*, 71 Ala. 377; *Brewer v. Watson*, 71 Ala. 299." *McCormick v. Joseph*, 77 Ala. 236, 240.

Intentions on Cross-Examination.—Except on cross-examination, it is not proper as a rule to ask witness as to his uncommunicated motives or intentions. *Davis v. Clausen (Ala.)*, 62 So. 267.

Failure to Deliver Lumber.—In an action for the price of lumber, for which defendant agreed to pay, in which defendant sought to recoup for delay in delivery, etc., it was error to allow testimony by plaintiff's officer as to why he stopped sending the lumber to defendant. *Merchants' Bank v. Acme Lumber & Mfg. Co.*, 160 Ala. 435, 49 So. 782, cited in note in 34 L. R. A., N. S., 323.

One may not testify as to why he ceased sending lumber to the defendant, who is seeking to recoup damages for such failure in an action against himself for the price of lumber delivered. *Merchants' Bank v. Acme Lumber, etc., Co.*, 160 Ala. 435, 49 So. 782, cited in note in 34 L. R. A., N. S., 323.

Person Traveling on Pass.—The plaintiff in an action for personal injuries against a carrier, which defends upon the ground that at the time of the accident, the plaintiff was riding upon a pass which she was not entitled to ride, can not testify that she would have gone on the trip if nothing had been said to her about a pass by the person who procured it for her; or that she would have paid her fare if it had been demanded; or whether she believed at the time she boarded the car that she had a right to ride upon the pass. *Broyles v. Central, etc., R. Co.*, 166 Ala. 616, 52 So. 81, cited in note in 34 L. R. A., N. S., 323.

In an action on the case, founded on a

letter written by the defendant to the plaintiff, recommending another as trustworthy, the latter having loaned money on the faith thereof, the plaintiff can not testify as a witness, that he never would have loaned the money but for the letters written to him by the defendant, such testimony being, not of a fact, but of an inference or conclusion of fact, to be drawn by the jury. *Baker v. Trotter*, 73 Ala. 277.

In the construction of a written contract, the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction, and the surrounding circumstances; and they can not be allowed to testify as to their understanding and intention. *Kyle v. Bellenger*, 79 Ala. 516, cited in note in 23 L. R. A., N. S., 370.

Evidence in Rebuttal.—To evidence that the defendant proceeded to commence work agreed to be done, but found fault with the materials to be furnished by the plaintiff, and did not begin the work, evidence tending to show that he was then really going to another place, where he had undertaken another job, and falsely pretended he was ready and willing to begin the former, is competent in rebuttal. *Moore v. Lea's Adm'r*, 32 Ala. 375.

Negating Malice.—In an action against the auditor of state for damages sustained by an attorney through the refusal to allow him to inspect the records in the office, containing accounts between the state and certain tax collectors whom the attorney represented, evidence of the reason of the auditor for such refusal of access to his books is admissible for the purpose of negating malice. *Brewer v. Watson*, 71 Ala. 299, cited in note in 23 L. R. A., N. S., 371.

Belief as to Solvency of Vendee.—In an action by the vendor of goods to recover them from one to whom his vendee had sold them, on the ground that such vendee had fraudulently represented himself as solvent at the time of their purchase, when he had no reasonable expectation of paying for them, plaintiff can not, as witness for himself, be allowed to state "that he believed the purchaser to be solvent, and would not have sold the goods if he had known of his insolvency."

McCormick v. Joseph, 77 Ala. 236, cited in note in 23 L. R. A., N. S., 368, 370.

Motive of Suing Out Writ of Garnishment.—In an action for wrongfully suing out a writ of garnishment it was improper to permit defendant to testify that he was not influenced either by malice or vexatious spirit in having the garnishment issued. *Mobile Furniture Commission Co. v. Little*, 108 Ala. 399, 19 So. 443, cited in note in 23 L. R. A., N. S., 371.

§ 76. Knowledge.

Record of Suit as Notice to Attorney.—An attorney will be presumed to have read a declaration to which pleas are filed in the name of a firm of which he is a partner and the record of the suit in which such proceedings were had is admissible evidence in a subsequent suit against the attorney, to prove actual notice to him of the plaintiff's title, as set out in said declaration. *Parsons v. Boyd*, 20 Ala. 112.

Conversation of Family as Notice to Husband.—In order to show knowledge of a fact on the part of a husband, it is not allowable to show that the matter was spoken of in his family and in presence of his wife. *Oden v. Stubblefield*, 4 Ala. 40.

Knowledge of More Favorable Contract.—It seems that in a controversy as to the terms of a verbal contract the fact that the party knew that he might have made a more favorable contract with others is not relevant. *Crews v. Threadgill*, 35 Ala. 334.

Relation of Dormant Partner to Firm.—In an action against the executor of a deceased dormant partner on a debt contracted by the firm after his withdrawal, evidence that plaintiff, when he commenced dealing with the firm, had notice that deceased was then a member thereof, is admissible in plaintiff's behalf. *Park v. Wooten*, 35 Ala. 242.

"If a dormant partner be known as a member of the firm, to one with whom the firm has dealings, actual notice of dissolution must be carried home to the person who has thus dealt with the firm, in order to exonerate outgoing partners from liabilities afterwards incurred. This actual notice may be shown by positive evidence, or by pertinent circumstances,

if sufficient to convince the jury. *Mauldin v. Branch Bank*, 2 Ala. 502, 511; *Coll. on Part.*, §§ 536, 537, and notice." *Park v. Wooten*, 35 Ala. 242, 245.

§ 77. Statements and Conduct of Parties.

Inability to Make Overpayment of Money.—In an action to recover an overpayment of money, for the purpose of showing inability to make such overpayment, a letter written by him to defendant, some time after the alleged overpayment, showing that plaintiff was pressed for money, and that he had had an interview with defendant the day before it was written respecting a sum of money which defendant was liable to pay, and claiming from him that sum only, was not irrelevant, as it tended to show that the plaintiff did not know of the alleged mistake at that time, and his being embarrassed in not discovering the mistake was some evidence that it had not been made. *Rutherford v. McIvor*, 21 Ala. 750.

Evidence in Rebuttal.—In an action by an attorney to recover for services rendered by him as defendant's agent in going to Louisiana, the plaintiff proved a conversation between himself and defendant, in which the latter requested him to accompany him to Louisiana as his agent, and he agreed to go, and that they both left the county in which they resided at the same time. Held, that defendant, to rebut this evidence, and to show that they in fact went to Texas, and not to Louisiana, might prove that plaintiff had land and slaves in Texas, and had stated that he had gone to Texas with defendant. *Jones v. Sterns*, 28 Ala. 677.

Declarations as to Possession.—Where the issue is as to the validity of the deed under which the defendant claims, his declaration as to the manner in which he obtained possession are not relevant, unless the execution of the deed is connected with the means by which possession was obtained. *Thompson v. Drake*, 32 Ala. 99.

Conversation as to Manner of Enforcing Bond.—In an action on a bond transferred to plaintiff by one who took it from defendant in partial payment for slaves sold to him, the question being whether or not defendant consented to the transfer, evidence that at the time of the sale the seller promised defendant

that this bond should not be applied in any other way than to the extinguishment of a mortgage which one C. held on the slaves was relevant. *Huntington v. Adams*, 12 Ala. 834.

Statement of Master to Slave.—In an action against one for instigating his slave to burn the plaintiff's house, evidence that, a few weeks after the burning of the plaintiff's house, his brother-in-law's house was burned by an incendiary, taken in connection with the fact that, a week after that, the defendant was heard to say to the slave, "That's right, damn 'em; burn 'em up," is proper for the jury. They are to consider but with great caution, what the defendant meant and referred to. *Bell v. Troy*, 35 Ala. 184.

Statement as to Theft by Slaves.—Evidence that the defendant, sued for instigating his slave to fire a building some time previously, when purchasing a negro, had said, "I like these smart negroes; one or two more would steal me rich in a short time," in inadmissible. *Bell v. Troy*, 35 Ala. 184.

Return of Papers.—In ejectment plaintiff may be asked "if he did not return the land papers" to his vendor, where such papers were lost, and the secondary evidence in regard thereto was conflicting, since the fact of such return is relevant on the question whether the papers were worthless as a conveyance. *Allred v. Kennedy*, 74 Ala. 326.

To Prove Loan.—In trying the question whether personal property sought to be recovered was a gift or a loan, the declaration of the donor, at or shortly before the time of the alleged loan, if confined to the issue, are admissible to show the intention, although the donee was not present. *Olds v. Powell*, 7 Ala. 652.

To Prove Ownership of Slaves.—It being shown, on a trial of the right of property in certain slaves, that the defendant in execution is the father of the claimant, that they lived together, and that the slaves were employed in cultivating the land on which they resided, the contemporaneous declaration of the defendant that he claimed to own the land in his own right is not irrelevant, but is admissible, as conducing to show that the slaves were in his possession. *Thomas v. Degraffenreid*, 17 Ala. 602.

§ 78. Customs and Course of Business.

Custom of Trainmen to Ride in Dangerous Places.—There was no error in rejecting evidence that it was the custom of plaintiff and other head brakemen on that train to ride between stations on the pilot. *Warden v. Louisville, etc., R. Co.*, 94 Ala. 277, 10 So. 276, cited in note in 41 L. R. A., N. S., 684.

Custom of Suing Railroad Track.—"Evidence of the habits of the person injured in respect of trains whether those of a prudent and careful person or the reverse, is never admissible in actions sounding in damages for personal injuries." *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581, 10 So. 215, 217, cited in note in 41 L. R. A., N. S., 684.

"The mere fact that persons living in the neighborhood of a railroad track have become accustomed to use it to walk upon without any objection on the part of the railroad company does not in any manner alter or change the duty of the railroad company to such persons. They are simply trespassers." And evidence of such custom is irrelevant and inadmissible. *Railroad v. Brinson*, 70 Ga. 207, 19 Amer. & Eng. R. Cas. 42, and notes; *Hoppe v. Railway Co.*, 61 Wis. 357, 21 N. W. Rep. 227, 19 Amer. & Eng. R. Cas. 74, notes; *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Savannah, etc., R. Co. v. Meadows*, 95 Ala. 137, 10 So. 141; *Mason v. Railway Co.*, 6 Amer. & Eng. R. Cas. 1." *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581, 10 So. 215, 217, cited in note in 41 L. R. A., N. S., 684.

Custom May Be Proved by Parol.—"A custom or usage, before it has ripened into a law, so to be judicially noticed by the courts, may be proved by parol as a fact." *Innerarity v. Heirs*, 1 Ala. 660, cited in note in 25 L. R. A. 452.

Plaintiff's Habit of Attending Sunday School.—In a suit on a promissory note, the issue being whether it was executed on Sunday or not, evidence that the plaintiff, the payee, was the superintendent of a Sabbath school, which he invariably attended unless he was sick or absent from home, is not admissible. *Blackwell v. Hamilton*, 47 Ala. 470.

Custom of Trading with Plaintiff.—In an action to charge the estate of a wife for goods sold for the support of the

household, the fact that the husband and wife, during the time covered by the account sued on, did most of their trading with plaintiffs, is relevant. *Sharp v. Burns*, 35 Ala. 653.

Business System Prevailing between Parties.—In an action by a warehouseman against a compress company for the conversion of cotton, evidence of the business system prevailing between the parties is admissible to explain the acts of the parties' agents in the matter of the delivery of the cotton in controversy. *Baker v. Troy Compress Co.*, 114 Ala. 415, 21 So. 496.

Business in Which Plaintiff Was Engaged.—In an action on a parol agreement to insure cotton shipped from Mobile to New Orleans, the terms of the contract being in issue, the plaintiff may adduce evidence of the business' in which he was engaged. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711.

Can Not Vary Written Contract.—Though evidence of a local custom is admissible to supply details in a contract, oral or written, as to which the contract is silent, or to show that provincialisms and technicalities of science and commerce have acquired a known, fixed, and definite meaning, different from their ordinary import, or where such technicalities, unexplained, are susceptible of two or more reasonable constructions, yet it can not be received to contravene any positive requirement of the law, any principle of public policy, or an express contract, oral or written, or to give to plain and unambiguous words or phrases a meaning different from their natural import, and hence is inadmissible to show that a stipulation, in a contract of hiring, that the hirer was to "lose the negro's lost time," "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death." *Barlow v. Lambert*, 28 Ala. 704.

Use of Machinery.—"It is admitted in argument, and fully established in our decisions, that the custom and usage of other well regulated business the like kind as to the use of certain machinery and mechanical appliances may always be adduced in evidence as tending to negative the charge of negligence when that charge is based upon the use of such

machinery or appliances by the defendant. Louisville, etc., R. Co. v. Allen, 78 Ala. 494; Propst v. Georgia Pac. R. Co., 83 Ala. 518, 3 So. 764; Alabama, etc., R. Co. v. Arnold, 84 Ala. 159, 4 So. 359." Holland v. Tennessee, etc., R. Co., 91 Ala. 444, 8 So. 524, 525.

§ 79. Value of Services.

Salary Received by Plaintiff for Other Work.—In an action for work and labor, salary received by the plaintiff in other employments at the time they were performed is inadmissible to prove what his services were worth. Alabama Security Co. v. Dewy, 156 Ala. 530, 47 So. 55.

Compensation of Third Person.—In an action for work and labor evidence as to the amount paid a third person for the work of supervision is irrelevant to determine what plaintiff is entitled to. Alabama Security Co. v. Dewy, 156 Ala. 530, 47 So. 55.

Salary of Engineer.—Evidence as to the salary of an engineer is inadmissible to show the value of services performed in constructing a railroad, where plaintiff was not shown to be an engineer or doing the work of one. Alabama Security Co. v. Dewy, 156 Ala. 530, 47 So. 55.

Value of Labor Performed.—"Plaintiffs, against objections and exceptions of defendants, were permitted to prove the value of the work and labor done by them on the railway track. There was no error in this. If there was right of recovery against any of the defendants, the value of the labor done was a material factor in determining the amount of recovery they were entitled to. Neither was there error in receiving testimony that one or more of the board of directors of the belt line and railway company saw plaintiffs and their employees at work on the roadbed of the corporation. That inquiry was pertinent and material in one aspect of the issue before the jury." Huntsville, etc., R. Co. v. Corpening, 97 Ala. 681, 12 So. 295, 298.

Rate of Exchange as Bearing on Compensation.—H., a British subject, contracted to receive as his own a certain amount of cotton, and to ship the same to Liverpool when the opportunity afforded, and for the protection of such cotton he was to receive a sum named from

the net proceeds of the sale of the cotton. The contract was afterwards rescinded by consent, and H. brought suit for a part performance of the contract. Held, that it was competent for plaintiff to prove the rate of exchange between Mobile and Liverpool, in order to aid the jury to fix the amount of compensation he was to receive. Chamberlain v. Hilton, 42 Ala. 101.

Value of Services of Son and Slave.—Where a father hired slaves to A. for one year, directions to pay the hire to his son B., who was overseer of slaves for A., and B. died within the year, it was held, in an action by B.'s administrator against A. for his services and the hire of the slaves, that an agreement by A. with the father, after the death of the son, by which A. was to pay to the father \$600 for the services of the son and the hire of the slaves, although without consideration, was admissible in evidence for the purpose of showing the value of the service. Pope v. Randolph, 13 Ala. 214.

Gratuitous Service by Slave.—In an action for a breach of warranty on the sale of the slave, evidence that plaintiff allowed the slave to serve a witness gratuitously for a year next before the trial was incompetent to show that the services were worthless. Gingles v. Caldwell, 21 Ala. 444.

Services of Clerk.—Where the question is as to the value of a clerk's services, with whom there was no express contract, evidence as to what compensation is paid other clerks in other stores is inadmissible. Harris v. Russell, 93 Ala. 59, 9 So. 541.

State of Accounts between Tax Collector and State.—In such action, it appearing that the plaintiff was employed by a tax-collector to procure the allowance of the claim by the auditor for an alleged excess or over-payment of taxes, as shown by the books in the auditor's office, his compensation depending on the allowance and amount of the claim; evidence in relation to the state of the accounts between the tax-collector and the state, is too remote from the issue, and is irrelevant. Brewer v. Watson, 65 Ala. 88.

§ 80. Value or Market Price of Property. § 80 (1) In General.

Value after Erection of Nuisance.—In

an action for damages for the maintenance of a nuisance testimony by the plaintiff as to what he would or would not take for his homestead after the erection of the nuisance is inadmissible on the issue of the then market value of his premises. *Town of Vernon v. Edgeworth*, 148 Ala. 490, 42 So. 749.

Value Fixed by Agreement.—Where plaintiff claimed damages for the refusal of the defendant to accept cross-ties, alleging that defendant had agreed to pay thirty-eight cents for first-class and nineteen cents for second-class ties, it was permissible to establish such a price, either by express or implied agreement; but plaintiff could not prove a quantum valebant in order to fix the price. *Nashville, C. & St. L. Ry. v. Wood*, 171 Ala. 382, 54 So. 753.

Deposits Representing Amount of Sales.—Where, in proceedings by a claimant to establish his right to attached property consisting of merchandise, there is evidence of its value six months prior, and of the amount of goods bought subsequent thereto, and that the amount of the sales was always deposited in bank, evidence of the amount of such deposit is admissible to prove the present value of the goods. *Tobias v. Treist*, 103 Ala. 664, 15 So. 914.

Value of Local Bank Notes.—In an action upon a covenant to pay \$1,000, "in Huntsville or Tennessee bank notes, of good standing in Huntsville," it was held that evidence of the value of Tennessee notes in Tennessee was inadmissible. *Searcy v. Fearn*, 2 Stew. & P. 128.

§ 80 (2) Time and Place of Valuation.

Value at Subsequent Periods in Same Market.—It is competent to prove the value of property at a certain time by showing its value at a subsequent period, within reasonable limits, in the same market. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348, cited in note in 37 L. R. A., N. S., 598.

Value of Property Months after Unlawful Seizure.—Since the measure of recovery, in trespass for seizure and selling personalty, is the value of the property at the time of the seizure, evidence of efforts to sell the personalty several months after the seizure is inadmissible to fix

value. *Burgin v. Marx*, 158 Ala. 633, 48 So. 348.

Price Two Years before as Evidence of Present Value.—The price paid for a machine which has since been operated some two years, and one of the arms of which is cracked, is no evidence of its present value. *Hensley v. Ordendorff*, 152 Ala. 599, 44 So. 869.

Value at Different Places.—In an action for injury to or destruction of goods received for carriage to J., evidence of the value of the good at B., to determine their value at J., is admissible. *St. Louis, & S. F. R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81.

Place at Which Price Is Fixed Must Be Shown.—It is not error to exclude evidence offered to prove the market value of an article, which does not show the place at which the price is fixed. *Warrior Coal & Coke Co. v. Mabel Min. Co.*, 112 Ala. 624, 20 So. 918.

Value at Distance from Market.—On the issue as to the market value of an article at a certain place, evidence as to its market value at a distant point is inadmissible, where it is clear that the article had a market value at the place in question. *Comer v. Way*, 107 Ala. 300, 19 So. 966.

Value in 1901 as Evidence of Value in 1890.—Evidence as to the value of land in 1901 was not evidence of its value in 1890, when an alleged agreement for the exchange was entered into. *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836, cited in note in 25 L. R. A., N. S., 1198.

Value Twenty-Eight Miles Distant.—In trover evidence as to the value of cotton in a certain state on a certain day is admissible to show the value of a similar quality at a place twenty-eight miles distant on that same day. *Johnson v. West*, 43 Ala. 689.

"The testimony of West respecting the value of the cotton, was admissible. The price which a similar quality sold for, on the day of the levy, in the city of Montgomery, only twenty-eight miles distant, was a criterion from which the value of this cotton could be deduced. *Ward v. Reynolds*, 32 Ala. 384; *Foster v. Rodgers*, 27 Ala. 602." *Johnson v. West*, 43 Ala. 689, 691.

Value of Machines in Another.—In an

action for breach of contract for failure to deliver certain machines within the state, it was not prejudicial error to permit plaintiff to show the value of the machines in another state, if the value there was the same as at the agreed point of delivery. *Alabama Iron Works v. Hurley*, 86 Ala. 217, 5 So. 418.

§ 80 (3) Appraisal of Property.

Inventory by Sheriff.—Where the sheriff in levying on property in possession of defendants, claiming it under a sale from the debtor, in consideration of a debt to them, makes an inventory of the "reasonable market value" of such property, such inventory is admissible on the part of plaintiff, another creditor of such debtor, in a trial of right of property, to show the value of the property levied on. *Roswald v. Hobbie*, 85 Ala. 73, 4 So. 177.

Schedule Attached to Deed of Assignment.—In trespass for levying on property claimed by plaintiff under a deed of assignment, the schedule attached to the assignment is not evidence of the value of the goods at the time of assignment. *O'Neal v. Brown*, 20 Ala. 510.

§ 80 (4) Comparison with Other Property and Other Interests in Same Property.

Value of Sample.—Where cotton, bought by sample in Montgomery, Alabama, in January, was shipped to New Orleans, and there resold at public auction in May, after notice to the vendor, the price brought at the resale may be looked to by the jury in determining the actual value in Montgomery at the time of the sale, when the other evidence in the cause shows the value of the sampled cotton in Montgomery at the time of sale, in New Orleans at the time of resale, and that the relative value of the sampled and damaged cotton was the same in both places. *Foster v. Rodgers*, 27 Ala. 602.

§ 80 (5) Cost of Property and Amount Received in General.

Amount Paid for an Outstanding Title.—The amount paid by the plaintiff for an outstanding title or incumbrance is no evidence of its value, in the absence of all other evidence. *Anderson v. Knox*, 20 Ala. 156.

Price of Transfer of Stock.—On an is-

sue as to the market value of certain stock at the time of claiming exemptions, a witness can not testify for what price defendant transferred the stock, when the time of transfer does not appear. *Roden v. Brown*, 103 Ala. 324, 15 So. 598.

Articles Kept for Use.—In an action against a carrier for loss of and damage to personal property, evidence of the cost of the articles, not shown to have had a market value, is admissible; the market value not being the test as to secondhand articles kept for use and not for sale. *Kates Transfer, etc., Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355.

"The photographs were articles of property that were lost that can not be said to have a marketable value that could be shown, but, as said in *Southern Exp. Co. v. Owens*, 146 Ala. 412, 41 So. 752, 755: 'It does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value can not be predicated of it, its value, or plaintiff's damages, must be ascertained in some other rational way, and from such elements as are attainable. *Trustees v. Turner*, 71 Ala. 429; *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 So. 712; *Jonas v. Noel*, 98 Tenn. 440, 39 S. W. 724, 36 L. R. A. 862; *Masterson v. Mayor, etc.*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38; *Sullivan v. Lear*, 23 Fla. 463, 2 South. 846, 11 Am. St. Rep. 388; 3 *Southerland on Damages* (3d Ed.), § 919.' *Southern Exp. Co. v. Owens*, supra. 'As compensation for the actual loss is the fundamental principle upon which this measure of damages rests, it would seem that the value of such goods to their owner would furnish the proper rule upon which he should recover.' *Cooney v. Pullman Palace Car Co.*, 121 Ala. 368, 25 So. 712." *Kates Transfer, etc., Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355, 357.

§ 80 (6) Auction or Judicial Sale.

Sheriff's Sale as Bearing on Age, Condition and Value.—That goods were sold at a sheriff's sale near the time when their value is in issue is a circumstance to be considered by the jury as to their condition, age, and value, in connection with other evidence, though of itself not bind-

ing on the parties. *Corey v. Penney*, 165 Ala. 234, 51 So. 624.

Attorney Allowing Sale of Property.—That the attorney for plaintiff in attachment is at the sale, and allows the property to be sold for a price bid by a stranger, is not evidence that the price was fair, it not appearing he had authority to bid for his client. *Clewis v. Malone*, 131 Ala. 465, 31 So. 596.

Number of Times Property Was Offered for Sale.—It being in issue whether property sold by sheriff under attachment brought its fair value, he may testify how many times it was offered for sale under the attachment before it was sold. *Clewis v. Malone*, 131 Ala. 465, 31 So. 596.

§ 80 (7) Amount for Which Property Can Be Purchased.

Offering to Sell at Certain Price.—Where, in an action to recover the purchase money of three slaves, sold by the plaintiff to the defendant, issue is joined on the plea of failure of consideration, proof that the plaintiff had offered them, within twelve month immediately preceding the sale, at \$350 less than he sold them for to the defendant, is relevant, as in some degree conducing to show, especially in connection with other evidence, that one of the slaves was unsound at the time of the sale. *Rowland v. Walker*, 18 Ala. 749, cited in note in 24 L. R. A., N. S., 254.

§ 80 (8) Amount for Which Property Will Sell.

See ante, "Amount for Which Property Can Be Purchased," § 80 (7).

§ 80 (9) Tax Assessment.

Damage to Land by Railroad.—In an action against a railroad company for damage to land, the value of the land can not be shown by tax assessments. *Savannah, A. & M. Ry. v. Buford*, 106 Ala. 303, 17 So. 395.

Proceeding to Lay Out Highway.—In a proceeding to lay out a public highway, the tax assessment book for the county was admissible on the question of the value of the land sought to be taken. *Gayle v. Court of County Com'rs*, 155 Ala. 204, 46 So. 261.

Injuries to Animal by Train.—In an action for injuries to colts by defendant's

train, the tax record for a certain year was properly excluded on the question of value of the colts, where it did not appear that the assessment for that year was given by plaintiff, or that it included the colts in question. *Nashville, C. & St. L. Ry. v. Garth*, 155 Ala. 311, 46 So. 583.

§ 80 (10) Circumstances Adding to or Subtracting from Value in General.

Difficulty of Marketing Timber.—To ascertain the net value of timber, the difficulties of getting it to market and the impossibility of doing so, except at uncertain periods of high water, may be shown. *Ladd v. Ladd*, 121 Ala. 583, 25 So. 627.

Cost of Marketing Timber.—Evidence of the value of timber in near-by markets and the cost of marketing the same, there being no market at the land on which it stands, is competent as to the value of the land, which is principally valuable for its timber. *Ladd v. Ladd*, 121 Ala. 583, 25 So. 627.

Value of Land for Specific Purpose.—Evidence that land across which a right of way is taken is adapted to and used for certain purposes, such as farming, etc., is admissible to show its value. *Long Distance Telephone & Telegraph Co. v. Schmidt*, 157 Ala. 391, 47 So. 731.

§ 80 (11) Animals.

In an action for killing plaintiff's dog, it is error to admit evidence as to what plaintiff was offered for the dog two years before. *Southern Ry. Co. v. Parnell*, 142 Ala. 146, 37 So. 925.

Injury to Horses.—In an action for injuries to colts by defendant's train, testimony as to the cost of entering the colts for the "futura stakes" and as to the amount of the stakes therein was erroneously admitted, and was prejudicial to defendant, although it may be that on the question of the value of the colts the fact that they had been entered for the "futura stakes" may have been proper. *Nashville, etc., Railway v. Garth*, 155 Ala. 311, 46 So. 583.

"The court erred in admitting in evidence, over the defendant's objection, testimony as to what was the cost of entering the colts for the 'futura stakes,' and as to what was the amount of the 'futu-

urity stakes.' This evidence, under the issues, was clearly illegal, and calculated to prejudice the jury unfavorably to the defendant. It may be that on the question of value of the colts it was proper to show that the colts had been entered for 'futuraity,' but not the cost of such entry, or the value of the 'futuraity stakes.'" *Nashville, etc., Railway v. Garth*, 155 Ala. 311, 46 So. 583, 584.

§ 81. Facts Relevant to Particular Issues.

Payment of Mortgage.—In an action involving the title to land on which B., the former owner, had given two mortgages, one alone and one jointly with her husband, where the mortgagee on cross-examination had already testified to the payments of the mortgage made by B. alone, the exclusion of offered evidence that the mortgage made by B. had been paid was proper, since it manifestly did not refer to the joint mortgage. *Brown v. Loeb* (Ala.), 58 So. 330.

Custom of Mailing Letters by Postmaster.—On an issue as to the time a letter sent from a country post office, via Selma to Mobile, was received in the latter city, the testimony of the Selma postmaster that country postmasters sometimes mailed letters in person in Selma is irrelevant; there being no evidence that this letter was so mailed. *Miller v. Boykin*, 70 Ala. 469.

Purchasers from One Person Only.—In an action on account by a grocer, evidence of the amount of groceries necessary for the use of defendant's family was not admissible in evidence of the amount purchased, it not being shown that he purchased exclusively of plaintiff; and the fact that plaintiff kept no clerk by whom to prove the delivery furnished no reason for the admission of such evidence. *Scott v. Cox's Adm'rs*, 20 Ala. 294.

Opposition to Marriage.—Where the question at issue is whether or not the gift of a slave had been perfected before the marriage of the donee, the fact that the donor was opposed to the marriage is wholly irrelevant. *Perry v. Graham*, 18 Ala. 822.

§ 82. Matters Showing Relevancy of Other Facts.

Should Show Relevancy of Offered Tes-

timony.—Where evidence is offered which is seemingly irrelevant to the matter in issue, it is the duty of the party offering it to show how it can be made relevant by connecting it with other facts and circumstances already in evidence, or intended to be offered; and, if there is no such offer to show its relevancy, the court may lawfully reject it. *Crenshaw v. Davenport*, 6 Ala. 390; *Tuggle v. Barclay*, 6 Ala. 407.

Where evidence is *prima facie* irrelevant, it is the duty of the party offering it to show its relevancy, either by showing its connection with facts which are already proved, or by offering it in connection with facts expected to be proved. *Ashley v. Robinson*, 29 Ala. 112.

"When, therefore, evidence is offered, apparently not connected with the issue, and is opposed, it becomes the duty of the party offering it, to show its connection with other facts, either in evidence, or intended to be given to the jury. It is impossible to prescribe the course which counsel shall pursue in putting a case to the jury, but they must always be prepared to explain the object for which the evidence is offered; and if this is not done, the court may lawfully reject that which is apparently irrelevant." *Crenshaw v. Davenport*, 6 Ala. 390, 392.

"When the relevancy is not apparent from the evidence offered, but other facts will make it so, the duty of the party offering it is to state its connection with the other facts, in order that its relevancy may be disclosed to the court. 2 Starkie's Ev. 381." *Crenshaw v. Davenport*, 6 Ala. 390, 391.

Evidence to Show Materiality of Concealed Fact.—Evidence that after the assignment of a contract for the purchase of land, which required the vendees to give joint notes for the purchase money, the assignor had a conversation with his covenantees, who then told him that they would not sign joint notes with the assignees, and would have nothing more to do with the contract, is admissible to show the materiality of the concealed fact that the notes were to be signed jointly, and that the assignees were prejudiced thereby. *Griel v. Lomax*, 86 Ala. 132, 5 So. 325.

Acts between Plaintiffs and Third Persons.—In an action by an administrator to recover bonds alleged to belong to the decedent's estate, and which had never been in plaintiff's possession, it was permissible for him to testify that he was put on inquiry as to the bond by information received from others and by his own idea of the testator's wealth, for, though relating to acts of the plaintiff and the third persons, it was admissible as being introductory and by way of inducement. *David v. David*, 66 Ala. 139.

The contents of the telegram, and the fact of its delivery to plaintiff, were relevant, as tending to show that plaintiff, when injured, was acting within the scope of his employment, and on an assurance of the track's good condition, which tended to acquit him of negligence in not discovering the obstruction which caused the accident. *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6.

To Show Nature of Transaction.—In an action against a sheriff and another for selling under execution, against a third person, wood belonging to plaintiff, defendants raised a question as to whether plaintiff was simply acting, when he purchased the wood, as agent of a certain iron company, and plaintiff offered to prove that when he settled with the iron company no credit was allowed him on account of wood not delivered. Held, that such testimony was relevant to show the nature of the transaction between plaintiff and the iron company. *Smiley v. Hooper*, 147 Ala. 646, 41 So. 660.

§ 83. Matters Explanatory of Facts in Evidence or of Inferences Therefrom.

Evidence not inconsistent with the record may be allowed to explain and give point and direction to it. *Young v. Fuller*, 29 Ala. 464.

Presumption from Purchase of Goods.—The fact that the plaintiff was frequently seen to purchase groceries from the defendant, who was the only grocer in the village, does not warrant the presumption that he purchased his entire supply from him, so as to authorize proof of the amount of groceries necessary for his family, or actually consumed by them during the time such purchases were be-

ing made. *Scott v. Coxe's Adm'rs*, 20 Ala. 294.

Action against Tax Collector.—Two suits were pending against a tax collector for the county taxes of 1845 and 1846. On the trial of the suit for the taxes of 1845, he produced the receipt of the county treasurer for an amount greater than the sum due for the taxes of that year, but purporting on its face to be given for the taxes of 1845. He also examined the county treasurer as a witness, who testified that, though he would not deny his signature to the receipt, yet he was sure that defendant had never, at any one time, paid him so large an amount as that specified in the receipt; that, if the receipt was his, it must have been given for some smaller receipts, which defendant had never surrendered; that he was county treasurer in 1845, 1846, and 1847, and had never had a final settlement with defendant. Held, that it was relevant for defendant to introduce the county treasurer's receipts for the year 1846, for the purpose of showing that all the receipts amounted in the aggregate to the taxes of the two years. *Williams v. Fitzpatrick*, 20 Ala. 791.

Action against Steamer Damages Resulting from Collision.—A steamer ran into a flatboat, sunk it, picked up and carried forward a portion of the cargo, claimed salvage, and received a large sum of money. In an action against the steamer for the collision, the shipper was allowed to show that he paid the money, protesting that no salvage was due, in order to get possession of the goods, and under a special agreement that the claim for salvage, damages, etc., was to be left to legal decision. *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176.

A newspaper advertisement, which furnished the occasion of a conversation testified to, but which neither formed part of nor explained the conversation, is not admissible. *Bell v. Troy*, 35 Ala. 184.

In detinue for a mule, claimed by plaintiff under a purchase money mortgage on mule claimed to have been executed to him, it appearing that the mortgagor had been in possession of the mule prior to the time of the mortgage, it was proper to permit plaintiff to testify that the relation of landlord and tenant had existed

between himself and the mortgagor for several years, and that he had furnished the mortgagor with several mules, including the one in controversy. *Holman v. Clark*, 148 Ala. 286, 41 So. 765.

Legal Interpretation of Written Instrument.—It is not error in a court to reject proof which is merely affirmative of the legal interpretation of a writing adduced in evidence. *Sims v. Pryor*, 5 Ala. 592.

§ 84. Evidence Irrelevant unless Preceded or Followed by Other Evidence.

Relevant Evidence May Be Assisted by Other Evidence.—Evidence which is relevant to the issue can not be excluded by the court because, unless assisted by other proof, it will not establish the point in dispute. *Harrell v. Floyd*, 3 Ala. 16; *Cuthbert v. Newell*, 7 Ala. 457; *Laroque v. Russell*, 7 Ala. 798.

Preliminary or Connecting Proof as Rendering Evidence Relevant.—The admissions of evidence, which, when offered, is prima facie irrelevant, or otherwise inadmissible, is cured by the subsequent introduction of the necessary preliminary or connecting proof. *McCoy v. Watson*, 51 Ala. 466.

Irrelevant Evidence Must Be Followed by Relevant Evidence.—In an action for personal injuries by a brakeman against a railroad company, questions whether defendant offered plaintiff a position after the accident, and whether he refused the same, put to plaintiff on cross-examination, were improper, unless designed to be followed by proof showing the character and terms of the offer. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276, cited in note in 24 L. R. A., N. S., 264.

Evidence Not Shown to Be Relevant.—In an action for the price of fertilizer, on an issue as to whether water transportation permitted its due delivery to defendant, a statement in a deposition, the date of which was not given, that a boat had made one trip to defendant's landing, the place of delivery, "last year," was properly excluded, as it could not be determined therefrom whether the boat made the trip before or after the fertilizer should have been delivered. *Raisin Fer-*

tilizer Co. v. J. J. Barrow, Jr., Co., 97 Ala. 694, 12 So. 388.

Receipts Given by Agents.—Evidence that receipts are in the handwriting of the agents of persons sought to be charged is inadmissible, in the absence of a showing that the receipts were made during the existence of the authority of such agents. *Bell v. Pharr*, 7 Ala. 807.

Failure to Show Possession of Writing.—A writing, in the possession of the plaintiff, purporting to be indorsed to the defendant, but not shown to have been ever held by him, is not admissible against him, although the makers' and indorsers' signatures are proved. *Carlisle v. Davis*, 9 Ala. 858.

Action on Bond of Railroad Employee.—In an action by a railroad company upon the bond of one of its agents, conditioned to faithfully discharge his duty, the company can not introduce in evidence that it was accustomed to require its agents, by printed instructions, to make monthly reports, without showing that the principal in the bond made such reports, charging himself therein, or violated his duty in failing to do so. *Memphis & C. R. Co. v. Maples*, 63 Ala. 601.

Action to Recover Damages.—That on a certain date a witness left the place where plaintiffs were working to attempt to collect for work done and to get the time extended for completing the work did not warrant a conclusion that plaintiffs' outfit was kept idle during that time by defendant, so as to make admissible evidence as to the reasonable value of the use and hire thereof during that period on the question of damages. *Hardaway-Wright Co. v. Bradley Bros.*, 163 Ala. 596, 51 So. 21.

Admission of Correctness of Part of Account.—The admission by the defendant that a part of an account presented to him is correct, without stating which part, is inadmissible in evidence for its uncertainty. *Watson v. Byers*, 6 Ala. 393.

Defective Condition of Motor.—Where plaintiff was injured by a defective motor drill, questions asked him as to whether his boss did not know that "those sockets" had burrs on them, etc., were properly excluded; the questions not being confined to the socket used by plaintiff at

the time of his injury. *Owen v. Alabama*, etc., R. Co. (Ala.), 61 So. 924.

Where a motor which a witness found for his own use in defendant's shop the next morning after plaintiff had been injured while using a similar motor, as the witness started to finish plaintiff's job, was not shown to be the same motor that plaintiff was using when injured, the witness was not entitled to testify as to the defective condition of the motor he found. *Owen v. Alabama*, etc., R. Co. (Ala.), 61 So. 924.

In an action for injuries by reason of the alleged incompetency of plaintiff's fellow servant, a question calling for the fellow servant's duty concerning the cutting off of air from a motor drill, prior to any evidence that he was incompetent, held immaterial. *Owen v. Alabama*, etc., R. Co. (Ala.), 61 So. 924.

Where plaintiff was injured by a defective motor drill, and claimed that a negro, his fellow servant, was incompetent, and that the injury resulted from his incompetency, a question as to what the helper's duty was concerning cutting off air when directed, prior to the introduction of any evidence that the helper was incompetent, was immaterial. *Owen v. Alabama*, etc., R. Co. (Ala.), 61 So. 924.

Proper Way to Pile Iron.—In an action for injuries to a servant by his being struck by a piece of iron which fell from the top of an accumulator, evidence that pieces of iron on the top of the accumulator sometimes fell off when they were not piled straight is not admissible, where there was no proof that the iron was not piled straight, or was sticking out at the time when plaintiff was injured, or that the conditions were the same then as when iron fell off on previous occasions; no statement being made by counsel that it would be made relevant by competent evidence. *Fletcher v. Tennessee Coal, Iron & R. Co.*, 163 Ala. 240, 50 So. 996.

(B) RES GESTÆ.

§ 85. Nature of Doctrine in General.

Defining Res Gestæ.—"Many phrases have been used in the endeavor to express definitely and clearly the proper relation and character of a declaration or act to the main fact, by which it becomes res gestæ. It is termed a 'verbal

act from an act;' 'a natural impulse from an act' is that which 'owes its birth to a preceding fact;' 'it must spring out of the transaction;' 'it must be spontaneous;' and many others might be mentioned. Unless the main fact is relevant and competent evidence, the res gestæ is inadmissible as evidence. If the declaration be a mere narration of a past, complete act, it is not res gestæ. If it bears evidence of the exercise of reason, or that it is a conclusion of the mind after reflection, it is no part of the main fact, but a mere expression of opinion. In determining whether a declaration or circumstance is a part of the res gestæ, it is important to consider the time between the main fact or act and the declaration or circumstance; but res gestæ can not be tried by any specified time or number or minutes." *Louisville*, etc., R. Co. *v. Pearson*, 97 Ala. 211, 12 So. 176, 178.

Illustrative of Main Act.—"The real inquiry is: Did the main act, *proprio vigore*, further assert itself and demonstrate its character or intent by impelling the contemporaneous or subsequent declaration or act offered in evidence, and without which the main act is left incomplete, and only partially proven; or did the declaration or circumstance offered as res gestæ originate from some cause extraneous to the main act. If traceable solely to the main act as the producing cause, and the declaration or circumstance is illustrative of the main act, it is res gestæ; otherwise it is mere hearsay, or irrelevant, and inadmissible as res gestæ." *Louisville*, etc., R. Co. *v. Pearson*, 97 Ala. 211, 12 So. 176, 179.

"In 1 Tayl. Ev., § 545, it is said: 'In all these cases the principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction.' The same rule is declared in almost similar language in 1 Greenl. Ev., § 108." *Louisville*, etc., R. Co. *v. Pearson*, 97 Ala. 211, 12 So. 176, 178.

Determination by Court.—"The principle of law upon which the doctrine of res gestæ rests should not be confounded with the principle of law under which the

admissions of a party are admissible as against him, or with the principle upon which dying declarations are admitted as evidence. Cases will arise in which it is difficult to determine whether the declarations or acts are a part of the main act, and *res gestæ*, or whether they are mere hearsay; and each case must in great measure be determined by the court when presented." *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, 179.

Difficult to Define.—"We confess that it is difficult, if not impossible, to define the principle of *res gestæ*. Like many other principles of the law, it is easier to say or define what it is not than what it is; hence negative definitions are probably the most serviceable and the most accurate in determining in a particular case whether a given fact or incident is a part of the *res gestæ* so as to render it admissible in evidence as such testimony. The subject has been so often discussed by this court, and at such length, that we could not hope to better define the term than has already been done by this court." *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82, 86.

Spontaneous Expression.—"In *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577, it is said: 'To determine when declaration relating to a transaction form part of the *res gestæ* often requires nice discriminations. As a general rule, approximating definiteness as nearly as practicable, it may be said, that when the declarations are the natural outgrowth of the transaction, spontaneously expressed, are so nearly coincident in point of time with the main fact as to serve to illustrate and explain it, they are admissible on the principle that the declarations and the main fact constitute one transaction.' In *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, and *Hammond's Case* and *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, the particular declarations in question were held not to be admissible; but from what is said in each of those cases the acts and declarations of the motorman in this case would have been held admissible. They were held not to be admissible in each of those cases, because not spontaneous but made in answer to questions, and because narrative of past transactions, and

not the actual product of the main transaction, as was the exclamation of the motorman in this case, 'My God! I have killed a man,' made before he had time to reflect, as an exclamation of surprise and shock, and not in answer to any question. His acts, deeds, and words all showed that they were natural and spontaneous, and were not concocted nor made after deliberation or reflection. In the ebullition of his excitement, human nature and the emotions spoke, as well as the individual motorman. In the language of Chief Justice Bleckley in *Shepard's Case*, 85 Ga. 751, 12 S. E. 18 (quoted by Justice Sayre, in *Heald's Case*, above referred to), the exclamation of the motorman, 'My God! I have killed a man,' was the 'utterance of human nature, of the genus homo, rather than of the individual.'" *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82, 86.

Pertinent to Issue.—"In order that the declarations of a third person may be evidence, as a part of the *res gestæ*, it is necessary that the act which they explain and qualify should itself be pertinent to the issue. *Gilbert v. Gilbert*, 22 Ala. 529; *Hooper v. Edwards*, 20 Ala. 528; *Robertson v. Smith*, 18 Ala. 220. The wife of one of the witnesses declared, when in the act of going to the plaintiff's house, that she was going to see a negro woman, about to be delivered of a child; and when she returned, she declared that the woman had given birth to a child. It is a fatal objection to the competency of those declarations, that the acts of going to and of returning from the plaintiff's house, which they are supposed to qualify and explain, are totally immaterial and irrelevant. The declarations of third persons can not become evidence, because they accompany acts of third persons which have no connection with the case. For the error in the admission as evidence of these declarations, the judgment of the court below must be reversed and the cause remanded." *Fail v. McArthur*, 31 Ala. 26, 30.

Contemporaneous with Main Fact.—"In *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, 118, it is said: 'It is difficult, if not impossible, to accurately define the principle of *res gestæ* as it is often called. It is commonly said to have reference to

such circumstances and declarations as are contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. 1 Greenl. Ev., § 108." *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82, 86.

"What lapse of time is embraced in the word 'contemporaneous' is often a question of difficulty. Perfect coincidence of time between the declaration and the main fact is not, of course, required. It is enough that the two are substantially contemporaneous. They need not be literally so. The declaration must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. The evidence offered must not have the ear-marks of a device, or afterthought, nor be merely narrative of a transaction which is really and substantially past. The same language almost has been used in dozens of cases before and since *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112. The decisions and the text books on the subject were received and quoted in *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, and in the recent case of *Alabama, etc., R. Co. v. Heald (Ala.)*, 59 So. 461." *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82, 86.

The *res gestæ* rule authorizes the admission of such circumstances and declarations as are contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. The term "contemporaneous," however, in such senses does not mean coincidence, but requires that the circumstance or declaration be substantially at the same time as the main fact, so that it will appear that the evidence offered has not the ear-marks of a device or afterthought, or a narrative of a transaction which is really and substantially past. *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82, 83.

"The general rule is, that a party's *ex parte* statements can not become evidence for himself. To that rule there are exceptions, one of which is, that what a

party says, contemporaneously with an act done, and explanatory of its nature, may be given in evidence as part of the *res gestæ*. To bring a case within this rule, the declaration must be so connected with the fact it is sought to explain as to illustrate its character. 1 Greenl. Ev., § 108. In the present case, the declaration was not at all explanatory of the work and labor done; and hence we hold, that the declaration formed no part of the *res gestæ*. We know of no principle of law on which it was admissible, and hold that the county court of Montgomery erred in its admission." *Gordon v. Clapp*, 38 Ala. 357, 359.

But by the great weight of authority in this country, perfect coincidence of time is not acquired. It is enough that the declaration and the main fact are substantially contemporaneous; they need not be literally so. *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, cited in note in 19 L. R. A. 734.

"This statement of the declarations was admitted as *res gestæ* suffices for a consideration of the question as to whether they constituted a part of the *res gestæ* of the accident, and, as such, admissible in evidence. In *Gandy v. Humphries*, 35 Ala. 617, 624, the principle is thus declared: 'When it is said that declarations, to be admissible as a part of the *res gestæ*, must be contemporaneous with the principal transaction, it is not meant that they shall be exactly coincident in point of time with the main fact. If they appear to spring out of the transaction, if they serve to elucidate it, and are made so shortly after the happening of the main fact as to stand in the relation of unpremeditated result to it, the idea of deliberate design in making them being fairly precluded by the surrounding circumstances, then they may be regarded as contemporaneous.' In the case of *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, the same principle is declared, and it is added: 'The evidence must not have the earmarks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially past. * * * The time, "a few minutes," does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with

it as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narrative of a past occurrence, which at the moment was finished and complete.'" Louisville, etc., R. Co. v. Pearson, 97 Ala. 211, 12 So. 176, 178.

Necessity That Declarations Be Strictly Contemporaneous.—In determining whether declarations fall within the principle of *res gestæ*, while it is not necessary that they should be strictly contemporaneous with the main facts in issue they must be so nearly coincident in point of time as to grow out of that fact, to elucidate it, and to explain its character and quality, and must be so closely connected with it as to virtually constitute but one entire transaction. Alabama, etc., R. Co. v. Hawk, 72 Ala. 112.

Explanatory of an Act Not in Itself Evidence.—Declarations of a party to an action, explanatory of an act which is itself not evidence, are inadmissible as evidence. Gilbert v. Gilbert, 22 Ala. 529.

Act Must Be Relevant and Material.—The declarations of a third person, explanatory of a contemporaneous act, are not admissible evidence on the principle of *res gestæ* unless the act which they explain is itself relevant and material. Fail v. McArthur, 31 Ala. 26.

Explanatory of Character or Quality of Act.—Where the act of a party may be given in evidence, his declaration made at the time, and calculated to elucidate and explain the character and quality of the act, and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, form a part of the *res gestæ*, and are admissible in evidence. Hooper v. Edwards, 20 Ala. 528.

Showing Intent.—The declarations of a party are admissible in his favor where they are so connected with some material act as to explain or qualify it, or show the intent with which it was done. Tomkies v. Reynolds, 17 Ala. 109.

Declarations after Suit.—Declarations made after suit brought, and not connected with any fact or act whatever, are not admissible evidence for the party making them. Hooper v. Edwards, 20 Ala. 528.

Where Acts of Parties Are Evidence.—Where the acts of parties to a transaction

are evidence against third persons, their declarations, if they are so inseparably connected with the acts as to constitute a part of the *res gestæ* are also admissible. Robertson v. Smith, 18 Ala. 220.

Exclamation on Boat.—And after a collision of a boat and ferryboat, some one on board the boat was heard to say, "Go ahead and let her sink; it's nothing but a — old flat boat anyhow." The manner in which they were spoken and the facts that the engine had stopped, and the boat went as soon as the words were spoken, were held competent to show that the boat went on without any effort to render assistance after the collision, which, in admiralty, is regarded as suspicious circumstances. Otis v. Thom, 23 Ala. 469, cited in note in 42 L. R. A., N. S., 927.

§ 86. Facts Forming Part of Same Transaction.

Pain from Injury.—Where it appears in an action for personal injuries that plaintiff's hand was caught and crushed, and in trying to release it he stepped on a rail in front of the wheels of a car and his foot was thereby crushed, evidence as to the pain of the injuries to the hand is inadmissible as part of the *res gestæ*. Alabama Steel & Wire Co. v. Tallant, 165 Ala. 521, 51 So. 835.

Noise Made by Injured Animal.—In an action against a street railway company for killing a dog, evidence that the car, while approaching the place where the dog was run over, was making a great deal of noise, was admissible as a part of the *res gestæ*. Wallace v. North Alabama Traction Co., 145 Ala. 682, 40 So. 89.

Movement of Train.—Where plaintiff while crossing railroad tracks on a bicycle narrowly escaped injury from a moving passenger train, and immediately thereafter was injured by a switch engine on another tract, evidence of the movements of the passenger train was admissible in an action against the railroad for the injuries, as *res gestæ*. Louisville & N. R. Co. v. Stewart, 128 Ala. 313, 29 So. 562.

Construction and Furnishing of Car.—In an action against a railroad company by a passenger to recover damages for personal injuries sustained while seated in one of the cars of the defendant, testi-

mony describing the car's construction and furnishing is admissible in evidence as a part of the *res gestæ*, tending to illustrate the manner of plaintiff's fall and injury. *Southern Ry. Co. v. Crowder*, 130 Ala. 256, 30 So. 592.

Other Suits Resulting from Same Collision.—Evidence that in the collision of the trains causing the death of the engineer for which suit is brought three persons were killed is admissible as *res gestæ* tending to show the violence of the collision, and that the engineer's train was running too fast—the other being still—to allow persons to jump from it, and save themselves. *Louisville & N. R. Co. v. Mothershed*, 121 Ala. 650, 26 So. 10.

"The court committed no error in admitting incidentally testimony to the effect that three persons were killed in the wreck. This was of the *res gestæ* of the occurrence, as tending in some measure to show the violence of the collision, and that deceased's train was running at a great rate of speed, too great, the inference afforded is, for persons to jump from it and save themselves; the tendency of the fact is rather favorable to the defendant than otherwise. *Railroad Co. v. Spiker*, 134 Ind. 330, 393, 63 N. E. 218; *Railroad Co. v. Kennedy*, 170 Ill. 508, 48 N. E. 996." *Louisville, etc., R. Co. v. Mothershed*, 121 Ala. 650, 26 So. 10, 19.

§ 87. Acts and Statements Accompanying or Connected with Transaction or Event.

§ 88. — In General.

§ 88 (1) In General.

Where a declaration is connected with the main fact or transaction under consideration so as to illustrate and further its object, and form in connection with it one continuous transaction, it is admissible as part of the *res gestæ*. *Staples v. Steed*, 6 Ala. App. 594, 60 So. 499.

Carrying of Gun While Cutting Timber.—In an action for the penalty imposed by Code 1896, § 4237, for the willful cutting of trees on the land of another, in which action defendant claimed title to the land on which the trees stood, evidence that defendant had a gun with him at the time the trees were cut was admissible as a part of the *res gestæ*. *Long v. Cummings*, 156 Ala. 577, 47 So. 109.

Statement When Tendering Railroad Pass.—Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her or her mother, who was traveling with her, the conductor may testify as to whether the mother in handing the pass to the conductor indicated for whom she was tendering the pass, as it was part of the *res gestæ*. *Broyles v. Central of Georgia Ry. Co.*, 166 Ala. 616, 52 So. 81, cited in note in 34 L. R. A., N. S., 323.

Exclamation of Bystanders.—Where the conductor of a railroad train was present, and witnessed plaintiff's conduct at the time he was ejected, evidence that passengers called on the conductor to remove plaintiff from the train, and their opinions, etc., was inadmissible as *res gestæ*. *Nashville, C. & St. L. Ry. v. Moore*, 148 Ala. 63, 41 So. 984, cited in note in 20 L. R. A., N. S., 143.

So, in *Nashville, etc., Railway v. Moore*, 148 Ala. 63, 41 So. 984, cited in note in 20 L. R. A., N. S., 143, the court, while remarking that there was authorities holding that under some circumstances, exclamations of bystanders are admissible as *res gestæ*, said that requests made by passengers to a conductor to remove another passenger did not come within the rule.

Payment by Buyer of Mortgaged Property.—Evidence of payment by a buyer of mortgaged chattels through a third person to the mortgagor held a part of the *res gestæ* of the conversion of the chattels by the buyer. *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111.

Statement of Vendor of Goods.—On a trial of the right of property attached by plaintiff and claimed by a third person, the former may prove all that was said and done at the time of the levy as a part of the *res gestæ*. *Montgomery Moore Mfg. Co. v. Leeth*, 162 Ala. 246, 50 So. 210.

In a suit to set aside an alleged fraudulent transfer of a stock of goods, declarations made to the buyer by the seller while negotiating for the sale were admissible as part of the transaction to show the bona fides of the transaction. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770.

Declarations of Agent.—"Where the

act of an agent will bind the principal, then his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*." *Governor v. Baker*, 14 Ala. 652, 655.

Injury to Plaintiff's Husband.—In an action for injuries to plaintiff by being thrown down by a sudden jerk of a street car as she was endeavoring to alight, evidence as to the position of plaintiff's husband and the effect of the jerk on him was admissible as *res gestæ*. *Birmingham R., etc., Co. v. Glenn* (Ala.), 60 So. 111.

Statement of Bystander to Veterinary.—In an action against a veterinary surgeon for negligence in throwing a horse and cauterizing a spavin, the testimony of a bystander that he told the owner that the veterinary was killing the horse, and that the veterinary replied that he was running "that cat," was admissible as part of the *res gestæ*. *Staples v. Steed*, 6 Ala. App. 594, 60 So. 499.

The declarations of a sheriff, made while he is acting officially, in respect of money, are admissible against the sureties as part of the *res gestæ*; but if made at a subsequent time, and when he is not acting officially in the matter, they must be regarded as independent declarations, and can not be received as evidence. *Dumas & Co. v. Patterson*, 9 Ala. 484.

Payment by Vendee.—The payment by a buyer of mortgaged chattels through a third person to the mortgagor is a part of the *res gestæ* of the conversion by the buyer; and proof thereof is admissible on the issue of value at the time of the purchase, in the absence of anything to show that the buyer paid more than value. *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111.

"The fact that Jones paid the \$46.50 to the mortgagor on a written order of the appellant did not affect the competency of Jones to testify to that fact without producing the written order. The amount which appellant paid the mortgagor for the cotton was not one of the issues in the case, but was merely a collateral relevant fact to the main issues. It was relevant, because it had a tendency to show the value of the cotton at the time it was converted, and also tended to show the

conversion itself. The order upon which the money was paid by Jones being drawn into the issues collaterally, the court committed no error in permitting the witness to state that he paid the money upon such order and in accordance with its directions. The question as to whether the money was paid upon a forged order was not before the jury. *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667; *Duffie v. Phillips*, 31 Ala. 571; *East v. Pace*, 57 Ala. 521, 524; *First Nat. Bank v. Lippman*, 129 Ala. 608, 30 So. 19; *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1." *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111, 112.

Conversations During Progress of Work.—In an action for damages for the flooding of land caused by an excavation being made so near a ditch as to break in its walls, conversations had between plaintiff's agent and the one doing the excavation for defendant, relative to the cutting down of the embankment of the ditch made during the progress of the work, were admissible as part of the *res gestæ*. *Southern Ry. Co. v. Lewis*, 165 Ala. 555, 51 So. 746.

Statement While Moving Cotton.—In detinue for the recovery of property covered by a mortgage, where the mortgagor pleads payment, and offers in proof thereof evidence of the delivery of several bales of cotton to the mortgagee, about the price of which there is a conflict, the mortgagor contending that two of the bales brought more than the mortgagee allowed for them, a declaration made by the mortgagor, while moving the two bales, that they were his "prize cotton," is not admissible as *res gestæ*. *Powell v. Henry*, 96 Ala. 412, 11 So. 311.

Declaration While Refusing Tender.—Where proof is made of the refusal of a tender, the defendant is not entitled to have his declarations, made at the refusal, put before the jury as a part of the transaction. *Mahone v. Reeves*, 11 Ala. 345.

Acts and Statements When Rescinding Contract.—What was said or done by either party on rescission of a contract is a fact, and may be proved as such when the fact of a rescission comes in question. *Babcock v. Huntington*, 9 Ala. 869.

Payment of Rent.—When an attachment is sued out against a tenant's crop

on the ground that he is about to remove it without paying rent, and he afterwards sues on the bond for damages, it is permissible for him to prove, as a part of the *res gestæ*, that by the terms of his contemplated sale the purchaser was to pay the rent before removing the crop. *Masterson v. Phinizy*, 56 Ala. 336.

Statement as to Taking Paper.—A. and B. were settling some business. A. remarked that he had an appointment, and must go, and hastily gathered up some papers and rode off. As he was starting, B. began to gather up some of his papers, and, not finding a certain one, exclaimed, "A. has taken it, and ought not to have done so," and went to call him back, but on the suggestion of the witness that A. had gone some distance, and that B. could get it at another time, he desisted. Held, that B.'s declaration was part of the *res gestæ* and admissible. *Gandy v. Humphries*, 35 Ala. 617.

Statement Not Explaining Transaction.—In an action to recover money alleged to have been deposited by plaintiff's intestate with defendant for safe keeping, one who was present at intestate's house at the time of the alleged deposit, and who then returned to him the bag alleged to contain the money, testified that intestate went into an adjoining room with defendant, carrying the bag in his hand, and there had a conversation with him, and that intestate soon after came into the room where witness was, and said he had left defendant all the money to keep. There was no evidence that defendant returned with the bag. Held, that his testimony was inadmissible as *res gestæ*, since it served to explain no material transaction. *Tamplin v. Still's Adm'r*, 77 Ala. 374.

Grief at Removal of Furniture.—Where, in trespass for the removal of plaintiff's furniture, defendant claimed that plaintiff had fully consented to such removal, evidence that she was sitting in one corner of the house crying at the time was admissible as *res gestæ* and as bearing on the question of consent. *Terry v. Williams*, 41 So. 804, 148 Ala. 468.

Attorney's Advice as to Commencing Action.—A creditor who had instituted suits against children to whom he had furnished goods at the defendant's re-

quest, offered to prove the advice of his attorney that it would not prejudice his action against the defendant, and also that information was given the attorney at the same time that the children were willing that he should sue and recover judgment against them, or adopt any other means for the collection of the debts. Held that, as these declarations were made at the time when the suits were commenced, they must be regarded as explanatory of the act of commencing them, and were therefore a part of the *res gestæ*, and admissible on that ground. *Sanford v. Howard*, 29 Ala. 684.

Person without Interest in Suit.—"Declarations or admissions of living individuals not parties to the suit, or having such an interest in it as to render their admissions evidence, are never admitted, that we are aware of, except in explanation of acts transacting at the time of the declaration. *Greenl. Ev.*, §§ 123, 124." *Bradford v. Haggerthy*, 11 Ala. 698, 701.

§ 88 (2) By Agents or Employees.

Must Be Explanatory of Contemporaneous Act.—To render an agent's admissions binding on his principal, they must be explanatory of some contemporaneous act, within the scope of his authority, or be made while in the execution of the agency forming part of *res gestæ*. *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

"After the fact of agency has been established, to render his admissions binding on the principal, they must be explanatory of some contemporaneous act within the scope of his authority, or must be made while in the execution of the agency forming a part of the *res gestæ*. *Id.* p. 25, § 108." *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

An agent's declarations or admissions as to an act then being done are admissible as a part of the *res gestæ*; but this does not apply to admissions as to past transactions. *Mobile Light & R. Co. v. Baker*, 158 Ala. 491, 48 So. 119, cited in note in 42 L. R. A., N. S., 943.

"Declarations or admissions of an agent as to the act then being done are admissible as a part of the *res gestæ*, but this does not apply as to admissions as to past transactions. *Tennessee River*

Transp. Co. v. Kavanaugh, 93 Ala. 324, 9 So. 395; *Chewning v. Ensley R. Co.*, 100 Ala. 493, 14 So. 304. The declarations made by the motorman were subsequent to the collision, were not part of the *res gestæ*, and should not have been admitted over the objection of the defendant. *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618." *Mobile, etc., R. Co. v. Baker*, 158 Ala. 491, 48 So. 119, 120.

To Establish Agency.—In an action against a railroad company for breach of a contract with plaintiff by which he was to erect certain trestles for defendant, defendant denied any contract with plaintiff, claiming that it had contracted for the entire work with one P. and that the work plaintiff did was done under P.'s contract, or by permission of P. Held, that evidence of what P. told defendant, while settling with it, in relation to his contract with plaintiff, and the extent of his authority to represent him, was admissible as original testimony as part of the *res gestæ*. *Mobile & B. Ry. Co. v. Worthington*, 95 Ala. 598, 10 So. 839.

A conversation between a representative of a railroad company and a third person relative to work contemplated by a contract between the railroad company and plaintiff and the representative's authority to make the contract, had in the presence of plaintiff, while the work was in progress, is admissible as *res gestæ*. *Lafayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447.

Entries in a book of accounts, to be admissible as declarations and admissions of an agent binding upon the principal, as part of the *res gestæ*, must be explanatory of some contemporaneous act within the scope of the agent's authority, and this can not be proved by the declarations and admissions themselves, but must be shown by evidence aliunde. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, cited in note in 53 L. R. A. 521.

Necessity of Showing Nature or Extent of Authority.—Where a contract made with an agent is sought to be enforced by the principal or his assignee, and its validity is questioned on the ground of fraud, the agent may be called as a witness by defendant to prove what were his declarations at the time the contract was made, without showing any

proof of the nature or extent of his authority. *Harrison v. Tulane*, 3 Ala. 534.

Declaration of the cashier of the plaintiff bank while negotiating with a debtor for the acceptance of his note with accommodation indorsements in payment of an existing debt, to the effect that the note would not be accepted without the indorsements of defendant and another person, are admissible as part of the *res gestæ* against defendant, who afterwards indorses the note while in the hands of the bank. *Marks v. First Nat. Bank*, 79 Ala. 550.

§ 88 (3) Writings.

Letters.—In assumpsit for the price of a horse, affidavits inclosed in letters written by plaintiff to defendant concerning such sale, and referred to in defendant's testimony, are admissible as part of the *res gestæ*. *Moses v. Katzenberger*, 84 Ala. 95, 4 So. 237.

A., a retail merchant, applied to B., a merchant and agent of C., to purchase goods. B. declined to sell to him, and referred him to C., who refused to fill A.'s order except for cash. A. then wrote to C. inclosing his check, and sending sample of goods desired. C. sent the check to B., who returned it to A., who then drew on a bank in his town in favor of C., and sent the draft to C., who forwarded the goods. A. never paid the checks, and had no money in the bank, or authority to draw on it. Held, in an action by C., to recover the goods from a person to whom A. had sold them, that the letters from B. to A. were admissible as part of the *res gestæ*. *Cleveland Woolen Mills v. Sibert*, 81 Ala. 140, 1 So. 773.

Train Sheet.—Where defendant railroad company operated its trains on telegraphic orders, the time of departure of all trains from each telegraph station being telegraphed by the operator in charge to the train dispatcher and noted on a train sheet, the sheet was a record prepared by the railroad company's employee in the ordinary course of their business, and was admissible as *res gestæ* to show the actual running time between two telegraph stations of a train from which plaintiff, an employee, was thrown and injured. *St. Louis & S. F. R. Co. v. Sutton*, 169 Ala. 389, 55 So. 989.

§ 88 (4) Motive and Intent in General.

Intention of Sending to Particular Person.—Declarations by the mortgagor of personal property, made while removing the property, that he was going to send it to a particular person, were admissible in a suit by the mortgagee for conversion against the person who received the property. *Sanders v. Knox*, 57 Ala. 80.

"The declaration of the defendant to Hardy, at the time of the sale to him, were properly admitted; being parts of the *res gestæ* of parting with the possession of the property. *Sanders v. Knox*, 57 Ala. 80, 81." *Heflin v. Slay*, 78 Ala. 180, 184.

"The declaration of Barr when sending the cotton to the appellant were properly admitted. They were parts of the *res gestæ* of parting with the possession of the cotton. *Olds v. Powell*, 7 Ala. 652. Besides, there was evidence tending to show a delivery to the appellant; as he derived his right from Barr, he was affected by Barr's declarations made while in possession." *Sanders v. Knox*, 57 Ala. 80, 81.

To Show Purpose of Attachment.—The declarations of the defendant in an action on an attachment bond, made to his attorney at the time of suing out the attachment, are admissible in defendant's favor as part of the *res gestæ* in order to show that the attachment was not sued out in order to harass the plaintiff. *Wood v. Barker*, 37 Ala. 60.

"A part of the testimony of the witness Williams consisted of the declarations which the defendant made at the time the attachment was issued, as to his reasons for having it issued. These declarations were admissible as part of the *res gestæ*. *Pitts v. Borroughs*, 6 Ala. 733, 736, and cases cited; *Dearing v. Moore*, 26 Ala. 586, 590; *Sandford v. Howard*, 29 Ala. 694. The exception taken was to the admission of the whole of the witness' evidence; and, as part of it was admissible, this court will not reverse, even if other portions of it were illegal. On that point, however, it is not necessary for us to press an opinion." *Wood v. Barker*, 37 Ala. 60, 62.

Motive for Receiving Child.—In assumpsit to recover from defendant for

the board of an orphan minor, who had no guardian, the plaintiff showed such a state of facts as tended to prove that defendant had placed himself in loco parentis to her. Held, that to rebut this presumption, and to show the manner in which he had received the child into his house, and his motive in receiving her, and afterwards carrying her to plaintiff's, the defendant might prove declarations made by the child at the time she came to his house. *Edy v. McCoy*, 20 Ala. 403.

Showing Willingness to Go with Abductor.—Where the charge upon which an action for a malicious prosecution is founded is that of unlawfully taking away and detaining the defendant's daughter without her consent, the declarations of the daughter, made about the time of the alleged abduction, conducing to show her willingness to go, are admissible as part of the *res gestæ*. *Long v. Rogers*, 17 Ala. 540.

§ 88 (5) Residence or Domicile.

Where the plaintiff, for the purpose of showing the reason for a change of his residence, offered in evidence his declarations, made before and after it took place, not in the presence of the defendant, it was held that such declarations, not accompanying any act, were not a part of the *res gestæ*, and were inadmissible. *Bradford v. Haggerthy*, 11 Ala. 698.

§ 88 (6) Ownership or Possession of Property.

See, also, post, "Declarations of Persons in Possession or Control as to Title or Possession," § 214.

Declarations Made by Persons in Possession.—Declarations made by persons in possession of personal property, explanatory of the character of the possession, or the title by which it is held, etc., are admissible in evidence as part of the *res gestæ*. *Oden v. Stubblefield*, 4 Ala. 40; *Mims v. Sturdevant*, 23 Ala. 664; *Hair v. Little*, 28 Ala. 236; *McCrae v. Young*, 43 Ala. 622; *Daffron v. Crump*, 69 Ala. 77; *Had-den v. Powell*, 17 Ala. 314, 316.

"There is another not less familiar rule of evidence, applicable to a larger number of the rulings of the court below. It is, that the declarations of one in possession of property, explanatory of the possession, made in good faith, and showing

the character or extent of his claim to it—whether in his own exclusive right, or as tenant of another; or the capacity in which he claims, as partner, trustee or agent for another—are admissible in evidence, in an issue of disputed ownership, no matter who may be parties to the litigation. *Daffron v. Crump*, 69 Ala. 77; *Clealand v. Huey*, 18 Ala. 243; 1 Brick. Dig., p. 843, § 558; *Thomas v. Wheeler*, 47 Mo. 363. The theory, upon which the law admits such declarations, is, that they are a part of the *res gestæ* of the possession itself; such possession being the principal fact, and itself *prima facie* evidence of ownership in fee simple. 1 Greenl. Ev., § 109; *Perry v. Graham*, 18 Ala. 822; 2 Whart. Ev., § 1166. Of course, in all such cases, the fact of possession should itself be admissible as one pertinent to the issue. *Fail v. McArthur*, 31 Ala. 26." *Humes v. O'Bryan*, 74 Ala. 64, 79.

"Declarations made by a party while in the actual possession of property, asserting title in himself, are admissible in evidence as a part of the *res gestæ*, explanatory of the possession; but this doctrine can not be extended to include declarations as to the history and source of such title. *Ray v. Jackson*, 90 Ala. 513, 7 So. 747; *Vincent v. State*, 74 Ala. 274." *Baker v. Drake*, 148 Ala. 513, 41 So. 845.

"The declarations of a tenant in possession of land, when part of the *res gestæ*, are admissible; and the same rule prevails in relation to personal property." *Hadden v. Powell*, 17 Ala. 314, 316.

While, as a rule, on the trial of the right of property, declarations or admissions by the defendant in execution, made in the absence of the claimant, are hearsay and not admissible evidence; yet, declarations by parties in possession of personal property explanatory of their possession, constitute a part of the *res gestæ*, and may be given in evidence, no matter who are the parties to the suit. Such declarations, however, must not go beyond the time at which they are spoken. *McKenzie v. Hunt*, 1 Port. 37, 39.

To Prove Character of Possession.—A declaration, made while declarant is in actual possession of personal property, and explanatory thereof, is admissible as a part of the *res gestæ* of such possession.

Cohn & Goldberg Lumber Co. v. Robbins, 159 Ala. 289, 48 So. 853; *McBride v. Thompson*, 8 Ala. 650; *Gary v. Terrill*, 9 Ala. 206; *Thompson v. Mawhinney*, 17 Ala. 362; *Clealand v. Huey*, 18 Ala. 343; *Jones v. Chenault*, 124 Ala. 610, 27 So. 515; *Daffron v. Crump*, 69 Ala. 77; *Holman v. Clark*, 148 Ala. 286, 41 So. 765, 767; *Pilcher v. Smith*, 4 Ala. App. 444, 58 So. 672.

The declarations of a party in possession are admissible as a part of the *res gestæ* to prove the character of his possession, as that he claims the property as his own, or holds it in subordination to the claim of another, but not to show that he had not given it to a third person, or that what he said about such gift was in jest, or that he only loaned it. *Nelson v. Iverson*, 17 Ala. 216; *Walker v. Blassingame*, 17 Ala. 810; *Beal v. Ledlow*, 14 Ala. 523.

"The two remaining errors assigned relate to rulings on the admission of evidence. The statements attributed to *McKinley*, descriptive of the character of his possession of the mules, were admissible under the principle that such statements were explanatory of his possession, and were of the *res gestæ* of that possession. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137; *Perry v. Graham*, 18 Ala. 822; *Humes v. O'Bryan*, 74 Ala. 64, 84." *Boozar v. Jones*, 169 Ala. 481, 33 So. 1018, 1020.

The declaration of a vendor, who retains possession of the chattel after the sale, that he is the owner of it, is explanatory of his possession, and admissible in evidence as a part of the *res gestæ*. *Mobley v. Bilberry*, 17 Ala. 428.

"If these declarations were a part of the *res gestæ*, and made whilst the sale was being made, or the offer to sell as his own property by the vendor after the contested sale, to the claimants of the property, had been given by way of impairing the credibility and weight of the vendors' testimony; it seems to me that it would have been proper to admit it." *McKenzie v. Hunt*, 1 Port. 37, 39.

"The rule is well settled that statements made by one in the possession of personal property explanatory of his possession are admissible in evidence as *res gestæ* of such possession. *Wright v. Smith*, 66

Ala. 514." *Roberts, etc., Co. v. Ringemann*, 145 Ala. 678, 40 So. 81.

Declarations of Vendor Attacking Validity of Sale.—"It is true that the declarations of a vendor can not be received as evidence to defeat his own sale after it is consummated; that is, his statements narrative of the contract, as that it was without consideration, or fraudulent, or upon a secret trust, etc., are inadmissible to defeat the title acquired from him, for such declarations are no part of the *res gestæ*. *McBride v. Thompson*, 8 Ala. 650; *Thompson v. Mawhinney*, 17 Ala. 362." *Mobley v. Bilberry*, 17 Ala. 428, 429.

"But it is equally true that if the vendor remain in possession after the sale, that his declarations explanatory of his possession, as that he held in his own right or for another, are competent proof." *Mobley v. Bilberry*, 17 Ala. 428, 429.

"In the case of *Abney v. Kingsland & Co.*, 10 Ala. 353, it was said that the affirmation of a party in possession that he held in his own right or under another is proper evidence as part of the *res gestæ* is the continuous possession, but beyond this such declarations are inadmissible. See, also, *Goodgame v. Cole & Co.*, 12 Ala. 77; *Borland v. Mayo*, 8 Ala. 104; *Gary v. Terrill*, 9 Ala. 206." *Mobley v. Bilberry*, 17 Ala. 428, 429.

"These authorities, we think, fully establish that the testimony tending to show that Isham Bilberry whilst in possession of the cotton claiming it as his own, should have been admitted. What weight such testimony is to have must be left to the jury. It may in some cases be entitled to but little consideration, but it can not be altogether rejected, and we think the court erred in rejecting this evidence." *Mobley v. Bilberry*, 17 Ala. 428, 429.

To Show Ownership of Goods by Partnership.—In an action against a surviving partner for goods sold, declarations of the deceased partner, while in possession of the goods, as to whether they were his own or held by him as partner, are admissible as part of the *res gestæ* of possession, but not to show the fact of partnership, unless known to defendant. *Humes v. O'Bryan*, 74 Ala. 64.

Attempts to Sell Property.—In ejectment, it was not error to permit a witness to testify that the person through

whom the plaintiff derived title had been trying to sell witness' father the land three years before, where there was evidence that he was in possession, as this was part of the *res gestæ*, and it was for the jury whether it applied to the particular parcel of land. *Owen v. Moxom*, 167 Ala. 615, 52 So. 527.

History and Source of Title.—The rule that declarations of a party in actual possession of property asserting title in himself are admissible in evidence as part of the *res gestæ*, explanatory of the possession, does not extend to his declarations as to the history and source of such title. *Baker v. Drake*, 148 Ala. 513, 41 So. 845.

The declarations made by a party while in possession of property, that he held the same in his own right, or under another, is admissible evidence, as part of the *res gestæ*; but it is not permissible to prove every thing he may have said in respect to the title; as, that the property was acquired bona fide, and for a valuable consideration, was paid for by the money of a third person, or his own. *Abney v. Kingsland & Co.*, 10 Ala. 353.

The declarations of a party in possession of property, explanatory of the contract under which he acquired it, do not constitute a part of the *res gestæ*, and are consequently inadmissible as evidence for him. *Thompson v. Mawhinney*, 17 Ala. 362.

"In *McBride v. Thompson*, 8 Ala. 650, we said, 'the affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestæ*,' where the *res gestæ* was 'his continuous possession; but his declarations beyond this, are no part of the subject-matter, or thing done, and can not be received as such. While it is allowable to prove the statements of one in possession and explanatory thereof, it is not permissible to show every thing that may have been said by him in respect to the title; as that it was acquired bona fide, and for a valuable consideration; was paid for by the money of a third person, or his own, etc.'" *Berry v. Hardman*, 12 Ala. 604, 606.

Declarations at Time of Levy.—On the issue of title to property levied on under an attachment, a declaration made at the time of the levy by the person in possession that the property was his wife's, and

not that of the attachment defendant, which was a partnership composed of declarant, and another, was admissible as *res gestæ* and explanatory of declarant's possession. *Roberts, Long & Co. v. Ringemann*, 145 Ala. 678, 40 So. 81.

In the trial of the right of property attached, the claimant may put in evidence the declaration of the defendant to the officer at the time of the levy that the property did not belong to him, and also that, when the claimant got the property from the defendant, all the property owned by the latter was exempt from attachment. *Wright v. Smith*, 66 Ala. 514.

"Whatever a party in the possession of property says, which tends to explain the act or character of his possession, is admissible as original evidence, being considered part of the *res gestæ*. *Beal v. Ledlow*, 14 Ala. 523. Here the person in possession of the mare says, at the time the levy is made, that she was brought to his house by the defendant in attachment; and we must consider the declaration, in view of the circumstances under which it was made, as equivalent to saying that he did not hold the property as his own, but as bailee for the person who placed it in his possession; and under the rule we have referred to, it was properly admitted." *Derrett v. Alexander*, 25 Ala. 265, 268.

"The declarations of the defendant in execution made to the deputy sheriff a short time previous to the levy on Ned were certainly inadmissible. True, it has been often held, that what a person in the possession of real or personal estate says, in respect to the same, are admissible as part of the *res gestæ*. But in *McBride v. Thompson*, 8 Ala. 650, we said, 'it is not to be understood that such declarations are admissible to every conceivable extent.' That 'the affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestæ*, which *res gestæ* is his continuous possession; but his declarations beyond this, are no part of the subject-matter, or thing done, and can not be received as such. While it is allowable to prove the statements of one in possession, and explanatory thereof, it is not permissible to show every thing that may have been said by him in re-

spect to the title; as that it was acquired bona fide, and for a valuable consideration; was paid for by the money of a third person, or his own,' etc." *Abney v. Kingsland & Co.*, 10 Ala. 355, 359.

Statement as to Brand on Animal.—

Declaration made by defendant at the time he took plaintiff's mule, he being engaged in recovering mules belonging to the United States, that he had examined it, but could find no "U. S." mark on it, is admissible as part of the *res gestæ*. *Carter v. Fulgham*, 134 Ala. 238, 32 So. 684.

Ownership of Saloon.—On an issue as to whether a decedent owned a saloon business, it was error to exclude a question to the landlord of the building in which the business was carried on, as to whether decedent did not state to him when the building was leased that plaintiff was interested in the business. *Frank v. Thompson*, 105 Ala. 211, 16 So. 634.

Acts and Declarations of Husband's

Relatives.—In an action for conversion, brought by a wife against one who purchased the property at a sale under execution against the husband, acts and declarations made by the husband relative to such property while in his possession are admissible as bearing on the question of ownership at the time of the levy of the execution. *Woods v. Dunlap*, 73 Ala. 169.

Declarations of Step-Father.—In ejectment, or statutory real action in the nature of ejectment, in which plaintiff seeks to show that the land was rented out for his use for several years by his step-father, as a fact tending to prove prior possession by him, which might ripen into a title under the statute of limitations, the step-father's declarations made at the time of the renting are not competent evidence. *Jay v. Stein*, 49 Ala. 514.

Declarations of Land Owner.—Since the question whether machinery on lands is a fixture thereon depends largely on the intention with which it was erected, the declaration of the owner of the lands that she did not own such machinery is admissible as part of the *res gestæ*, on an issue whether such machinery is a fixture. *Nelson v. Howison*, 122 Ala. 573, 25 So. 211.

Action by Administrator to Recover Bonds.—In an action by an administrator to recover bonds alleged to belong to the

decendent's estate, the testimony of one who purchased a part of the bonds for the decedent, relative to a conversation between himself and the decedent, with reference to the bonds, at or near the time of the purchase, is admissible as a part of the *res gestæ*. *David v. David's Adm'r*, 66 Ala. 139.

In an action by an administrator to recover bonds, evidence that similar bonds were found on the premises a few days after intestate's death, and taken by defendant under a claim of ownership, is admissible as showing possession or ownership of the bonds by the intestate. *David v. David's Adm'r*, 66 Ala. 139.

Declarations of Guardian.—A declaration made by a guardian at the time of a loan that the money belonged to his ward's estate is competent evidence for him on a settlement of his accounts. *Beasley v. Watson*, 41 Ala. 234.

Mortgaging of Property.—In *detinue* against a sheriff for slaves taken under attachment against A. and claimed by plaintiff as his own property, in order to repel the idea of abandonment by A. and to show title in him, it was admissible to prove that while in possession he had mortgaged them. *Rowan v. Hutchisson*, 27 Ala. 323.

Inventory and Appraisement of Administrator.—The original inventory and appraisement, returned by an administrator to the orphans' court, if it has not been recorded, is admissible in evidence, as a part of the *res gestæ*, to show the character in which the administrator held possession of a particular chattel mentioned in them, but for no other purpose. *Calvert v. Marlow*, 18 Ala. 67.

In *detinue* for a mule claimed to have been held by defendant as bailee, testimony that witness asked one who had possession of the mule if he had bought it from plaintiff, and was told that he did not, but had hired it from him, was admissible as *res gestæ* to explain such other's possession. *Boozer v. Jones*, 160 Ala. 481, 53 So. 1018.

§ 88 (7) Execution of Contract in General.

Contemporaneously with Execution.—Declaration by parties to a contract, at the time it is made, as to its terms, are

admissible as part of the *res gestæ*. *Hooper v. Edwards*, 25 Ala. 528.

Declarations made by parties contemporaneously with a contract are admissible as part of the *res gestæ*. *Vincent v. State*, 74 Ala. 274.

After Execution of Contract.—What was said between the parties to a contract on the day of its execution, and after it, is not necessarily part of the *res gestæ*, so as to be admissible in a suit between them. *McAdams v. Beard*, 34 Ala. 478.

§ 88 (8) Existence or Nature of Contract and Relation of Parties.

Contract of Employment.—A slave was seen going from the house of the defendant in execution towards the new ground of the claimant with an ax on his shoulder, and in reply to a question answered that "he was going to some new ground to work." Held, that the declaration of the slave was incompetent to establish the fact that he was in the employ of the claimant. *Mauldin v. Mitchell*, 14 Ala. 814.

Statements of Third Party.—Where communications of a third party to defendants qualify or explain a bailment between such third party and defendants of the property in controversy, by disclosing some of the *res gestæ*, they are admissible. *Leffler v. Lehman*, 57 Ala. 433.

Delivery of Slaves under Contract of Hiring.—What is said by the parties, at the time slaves are delivered under a verbal contract of hiring previously made, in relation to the contract, is admissible, as *res gestæ*, to show the terms of the contract. *Hooper v. Edwards*, 25 Ala. 528.

What is said by the parties at the time slaves are delivered under a contract of hiring previously made, in relation to the contract, is also admissible on the same principle. *Hooper v. Edwards*, 25 Ala. 528.

§ 88 (9) Sale or Conveyance.

Sale of Personal Property.—Declarations of the seller to the purchaser of personal property at the time of the sale and delivery are part of the *res gestæ*. *Heflin v. Slay*, 78 Ala. 180.

Statements at Time of Signing Deeds.—In ejectment between heirs, involving the question of the delivery of deeds by

decedent to plaintiff, she could show by the justice of the peace who prepared the deeds and took the acknowledgement all that was said and done at the time of the signing by decedent, as well as what was then said by the justice to decedent relative to the making of the deeds. *Napier v. Elliott*, 152 Ala. 248, 44 So. 552.

Acts and Declarations at Time of Filing Instruments.—Acts and declarations made at the time of filing an instrument for registration are admissible as part of the *res gestæ* to show whether the filing was conditional, or intended as a delivery. *Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812.

Declarations of Grantor in Trust Deed.—In a contest between a creditor and the grantee of a trust deed made to secure another creditor, the declarations of the grantor, made at the time of executing it, are not admissible in favor of the grantee to show the consideration. *McCain v. Wood*, 4 Ala. 258.

Statements Made to Induce Substitution of Debtors.—The defendant in execution made a sale and conveyance of his entire estate to the claimant, and made certain statements to his creditor to induce him to accept the claimant for his debtor. Held, that as these statements were no part of the *res gestæ*, viz. the sale and conveyance, the creditor could not be allowed to narrate them in evidence. *Borland v. Mayo*, 8 Ala. 104.

To Prove Land Conveyed.—In an action against a grantor by a party claiming under his deed, where secondary evidence of its contents was admissible, owing to its nonproduction, evidence of declarations of the grantor at the time of the conveyance to prove the land conveyed was admissible. *Bethea v. McCall*, 3 Ala. 449.

Declarations as to Consideration.—Upon a trial of the right of property in slaves levied on by attachment, the claimant may prove that the defendant in the attachment, at the time he purchased the slaves levied on, declared that he paid for them with the land of the *cestui que trustent* (in whose behalf they were claimed), and purchased the slaves for their use, the *res gestæ* being the sale and purchase, and not the possession of the slaves; but such testimony, in itself, would

be no proof of consideration, if the attaching creditor's debt then existed. *Berry v. Hardman*, 12 Ala. 604.

Agreement by Sheriff to Accept Cotton.—In assumpsit to recover the proceeds of a note which plaintiff placed in defendant's hands for collection, and on which he obtained judgment in the name of the payee, for the use of himself, and levied on two lots of cotton belonging to the maker, bidding the same in himself, evidence of a demand of specie by the sheriff, by his direction, after one lot had been bid off by another, and of the latter's offer to pay in current bank notes, with the difference between them and specie, which the sheriff refused, occurring the day before defendant, without the bidder's consent, agreed with the sheriff to take the same lot of cotton for the amount bid, was admissible as part of the *res gestæ*, explaining the circumstances of the sale. *Hudson v. Crow*, 26 Ala. 515.

§ 88 (10) Tender, Payment, or Delivery of Money or Property.

Statement of Creditor When Paying Account.—What a creditor said, either verbally or in writing, at the time of payment of an account, as to who paid the same, is admissible as a part of the *res gestæ*. *Harrison v. Harrison*, 9 Ala. 73.

Statement as to Release of Lumber without Payment of Draft.—On an issue as to whether a bank purchased or received for deposit from a vendor a draft, with a bill of lading attached, drawn on the vendee for the price, statements by the vendor when delivering the draft as to releasing the lumber without receiving payment are, as part of the *res gestæ*, relevant. *Bank of Guntersville v. Webb*, 108 Ala. 132, 19 So. 14.

Sale of Goods as Credit on Note.—In a suit between the payee of a note and one who had assumed the debt, the issue was whether goods sold by the maker to the payee's sister and on his credit, were a payment on the note. The maker having been a witness for the payee, the clerks of the former testified for the other side that the maker of the note told him to sell the sister all the goods she wanted, and that it had been agreed that her account should be a credit on the note.

Held, that the statements testified to were not part of the *res gestæ* and were admissible only to impeach the testimony of the maker of the note. *McPherson v. Foust*, 81 Ala. 295, 8 So. 193.

Explanation of Delivery of Chattels.—

It is error to exclude the declarations made by a person in explanation of the delivery of chattels, when an inference unfavorable to him is sought to be drawn from the fact of delivery. The declarations made at the time are a part of the transaction, and proper to be given in evidence as a part of the *res gestæ*. Nor is the error cured by allowing the witness to state generally that the party asserted a title to the chattels. *Yarborough v. Moss*, 9 Ala. 382.

Delivery of Deceased Husband's Property to Wife.—Where a wife called at a store and demanded the portfolio of her deceased husband, which was locked and contained valuable papers, a conversation between one of the partners in the store and his bookkeeper who had possession of the portfolio, as to the propriety of delivering it to her when it contained a note which they claimed, not having been in the presence of the wife, is no part of the *res gestæ* connected with the delivery, nor is it admissible as explanatory of their possession. *Stalling's Adm'r v. Hinson*, 49 Ala. 92.

Declaration When Paying Note.—If payment of a note is made by the maker to the payee, the note having been indorsed without notice to the maker, and suit is afterwards brought upon it by the indorsee against the maker, the defendant, in proving the fact of payment, may also prove the declarations of both himself and the payee, made at the time of the payment, in relation thereto, as part of the *res gestæ*. *Hart v. Freeman*, 42 Ala. 567.

Explaining Payment of Money by Guardian.—On the settlement of a guardian's accounts, it appeared that he had collected the funds of his ward to a certain amount of confederate notes of the "old issue," some time in the latter part of 1863, and that he paid this out to satisfy individual debts, and that some time in February, 1864, he received in payment of debts due him individually a certain sum in confederate notes, "new

issue." Held that his declarations, made on its receipt, that he designed to retain, for the use and benefit of his ward, so much of this "new issue" as he had used of the "old issue," belonging to his ward, to pay his individual debts, did not explain the payment or reception of the money, and hence were not a part of the *res gestæ*, and were properly excluded when offered in his behalf. *Brand v. Abbott*, 42 Ala. 499.

To Prove Fact of Sale.—The declarations of one that he had sold his crop of cotton to the plaintiff, made to the witness who saw him delivering the cotton, are admissible to prove the fact of the sale, though they might be insufficient to prove the title of the seller to the cotton. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

Contemporaneous with Delivery of Gift.—Acts and declarations contemporaneous with an alleged gift are admissible in evidence, as part of the *res gestæ*, to prove delivery. *Bragg v. Masie's Adm'r*, 38 Ala. 89.

Declarations of a donor, at the time of the delivery of slaves, that they were delivered to the trustee pursuant to the provisions of a deed, are admissible as part of the *res gestæ*. *Hale v. Stone*, 14 Ala. 803.

A recital in a will made by the donor at the time of the gift to his daughter, though of no efficiency as a muniment of title, is relevant testimony as tending to show the gift, and is admissible as part of the *res gestæ*. *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

Statement by Slave as to Stealing Goods.—In assumpsit by the owner of a slave to recover money which his slave had paid to defendant on being detected in stealing goods from his store, the slave's confession, made at the time of the payment, that he had stolen other goods from the defendant equal in value to the money paid, is admissible evidence for the defendant, as a part of the *res gestæ*, to show the character of the payment and the circumstances under which it was made. *Jones v. Nirdlinger*, 20 Ala. 488.

§ 88 (11) Torts in General.

In an action for slander, no error was

committed in permitting evidence as to defendant's manner when he said that plaintiff swore to a lie, that defendant was gesticulating and very rough, since such fact was part of the *res gestæ*. *Hereford v. Combs*, 126 Ala. 369, 28 So. 582.

§ 88 (12) Personal Injuries.

Death of Brakeman.—In an action for the death of a railroad brakeman by the giving way of handhold while he was ascending the car, declarations made by him while under the car and after it was moving away from him as to the cause of the accident, made in response to inquiries, are inadmissible. *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, cited in note in 19 L. R. A. 749.

Injury to Passenger by Carrier.—In a suit against a railway company for injury to a passenger where the plaintiff received injury in leaping from a car while others who remained were unhurt, the declarations of such other persons giving their reasons for thus remaining were held part of the *res gestæ*. *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15, cited in note in 19 L. R. A. 749.

In an action for injuries to plaintiff by being thrown down by a sudden jerk of a street car as she was endeavoring to alight, evidence as to the position of plaintiff's husband and the effect of the jerk on him held admissible as *res gestæ*. *Birmingham Ry., Light & Power Co. v. Glenn (Ala.)*, 60 So. 111.

Injuries to Pedestrian from Falling Awning.—In an action for injuries to a pedestrian from the falling of an awning, evidence that a man was working with the awning at the time of the accident was admissible as *res gestæ*. *Lewy Art Co. v. Agricola*, 169 Ala. 60, 53 So. 145.

§ 88 (13) Injury to or Loss of Property.

Injury to Cattle in Shipment.—In an action against a carrier for injury to cattle in shipment, it was proper to admit in evidence conversations between the plaintiff and defendant's agents relative to the transportation of the cattle, in the course of such transportation, as a part of the *res gestæ*. *Louisville & N. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482.

§ 88 (14) Assault.

Assault and Battery.—In an action for

an assault and battery, where defendant justified on the ground that he was defending his son from an attack by plaintiff, it was competent to show all that occurred at the time of the difficulty and connected therewith, as forming a part of the *res gestæ*. *Morris v. McClellan*, 154 Ala. 639, 45 So. 641.

In an action against defendant for damages caused by its servants in entering plaintiff's house, assaulting her, and carrying away goods, what was said and done by those who seized the property was admissible as *res gestæ*. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89, cited in note in 24 L. R. A., N. S., 254.

Action by Passenger for Assault.

Where, in an action by a passenger for an assault by the conductor, the evidence showed that the assault followed a wrangle concerning the failure of the passenger and his companions to leave the car at their destination, evidence of what the passenger and his companions said at the time was admissible as a part of the *res gestæ*, and to show who was in fault for the failure of the passenger and his companions to alight at their destination. *Alabama City, G. & A. Ry. Co. v. Sampley*, 169 Ala. 372, 53 So. 142.

In an action against a street railroad company for an assault and battery committed by a conductor, evidence of profane language used by the conductor in an altercation with one of plaintiff's companions, passengers on the same car, whereby the trouble was started, was material, as a part of the *res gestæ*. *Birmingham Ry., Light & Power Co. v. Mullen*, 138 Ala. 614, 35 So. 701.

§ 88 (15) False Imprisonment and Malicious Prosecution.

False Imprisonment.—In an action for false imprisonment, the officer's statement to plaintiff, at the time of the arrest, that defendant had accused plaintiff of stealing, is admissible as part of the *res gestæ*. *Rich v. McNery*, 103 Ala. 345, 15 So. 663.

In an action for false imprisonment, evidence of the declarations of the defendant, made at the time that the plaintiff was in custody by virtue of a warrant, is admissible. *Rogers v. Wilson*, Minor 407.

§ 89. — Before Transaction or Event.
§ 89 (1) In General.

To Prove Priority of Attachment.—Where, on an issue of the priority of an attachment over an assignment for creditors, it appears that the officer making the levy left the goods in possession of the assignee until the following day, claiming that he left them with him as his agent, evidence that the attorney for the assignee, at the time of making the levy, declared it to be invalid, is admissible as part of the *res gestæ*, to show that the retention of the goods by the assignee was not as such agent. *Inman v. Schloss*, 122 Ala. 461, 25 So. 739.

Conversation between Husband and Wife.—Where a wife interposes a claim to goods that had been levied on under an execution against her husband while they were in his possession, a conversation between them prior to the levy relating to the fact of ownership, or of his agency in controlling them, is admissible as *res gestæ*. *Jones v. Chenault*, 124 Ala. 610, 27 So. 515.

To Prove Purchase of Slave.—In order to show that a slave sold on execution was purchased on account of the defendant in execution, evidence of conversations on the day of and preceding the sale, between such defendant and the purchaser, is admissible. *Downman v. Frow*, 6 Ala. 879.

Declarations When Starting on Journey.—Though it is proper to prove one's declarations, made immediately upon setting forth on a journey to a particular place, as explaining his intention in going, a stock subscriber's declaration before a meeting to organize a corporation, "No, I am out of it," made in response to an inquiry as to whether he was going to the meeting, was not admissible in an action against him on his subscription. *Planters' & Merchants' Independent Packet Co. v. Webb*, 156 Ala. 551, 46 So. 977.

"What a person says on setting out on a journey, or to go to a particular place, explanatory of the object he has in view in so setting out, is *res gestæ* evidence, and may be proven; and the jury may give it such weight as they think it entitled to. *Pitts v. Burroughs*, 6 Ala. 733; *Olds v. Powell*, 7 Ala. 652; *Autauga County v. Davis*, 32 Ala. 703, 1 Greenl.

Ev., § 108. It can not be said that there was no testimony from which the jury could infer that Dr. Monroe had a license to practice medicine, and the circuit court did not err in refusing to give the general charge in favor of the defendant." *Kilgore v. Stanley*, 90 Ala. 523, 8 So. 130, 131.

In an action to recover for medical services rendered to an "indigent sick person," the statements of plaintiff to witness just before leaving his office that he was going to visit the person were admitted on the principle of *res gestæ*. *Autauga County v. Davis*, 32 Ala. 703, cited in note in 19 L. R. A. 750.

Action for Delaying Death Message.—In an action for delaying a death message, it was proper, as *res gestæ* of the delivery, to show what defendant's agent read to the addressee as the telegram where the addressee was blind, and it was read to him before being handed to him. *Western Union Telegraph Co. v. Benson*, 159 Ala. 254, 48 So. 712.

In suit for malicious prosecution, a conversation between defendant's superintendent and an attorney as to swearing out a warrant for plaintiff's arrest, including the superintendent's statement that defendant did not want him arrested, was admissible as *res gestæ*, especially as the superintendent was then seeking legal advice as to the arrest, though such statement would have been inadmissible alone. *Emerson v. Lowe Mfg. Co.*, 159 Ala. 350, 49 So. 69, cited in note in 23 L. R. A., N. S., 372.

In an action to reform a deed, that grantor stated to his wife a day or two before the deed was executed what the agreement between the parties was, was not part of the *res gestæ*. *White v. Henderson-Boyd Lumber Co.*, 165 Ala. 218, 51 So. 764.

Ejection of Passenger.—Where, in an action against a street railway for negligently issuing to plaintiff a torn transfer ticket, on tendering which plaintiff was ejected from another of defendant's cars, one of defendant's witnesses testified that the transfers were cut by a mechanical appliance, which always cut a straight edge, a transfer issued simultaneously to plaintiff's companion, plaintiff having paid for both tickets at the same time, was

competent in evidence, as a part of the *res gestæ*, to show how the ticket would have appeared if properly cut, and to aid in determining how it was torn. *Montgomery Traction Co. v. Fitzpatrick*, 149 Ala. 511, 43 So. 136.

Acts Preceding Assault.—In an action for assault and battery, evidence that immediately after plaintiff grabbed defendant, and took a stick away from him and ran around the corner, defendant went into his store, grabbed his gun, and ran back to the front, was admissible as *res gestæ* to show animus. *Wilhite v. Fricke*, 169 Ala. 76, 53 So. 157.

Assault on Passenger.—On plaintiff's testimony, an assault on him by a brakeman in ejecting him from a train was willful and wanton, and without justification or palliation. According to defendant's evidence, it was committed under a reasonable apprehension of an immediate deadly attack by plaintiff on the conductor or brakeman. Held that, on the issues of fact thus presented, all that occurred and was said between plaintiff and the conductor and brakeman, and the language, manner, and conduct of the parties during the conversation just before and leading up to the assault, was competent as part of the *res gestæ*. *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303.

The declarations of a physician, on leaving home and taking medicines with him, as to the person whom he is going to visit, are admissible as part of the *res gestæ*. *Autauga County v. Davis*, 32 Ala. 703, cited in note in 19 L. R. A. 750.

Previous to Sale of Property.—"In admitting, as evidence for plaintiff, what he had himself said a few days after the sale, the city court erred. This was no part of the *res gestæ*, and Mr. Kelly could not make evidence for himself. *Shep. Dig.* 592; *Newcombe v. Leavitt*, 22 Ala. 631." *Webb v. Kelly*, 37 Ala. 333, 340.

§ 89 (2) Acts or Statements of Agents or Employees in General.

Statements of Defendant's Superintendent.—Evidence that when defendant's superintendent ordered an employee into the mine, where he was suffocated by gas, he said it was perfectly safe, is ad-

missible as part of the *res gestæ* of deceased's going into the mine and of the order given him to go into it, in an action based on negligence of the superintendent in so ordering him. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162.

"The court's action in overruling the motion to exclude this answer may be justified upon two or more grounds: In the first place, no objection was interposed to the question, and the answer is responsive. *Mobile, etc., R. Co. v. Bromberg*, 141 Ala. 258, 37 So. 395. Again, it was a part of the *res gestæ* of the intestate's going into the mine and of the order given to him to go into the mine. Furthermore, in view of the pleas of contributory negligence and assumption of risk filed by defendant, the testimony was competent and was properly allowed. *Southern R. Co. v. Guyton*, 122 Ala. 231, 25 So. 34; *Pioneer Min., etc., Co. v. Smith*, 150 Ala. 356, 43 So. 561; *Southern R. Co. v. Howell*, 135 Ala. 639, 34 So. 6; *Tennessee Coal, etc., R. Co. v. George*, 161 Ala. 421, 49 So. 681. This disposes of the twelfth, twenty-fifth, and twenty-sixth grounds in the assignment of errors." *Alabama Consol. Coal, etc., Co. v. Heald*, 168 Ala. 626, 53 So. 162, 167.

Statement of Servant.—In an action for assault alleged to have been committed by defendant's servant upon plaintiff's resistance of the servant's entry on plaintiff's land, the question asked plaintiff as a witness as to whether the servant, just before the assault, had told plaintiff that defendant's general manager had told the servant to go through the gate onto plaintiff's land, was not improper on its face because calling for evidence too remote to be of the *res gestæ*, since, if immediately preceding the effort to enter the gate the statement was made, it would be of the *res gestæ*. *Miller-Brent Lumber Co. v. Stewart*, 166 Ala. 657, 51 So. 943.

Statement of Conductor as to Condition of Road.—In an action for damages against a railroad company for injuries to the person, declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad

condition of the road and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ*, or as admissions of an agent binding on the principle. *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15.

§ 89 (3) Motive or Intent in General.

Purpose of Arrest.—In an action against a corporation for malicious prosecution, the officer who made the arrest testified that before the arrest, but while the warrant was in his possession, he met the general superintendent of defendant, who asked if he had arrested plaintiff, and stated that he intended to stop such depredations as plaintiff had been charged with, or break somebody's neck. Held, that such evidence was not subject to objection that it was not part of the *res gestæ*. *Southern Car & Foundry Co. v. Adams*, 131 Ala. 147, 32 So. 503.

Explanatory of Gift.—The declarations of the donor, made previous to the consummation of the gift, but while it was under consideration and discussion by him, and in reference to and in contemplation of it, and explanatory of his intention, are competent evidence in a suit involving the title. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

Motive of Libelous Publication.—Where defendant was charged to have induced or procured the publication of a libelous article concerning plaintiff, evidence of all his acts tending to show what he did with reference thereto, both before and after the publication, constituting part of one entire transaction, was admissible. *Maddox v. Newton*, 4 Ala. App. 454, 58 So. 934.

"All of the evidence which the plaintiff introduced and to which the defendant excepted had a tendency, when read in connection with the acts of the defendant prior to the publication, to show that Maddox participated in the publication of the article in the Register in Jefferson county, and was therefore relevant. All the acts that the evidence tends to show that Maddox did with reference to the matter under discussion, both before and after the publication, are so interwoven with each other as to constitute parts of an indivisible whole and, taken

together, constitute but one entire transaction. In addition to this, the plaintiff was entitled to recover, if the judge sitting as a jury thought the circumstances warranted it, punitive damages, and this evidence was relevant on the question of malice in the original publication *vel non*." *Maddox v. Newton*, 4 Ala. App. 454, 58 So. 934, 936.

Motive in Shooting Slave.—In trespass to recover damages for the battery of a slave, the plaintiff introduced a witness who testified that defendant and one R. were chasing the slave as a runaway with a pack of trained dogs belonging to defendant; that he heard the report of a gun, or pistol, in the direction the dogs were trailing, and when he reached a certain fence the defendant came up to him from a swamp on the opposite side of the field, and told him that he came up with the negro in the field on horseback, that the negro turned on him with a large stick, that he retreated to keep out of the way of the negro, who said he would die before he would be taken, that he went to R. and got his pistol, and pursued the negro to the swamp, and came up near to him, and shot him just as the negro was turning on him. Held, that the defendant's declarations to said R. at the time he got the pistol and pursued the slave, in explanation thereof, were competent evidence for him as part of the *res gestæ*. *Dearing v. Moore*, 26 Ala. 586.

Purpose in Removing Slaves.—On a trial of the right of property in slaves, the declarations of the defendant in execution as to his intention in removing them beyond the limits of the state, made one or two days before their removal, are too remote from the actual removal to form part of the *res gestæ*, and are therefore not admissible evidence for the plaintiff. *Newcombe v. Leavitt*, 22 Ala. 631.

§ 89 (4) Personal Injuries.

Statement of Conductor.—In an action for damages against a railroad company for injuries to the person, declarations made by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negli-

gence, as *res gestæ*. *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15, cited in note in 32 L. R. A., N. S., 1112.

Conduct of Third Persons.—In an action against a railroad company for wrongfully ejecting plaintiff from a car, testimony that, on entering the car, plaintiff went to his son, who was sitting down, and asked him to lend him some money; that cursing or profane language was used by others who were on the outside of the car; and that, after receiving the injuries, plaintiff requested another to take care of him, is not admissible as a part of the *res gestæ*. *Moore v. Nashville, C. & St. L. Ry.*, 137 Ala. 495, 34 So. 617.

"In a suit against a railway company for injury to a passenger where the plaintiff received injury in leaping from a car while others who remained were unhurt, the declarations of such other persons giving their reasons for thus remaining were held part of the *res gestæ*." *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15, cited in notes in 19 L. R. A. 749, 32 L. R. A., N. S., 1112.

Ringling Bell or Blowing Whistle.—In an action against a railroad for the death of plaintiff's intestate by being struck by one of defendant's engines, evidence whether the bell was rung, or the whistle blown, was admissible as part of the *res gestæ*. *Birmingham Southern R. Co. v. Fox*, 167 Ala. 281, 52 So. 889.

A remark made by a bystander calling attention to a fact which should have influenced a careful driver in the management of his team should have been allowed to go to the jury under a special plea as evidence of the driver's knowledge of the danger of the situation which he was in, resulting in the accidental death of one of a team of horses hired from plaintiff who sued for the loss thereof. *Weller & Co. v. Camp*, 169 Ala. 275, 52 So. 929.

§ 89 (5) Fraud.

Purpose of Coming to State.—On the question whether a conveyance is fraudulent, the vendee may show that he was advised by a third person to come into the state for the purpose of securing a debt from the vendor, and that he came for that purpose; his purpose in coming

being a part of the *res gestæ*. *Goodgame v. Cole*, 12 Ala. 77.

§ 89 (6) Statements Made During Negotiations Leading to Execution of Contract.

Statement as to Ownership of Land.

Where M., while riding over the land in controversy with plaintiff, prior to plaintiff's purchase thereof, without any intent to misrepresent, stated to plaintiff, "These are our woods, the line is further out there," such declaration was admissible in ejectment, as *res gestæ*. *Driver v. King*, 145 Ala. 585, 40 So. 315, cited in note in 14 L. R. A., N. S., 291.

Reason for Giving Note.—A plaintiff, testifying as a witness in his own behalf, was asked to state the circumstances under which the note sued on was given. Held that, in answering this question, he might give a conversation between himself and the defendant some days before the note was given, which was the commencement of the negotiation between them which resulted in the making of the contract, and which contained a declaration of the defendant relating to the subject-matter of the suit, and disclosed a reason for the defendant's desire to enter into the contract. *Weaver v. Lapsley*, 42 Ala. 601.

§ 90. — After Transaction or Event.

§ 90 (1) Particular Issues and Relation of Acts or Statements Thereto, in General.

Physical and Mental Condition of Plaintiff.

—In a passenger's action for damages for being put off at the wrong station in the night, with small children, causing her expense, mental anguish, etc., in which both simple and wanton negligence was alleged, evidence of plaintiff's physical and mental condition was competent as a part of the *res gestæ*, so that she could testify that she did not get supper or breakfast the night she was put off. *Alabama Great Southern R. Co. v. Arrington*, 1 Ala. App. 385, 56 So. 78.

Statements after Entry upon Property.

—Where, in forcible entry and detainer, there was no pretense that witness had anything to do with the entry, but came on the property after the others had entered, evidence as to what he said at the

time was inadmissible. *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667.

Narrative of Past Transactions.—In an action against a deceased partner for goods sold, statements by the deceased, while in possession, as to where he bought the goods, or on whose account, being mere narrative of past transactions, are not admissible. *Humes v. O'Bryan*, 74 Ala. 64.

The declaration of a partner, who had purchased a horse for himself, made when the vendor was not present, not being a part of the *res gestæ*, is not admissible evidence in a suit between the vendor and the other partner. *Smitha v. Cureton*, 31 Ala. 652.

Sale of Slave.—In a suit to recover a slave sold by the plaintiff to the defendant, the declarations of the vendor, made a few days after the sale, that if he had known that the slave was not going to Texas, where he had kin, as the purchaser represented, he would not have sold him, are not admissible as a part of the *res gestæ*. *Webb v. Kelly*, 37 Ala. 333.

Statement of Physician.—A physician, called as to the soundness of a slave, can not testify that, when he visited the slave, he told the plaintiff that he must have been unsound when purchased; the visit not being till some time after the purchase. *Buckley v. Cunningham*, 34 Ala. 69.

§ 90 (2) Writings.

Letters of Third Persons.—On a trial of a right of property between a seller of goods and the buyer's attachment creditors, letters written by third persons to the buyer are inadmissible. *McKenzie v. Rothschild*, 119 Ala. 419, 24 So. 716.

"The court also admitted the introduction of two letters, written by one Wilks to the defendant debtor, against the objection of the plaintiffs. In this the court erred. The issue before the court was between plaintiffs and claimant. The acts and representations of Blumberg, the purchaser of the goods, are competent, and his admissions were admissible, if a part of the *res gestæ*; but there is nothing in the present record to authorize the admission of the declarations or statements of a third party, or a letter written by such party to the debtor, and especially

when the letters bear internal evidence that they were written long after the purchase of the goods. We know of no principle of law which rendered these letters competent against the plaintiffs on the present trial." *McKenzie v. Rothschild*, 119 Ala. 419, 24 So. 716, 717.

§ 90 (3) Acts or Statements by Agents or Employees, in General.

Statements made by the superintendent of a fertilizer company the day after a cow had fallen in the company's pit were held inadmissible as only narrative, and not *res gestæ*. *Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98, cited in note in 42 L. R. A., N. S., 945.

In an action for the death of a heifer which fell into an unguarded pit maintained by defendant, a conversation between the son of the owner of the heifer and the manager of defendant on the day after the accident was not a part of the *res gestæ*. *Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98, cited in note in 42 L. R. A., N. S., 945.

"On the trial of the case in the city court, the appellant objected to the question asked the witness Joe Houston, appellee's son, 'What did you say to Mr. Southerland with reference to the heifer when you were there?' The court overruled the objection, and allowed the witness to answer. The conversation was the next day after the animal had been in the pit, and the question clearly sought to elicit illegal testimony, in that it called for a mere narrative of a past event or declaration, and the objection should have been sustained. *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Southern R. Co. v. Reeder*, 152 Ala. 227, 44 So. 699, and authorities cited; *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 173. The conversation was no part of the *res gestæ*; it related to a past transaction, and the fact that Southerland was appellant's superintendent did not make either the statements of Houston or Southerland competent evidence." *Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98, 99, cited in note in 42 L. R. A., N. S., 945.

Failure to Deliver Death Message.—In an action against a telegraph company for failure to deliver a death message, a state-

ment by the agent of defendant, whose duty it was to receive and deliver the message, that he had been paid a certain sum for the delivery of the message, was not admissible; it not being shown that such amount was paid to him by any of the parties to the contract, and it being at most a mere declaration as to a bygone transaction, and not a part of the *res gestæ* thereof. *Western Union Telegraph Co. v. West*, 165 Ala. 399, 51 So. 740.

Acts of Theatrical Performer.—In an action against a theater proprietor for damages for insulting and defamatory language addressed to plaintiff by a performer who had invited plaintiff to go on the stage, a remark by a person in the audience after plaintiff left the stage was not admissible as a part of the *res gestæ*. *Interstate Amusement Co. v. Martin* (Ala.), 62 So. 404.

§ 90 (4) Existence, Nature, or Validity of Contract or Transfer of Property.

Declarations of Original Vendor.—In an action of detinue by an original vendor against a subpurchaser from his vendee, the conduct, declarations, and actions of the original vendee, subsequent to the sale, are not admissible in evidence against the subpurchaser, not being a part of the *res gestæ* of such transaction. *New York & Havana Cigar Co. v. Bernheim*, 81 Ala. 138, 1 So. 470.

"The conduct, declarations, and actions of Dreyfus, the alleged fraudulent vendor of the defendant, which were subsequent to the sale, were not, in our opinion, admissible in evidence against the defendant, whom the evidence tended to show was a prior bona fide purchaser of the goods without notice of any fraud in the transaction. These declarations and acts were not so intimately related to the principal fact—the sale to the defendant—as to constitute a part of the *res gestæ* of such transaction, and, as such, to throw light upon or illustrate its nature. Having occurred subsequent to the sale, they could not have been brought home to the defendant's knowledge prior to the purchase, and were therefore properly excluded. *Shealy v. Edwards*, 75 Ala. 411, 416, and cases cited; *Alexander v. Caldwell*, 55 Ala. 517; *McCormick v. Joseph*,

77 Ala. 236." *New York, etc., Cigar Co. v. Bernheim*, 81 Ala. 138, 1 So. 470, 471.

There are some decisions which do not recognize that such declarations are a part of the *res gestæ*. Thus, the declarations of the maker of a deed of trust after execution, but while in possession of the property, to the effect that it was fraudulent and made to hinder and delay his creditors, are regarded in *Weaver v. Yeatmans*, 15 Ala. 539, cited in note in 41 L. R. A., N. S., 27, 28, as inadmissible as a part of the *res gestæ*, against one claiming title under the trust deed.

Acts of the donor and donee, subsequent to an alleged gift, showing the claim of title by the donee and its recognition by the donor, are admissible as part of the *res gestæ*. *Bragg v. Massie's Adm'r*, 38 Ala. 89.

Declarations of a vendor of a slave made a few days after the sale, to the effect that, if he had known that the slave was not going to Texas, where the purchaser had represented that he intended to carry him, he would not have sold him, were not evidence for the declarant, as a part of the *res gestæ*, in a suit involving the validity of the sale. *Webb v. Kelly*, 37 Ala. 333.

To Show Interpretation of Contract.—The surrounding circumstances and subsequent conduct and acts of the parties are material and competent to show the interpretation which they put on an agreement, and what conditions they have waived. *Acker v. Bender*, 33 Ala. 230.

Delivery of Deed.—Where the chief evidence of a delivery of a deed was its registration, evidence to show that the registration did not amount to delivery consisting of addenda to the deed, setting out that the deed was not delivered before the change in the deed, the addenda being made fifty-two days after the registration, was not a part of the *res gestæ*, and was not admissible. *Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812.

Acts after Alleged Trade.—Where, in an action on a bond or note alleged to have been given for the purchase price of land, the issue was whether the purchase was ever in fact consummated, evidence of acts of defendant, done long after the alleged trade, and in the absence of vendor, inconsistent with the fact of pur-

chase, is not admissible in defendant's favor, since to allow such testimony to explain or qualify a previous contract between the parties would be allowing defendant to make evidence for himself. *Smith v. Freeman*, 75 Ala. 285.

§ 90 (5) Torts in General.

Statement after Publication of Libelous Article.—Where defendant was charged to have induced or procured the publication of a libelous article concerning plaintiff, evidence of all his acts tending to show what he did with reference thereto, both before and after the publication, constituting part of one entire transaction, was admissible. *Maddox v. Newton*, 4 Ala. App. 454, 58 So. 934.

Statements after Uttering Slander.—In an action of slander, exculpatory declarations, made by the defendant subsequently to the speaking of the actionable words, are not admissible in evidence. *Scott v. McKinnish*, 15 Ala. 662.

§ 90 (6) Assault.

Arrest of Third Parties.—In an action for damages from assault and battery committed by employees of defendant corporation while acting within the scope of their employment, it was not error to admit evidence that other parties were arrested shortly after plaintiff was shot, where the shooting and arrest were closely related, and the court limited such evidence to proof of the agency relationship existing between defendant and the persons who shot plaintiff. *Republic Iron, etc., Co. v. Passafume (Ala.)*, 61 So. 327.

Complaint of Injured Person.—Plaintiff may prove that about two years after the assault, in which he was wounded in the breast, side, head, and neck, he lay down, and complained that his head, neck, and back hurt him. *Phillips v. Kelly*, 29 Ala. 628.

Statements of Son of Defendant.—In an action for assault and battery, where defendant justified on the ground that he was defending his son from an attack by plaintiff, evidence of the son going to the house of a certain person several minutes after the difficulty and what he there said and did was inadmissible, being no part of the *res gestæ*. *Morris v. McClellan*, 154 Ala. 639, 45 So. 641.

§ 90 (7) Personal Injuries in General.

Offer of Compromise.—In an action for injuries to a vessel by collision with a drawbridge because of the bridge tender's negligence in failing to open the bridge in time, evidence that the morning after the injury the bridge tender visited the vessel and inquired whether plaintiff would take a named sum and drop the matter was inadmissible as *res gestæ*. *Southern Ry. Co. v. Reeder*, 152 Ala. 227, 44 So. 699, cited in note in 42 L. R. A., N. S., 946.

And where a bridge tender failed to open a draw in time, and a steamboat struck the pier, evidence that, the morning after the accident, the bridge tender visited the vessel, and inquired if the owner would take a named sum and drop the matter, was held inadmissible as part of the *res gestæ*. *Southern R. Co. v. Reeder*, 152 Ala. 227, 44 So. 699, cited in note in 42 L. R. A., N. S., 946.

"Over the objection of defendant testimony was admitted to the effect that, the next morning after the injury complained of took place, the bridge tender visited the vessel and inquired whether the plaintiff would take a named sum and drop the matter. This was error. The alleged declaration of the tender was not a part of the *res gestæ* of the immediate transaction for redress of which the action was brought. Its inadmissibility is adjudged in the following decisions, among others, of this court: *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112; *Moore v. Nashville, etc., Railway*, 137 Ala. 495, 34 So. 617; *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176; *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577. The tender's alleged statement was also erroneously admitted, because, even if authorized by defendant, it was a mere offer to compromise. *Collier v. Coggins*, 103 Ala. 281, 15 So. 578." *Southern R. Co. v. Reeder*, 152 Ala. 227, 44 So. 699, 702.

Not Made Spontaneously.—Declarations of a laborer killed by jumping from a hand-car to avoid a collision, made more than five minutes thereafter in response to a question as to how it happened, were held inadmissible on the trial of an action to recover from the railroad company for

his death, because they were not made spontaneously, but in the course of a conversation as to his injury and did not illustrate or explain or receive support from the transaction itself. *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577, cited in note in 19 L. R. A. 749.

Attempt to Find Pass.—In an action against a railroad for wrongful death, where it appeared that deceased was allowed to ride on a pass, a question to a witness as to whether the conductor "was trying to find Bernard's pass" after the accident had happened was properly excluded as being immaterial and no part of the *res gestæ*. *Neyman v. Alabama, etc., R. Co.*, 174 Ala. 613, 57 So. 435.

§ 90 (8) Acts and Statements of Agents or Employees in Relation Thereto.

Statement of Engineer.—In an action for the death of plaintiff's child while a trespasser on defendant's track, the testimony of a witness as to statements by the engineer shortly after the accident, to the effect that he kept thinking the child would get off the track until it was too late, was not admissible as part of the *res gestæ*. *Southern Ry. Co. v. Smith (Ala.)*, 58 So. 429.

"There was no error in admitting the testimony of Mrs. Dave Downs as to what Wilson, the engineer, said shortly after the injury, to the effect that he kept thinking the child would get off the track until after it was too late. It is true that this testimony was not admissible as a part of the *res gestæ* to show how the injury occurred; but the evident purpose of introducing it was to show statements made by the witness, contrary to what he had stated on the stand. A predicate was laid for the introduction of the testimony for that purpose; and no objection was offered on account of the insufficiency of the predicate, but only on the ground that it was not a part of the *res gestæ*, which, as shown, was not apposite. *Jones v. State*, 141 Ala. 55, 37 So. 390." *Southern R. Co. v. Smith (Ala.)*, 58 So. 429, 430.

Exclamation of Motorman.—In an action for death of pedestrian by being struck by a street car at night at a crossing, evidence that as soon as the car had passed the crossing, or had gone a few

feet beyond, the motorman shut off the power, threw on the brakes, opened the door, threw up his hands, and exclaimed, "My God! I have killed a man," was admissible as *res gestæ*, and this notwithstanding plaintiff might have called the motorman as his own witness to prove whether his car struck or killed intestate. *Bessierre v. Alabama, etc., R. Co. (Ala.)*, 60 So. 82.

Declarations by a motorman subsequent to a collision are not a part of the *res gestæ*. *Mobile Light & R. Co. v. Baker*, 158 Ala. 491, 48 So. 119, cited in note in 42 L. R. A., N. S., 943.

And statements by a motorman "right after" an accident at a crossing, that it was raining and his head was down, and he never saw them, as the reason why it occurred, were held not admissible as *res gestæ*. *Mobile, etc., R. Co. v. Baker*, 158 Ala. 491, 48 So. 119, cited in note in 42 L. R. A., N. S., 943. This was on the ground that they were declarations of an agent, which are admissible as to matters which are part of the *res gestæ*, but not as to past transactions. The court said: "The declarations made by the motorman were subsequent to the collision, were not part of the *res gestæ*." The question of length of time seems to have made no difference, but they are condemned solely on the ground that they were subsequent. The case cited to sustain this is *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618, but that case rejected the declarations on the ground that they were not connected with the main fact, or contemporaneous therewith.

Admission of Killing.—Evidence that, immediately after stopping the train in consequence of the accident, one of the trainmen said, "We have run over a man, and killed him dead as hell," is not part of the *res gestæ*. *Memphis & C. R. Co. v. Womack*, 84 Ala. 149, 4 So. 618, cited in note in 42 L. R. A., N. S., 926, 943.

"The declaration of one of the trainmen, testified to by the witness Larkin, should have been excluded, on the authority of the following cases: *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621. The declaration was not sufficiently connected with the main fact, or contem-

poraneous therewith, to constitute a part of the *res gestæ*. Without serving to explain or elucidate its character, it was merely a heartless narration of a transaction really and substantially past, only tending to prejudice the minds of the jury, and which should not and does not bind the defendant." *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618, 619, cited in note in 42 L. R. A., N. S., 926, 943.

Admissions of Trainmen.—The admissions of defendants' employee while returning with the body of deceased were not admissible in evidence against the company as *res gestæ*. *Tanner's Ex'r v. Louisville & N. R. Co.*, 60 Ala. 621, cited in note in 42 L. R. A., N. S., 924.

Conversation between Plaintiff and Conductor.—In an action against a railroad company for personal injuries to a passenger, evidence of declarations of the conductor and engineer, a few minutes after the accident, as to the circumstances, are inadmissible against defendant. *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, cited in notes in 19 L. R. A. 734, 737, 42 L. R. A., N. S., 945.

A passenger was thrown or fell from a railroad train as it approached a station. Evidence that a few minutes after the plaintiff was hurt, the conductor asked the engineer why he did not respond to the bell call. This and the response were held inadmissible as part of the *res gestæ*. They were not made while in the discharge of duties by an agent. *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, cited in note in 42 L. R. A., N. S., 944. The court said: "The declarations must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be thus elucidated and explained. * * * The time—'a few minutes'—does not appear to be so proximate to the main transaction, nor are the declarations made otherwise so closely connected with it, as an elucidating circumstance, as to justly authorize the conclusion that they are not merely narra-

tive of a past occurrence, which, at the moment, was finished and complete."

Abusive Language by Conductor.—Where one has purchased a ticket and takes passage upon a train operated upon a railroad, and the ticket on its face entitles him to be carried on the train on which he is riding, and he offers such ticket to the conductor, such person does not lose his character as a passenger by being ejected from the train by the conductor; nor is the conductor authorized, after such ejection, to disregard any duty he owed such person as a passenger had he not been ejected; and abusive and insulting language used by a conductor towards such person while he was re-entering the train after his ejection for the purpose of continuing his journey constitutes part of the *res gestæ* of the ejection, and is admissible in evidence in an action to recover damages for being ejected from the train. *McGroits v. Cashin*, 130 Ala. 561, 30 So. 367.

Statements Day after Accident.—And statements made by the conductor or engineer the day after the accident, that the man was seen riding on the track some time before he was struck, but he was thought to be a boy who wanted to race, and therefore they didn't blow the whistle, was held to be no part of the *res gestæ*. *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621, cited in note in 42 L. R. A., N. S., 924.

§ 90 (9) Injuries to or Loss of Property.

Injury to Shipment of Bananas.—In an action against a carrier for damages to a car load of bananas in shipment, neither a statement of the defendant's conductor in charge of the train, made to a witness on the arrival of the car at its destination, nor a written certificate of the conductor, as to the condition of the car when he took charge of it, was admissible, since both the oral and written statements related to past transaction. *Seaboard Air Line Ry. Co. v. Hubbard*, 142 Ala. 546, 38 So. 750.

§ 91. Acts and Statements of Person Sick or Injured.

§ 92. — In General.

See ante, "Personal Injuries," § 88 (12).

§ 93. — Statements as to Cause of Injury.

§ 93 (1) At or Near Time or Place of Injury.

Statement of Plaintiff as to Disposition of Horse.—In an action against a street railway company for death of plaintiff's intestate, who was thrown in front of a car by a frightened horse which he attempted to hold by the bridle until the car passed, testimony that just before the accident decedent told witnesses that the horse was "the biggest fool on earth about a car" was not admissible as *res gestæ*. *Alabama City, G. & A. R. Co. v. Heald* (Ala.), 59 So. 461.

Inquiry by Plaintiff as to Cause of Injury.—Evidence that the assaulted party, upon regaining consciousness after the assault, asked what happened is admissible in an action for assault and battery, being part of the *res gestæ*. *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860.

"The statement by the witness Ward, to the effect that immediately upon regaining consciousness after being stricken, Griswold asked what had happened, the court correctly admitted as part of the *res gestæ*. *Nelson v. State*, 130 Ala. 83, 30 So. 728; *Hall v. State*, 130 Ala. 45, 30 So. 422." *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860, 861.

Complainants and declarations of slaves made while sick were also admitted upon the principle of *res gestæ*, as well as from the necessity of the case, whether made to physicians or other persons. *Rowland v. Walker*, 18 Ala. 749; *Eckles v. Bates*, 26 Ala. 655; *Barker v. Coleman*, 35 Ala. 221; *Stein v. State*, 37 Ala. 123; *Stone v. Watson*, 37 Ala. 279; *Holloway v. Cotton*, 33 Ala. 529; *Kelly v. Cunningham*, 36 Ala. 78; *Wilkinson v. Moseley*, 30 Ala. 562, cited in note in 34 L. R. A., N. S., 254.

§ 93 (2) Response to Inquiries.

Not Part of Res Gestæ.—In an action against a railroad company for the negligent killing of a brakeman while in its employ, the declaration of the brakeman that "that handhold let me down," made to a witness who had seen the accident when a few yards away, and had run to help the brakeman in answer to his call, after the exclamation by witness of

"What in the world!" is not a part of the *res gestæ*, but is in the nature of a response to an injury. *Louisville & N. R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, cited in note in 19 L. R. A. 747, 42 L. R. A., N. S., 965, following *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 191, 9 So. 577.

"Apply these principles of law to the facts of this case. It seems that the witness was some thirty to fifty yards off; saw the accident; that deceased saw him, and called for assistance; that witness ran up to deceased, and exclaimed, 'Mr. Crecy, what in the world!' This exclamation of the witness was, in effect, an inquiry as to how the accident happened. It was made after deceased had called to him for help. The declaration of the deceased, 'The handhold let me down,' was more in the nature of a response to the inquiry of the witness, 'What in the world!' than a further assertion or demonstration of the main fact, manifesting itself in the declaration; and this is further apparent when it is remembered that deceased had, prior to that time, called to witness to assist him. We think the declaration was no part of the main fact. It is clear that the declaration of deceased, testified to, made after the car was removed from over the body, and those in response to questions as to 'how it happened,' under the facts as proven, were not *res gestæ*. The court erred in admitting the declarations of the deceased." *Louisville, etc., R. Co. v. Pearson*, 97 Ala. 211, 12 So. 176, 179, cited in notes in 19 L. R. A. 749, 42 L. R. A., N. S., 965.

§ 93 (3) Dying Declarations.

Declarations of deceased, made five minutes or more after the accident, not spontaneous, but in answer to the question of how it happened, and not illustrating or explaining or receiving support from the transaction itself, do not form part of the *res gestæ*. *Richmond & D. R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577, cited in notes 42 L. R. A., N. S., 965, 19 L. R. A. 749.

And where an accident was caused to a workman on a hand car, because no flagman had been put out, the declarations of the injured man, giving the cause,

made within five minutes of the time of the accident, which was fatal, were held inadmissible. *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9 So. 577, cited in note in 42 L. R. A., N. S., 965. The court said: "They were made five minutes or more after the collision; were not spontaneously made, but in answer to the question, 'how it happened,' propounded by someone present, after a conversation with the witness as to the extent of his injury; and do not illustrate or explain, or receive support from, the transaction itself, unless it be as to his supposition that it happened from the carelessness of Hackett, in not having out a flagman."

§ 94. — Statements as to and Expressions of Personal Injury or Suffering.

§ 94 (1) In General.

Complaints of pain, suffering, and symptoms indicate of injury, made by the person claimed to have been injured, are admissible. *Southern Ry. Co. v. Hardin*, 1 Ala. App. 277, 55 So. 270.

In an action for injuries, complaints of pain and suffering on the part of the person alleged to have been injured are admissible as original evidence tending to prove the existence of the condition or sensation complained of. *Birmingham Ry., Light & Power Co. v. Rutledge*, 142 Ala. 195, 39 So. 338.

Denominated Natural Evidence.—Whenever the bodily or mental feelings of an individual at a particular time are material to be proved, the usual expressions of such feelings, made at the time in question, are admissible as evidence of the existence of such feelings. They are classed with natural evidence, as distinguished from personal evidence, and whether they were real or feigned is for the jury to determine. *Phillips v. Kelly*, 29 Ala. 628, cited in note in 24 L. R. A., N. S., 254.

Immaterial to Whom Made.—Declarations of a sick person as to the symptoms and nature of his disease or injury, whether made to a physician or other person, are admissible as *res gestæ*, in explanation of the condition of declarant. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89, cited in note in 24 L. R. A., N. S., 254; *Eckles v. Bates*, 26 Ala.

655, cited in note in 24 L. R. A., N. S., 254.

The declarations of a slave, when sick, relative to the symptoms and nature of the disease under which he is laboring, whether made to a physician or other person, are admissible as original evidence. *Rowland v. Walker*, 18 Ala. 749.

In a servant's action for injuries, declarations of plaintiff as to his suffering could be proven by his father, to whom they were made, as well as if made to the physician treating him. *Western Steel Car, etc., Co. v. Bean*, 163 Ala. 255, 50 So. 1012, cited in note in 24 L. R. A., N. S., 1012.

The last rule stated prevails in Alabama, where expressions of pain and also complaints are admissible, whether made to physicians or laymen, on the ground of *res gestæ* of the fact of the pain, as well as on the principle of necessity, expressions of pain and complaints to laymen. *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500; *Birmingham R., etc., Co. v. Enslen*, 144 Ala. 343, 39 So. 74; *Phillips v. Kelly*, 29 Ala. 628; *Kansas, etc., R. Co. v. Butler*, 143 Ala. 262, 38 So. 1024; *Kansas, etc., R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207; *Louisville, etc., R. Co. v. Davander*, 162 Ala. 660, 50 So. 276; *Helton v. Alabama Mid. R. Co.*, 97 Ala. 275, 12 So. 286; *Stowers Furniture Co. v. Blake*, 158 Ala. 639, 48 So. 89; *Western Steel Car, etc., Co. v. Beau*, 163 Ala. 255, 50 So. 1012, cited in note in 24 L. R. A., N. S., 254.

"Whenever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings, made at the time in question, are original evidence. So, also the representations by a sick person, of the nature, symptoms and effects of the malady under which he is laboring at the time are received as original evidence." *Rowland v. Walker*, 18 Ala. 749; *Eckles v. Bates*, 26 Ala. 655; *Phillips v. Kelly*, 29 Ala. 628; *Holloway v. Cotton*, 33 Ala. 529; *Blackman v. Johnson*, 35 Ala. 252. These declarations are admitted, to the extent indicated, on a principle of necessity, and as a part of the *res gestæ*, whether made to a physician or not, and whether made by a slave or a free person." *Kelly v. Cunningham*, 36 Ala. 78, 79.

"There was no error in permitting the witness Ashford to testify that plaintiff was complaining the next day of his injuries and said that his limbs and back were hurting. *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500. If what the witness said as to what 'seemed' to him as the plaintiff's 'laying more stress on his back' was improper, it should have been separated from the other part of the answer; and the trial court will be put in error for refusing to exclude the entire answer. It may not have been material or proper to show the custom as to how the people drive teams over this crossing, but the existence was of no detriment to the defendant. The proof shows that they drive rapidly, and the jury could have inferred that if, the plaintiff had complied with the custom, he would have cleared the defendant's before the train struck his wagon." *Louisville, etc., R. Co. v. Davander*, 162 Ala. 660, 50 So. 276, 277.

Complaints and declarations of slaves made while sick relative to the symptoms and nature of the disease under which he is laboring were also admitted upon the principle of *res gestæ*, as well as from the necessity of the case, whether made to physicians or other persons. *Rowland v. Walker*, 18 Ala. 749, cited in note in 24 L. R. A., N. S., 254; *Eckles v. Bates*, 26 Ala. 655, cited in note in 24 L. R. A., N. S., 254; *Barker v. Coleman*, 35 Ala. 221; *Stein v. State*, 37 Ala. 123; *Stone v. Watson*, 37 Ala. 279, cited in note in 24 L. R. A., N. S., 254; *Holloway v. Cotton*, 33 Ala. 529, cited in note in 24 L. R. A., N. S., 254; *Kelly v. Cunningham*, 36 Ala. 78, cited in note in 24 L. R. A., N. S., 254; *Wilkinson v. Moseley*, 30 Ala. 562, cited in note in 24 L. R. A., N. S., 254; *Phillips v. Kelly*, 29 Ala. 628.

In a suit for breach of warranty of soundness of a slave, the declarations of the slave as to the existence of a pain in her breast are admissible. *Stone v. Watson*, 37 Ala. 279, cited in notes in 53 L. R. A. 541, 24 L. R. A., N. S., 234.

In covenant to recover damages for the breach of a warranty of soundness contained in a sealed bill of sale of a slave, declarations of the slave, made while sick to a physician, as to his symptoms and condition during previous similar attacks,

upon which the physician in part relies in forming his opinion as to the duration and character of the disease, are competent evidence, on the principle of *res gestæ*, as well as from the necessity of the case, as furnishing the basis on part of that opinion, but for no other purpose. *Eckles v. Bates*, 26 Ala. 655, cited in note in 24 L. R. A., N. S., 254.

On the issue whether water furnished to a city by defendant under contract was unwholesome and poisonous, the declarations of a slave, complaining of sickness and describing his symptoms while affected by the water, were admissible in evidence, though made to one not a physician. *Stein v. State*, 37 Ala. 123, cited in note in 24 L. R. A., N. S., 123.

In an action for breach of warranty of soundness of the slave, his declarations, while he was ill, detailing his bodily feelings at such time, are admissible. *Barker v. Coleman*, 35 Ala. 221, cited in note in 24 L. R. A., N. S., 254.

The declarations of a slave, made while sick, to a physician or any other person, relative to the symptoms and nature of the disease under which he is laboring, are admissible evidence upon the principle of *res gestæ*, as well as from the necessity of the case. *Eckles v. Bates*, 26 Ala. 655, cited in note in 24 L. R. A., N. S., 254.

Competency of Witness Immaterial.—"The admissibility of such declarations, therefore, does not rest upon the ground that the party making them was a competent witness, but whether upon the doctrine of *res gestæ*, the nature or necessity of the case, the competency of the party as a witness is immaterial. We think there was no error in admitting the negro's declarations with respect to his sickness, as proved by Mr. Saunders. They were to be carefully weighed by the jury." *Rowland v. Walker*, 18 Ala. 749, 752.

§ 94 (2) At or Near Time or Place of Injury.

Not Narrative of Past Occurrences.—Where, in an action against a railway company for the negligent death of a passenger, the issue was whether decedent died in consequence of the injuries re-

ceived while a passenger, or from an independent cause, evidence of complaints of hurts attributable to the company's negligence, made by decedent, was admissible, if confined to expressions in respect to current conditions, to the exclusion of narration of past conditions, and of the causation of the present conditions complained of. *Kansas City, M. & B. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207, cited in note in 24 L. R. A., N. S., 254.

§ 94 (3) Not Contemporaneous with Occurrence of Injury.

Existence of Pain and Suffering at Time of Declaration.—While the declarations of one injured, indicative of pain, in actions for damages, are not limited to those uttered near the time of the injury, but may be shown to have been made several months after the injury and after suit brought, such declarations must be limited to the existence of pain or suffering at the time they are made, and do not extend to rehearsals of past conditions or sufferings, nor to declarations as to the cause of the pain or suffering. *Western Steel Car, etc., Co. v. Bean*, 163 Ala. 255, 50 So. 1012, cited in note in 24 L. R. A., N. S., 1012.

Day after Occurrence of Injury.—In a personal injury action, there was no error in permitting evidence that plaintiff complained the next day of his injuries, and said that his limbs and back were hurting. *Louisville & N. R. Co. v. Davaner*, 162 Ala. 660, 50 So. 276, cited in note in 24 L. R. A., N. S., 254.

§ 94 (4) Exclamations and Expressions Indicating Pain or Mental Suffering.

Expressions of pain made by a person injured forming a part of the *res gestæ* of the accident are admissible. *New Connellsville Coal & Coke Co. v. Kilgore*, 162 Ala. 642, 50 So. 205.

Pain Resulting from Swollen Face.—In an action for injuries, it was proper to permit a witness to testify that plaintiff's face was badly swollen and that she gave expressions of suffering. *Lewy Art Co. v. Agricola*, 169 Ala. 60, 53 So. 145.

Expressions Previous to Death.—In an action for wrongful death, evidence of complaint and expressions of pain and suffering, made by plaintiff's intestate

during his lifetime and after receiving the injuries which resulted in his death, was competent. *Birmingham Ry., Light & Power Co. v. Enslen*, 144 Ala. 343, 39 So. 74, cited in note in 24 L. R. A., N. S., 254.

Weeping.—In an action for injuries, evidence that plaintiff cried all the afternoon, in connection with evidence of actual hurts, was admissible as a part of the *res gestæ*. *Montgomery St. Ry. Co. v. Shanks*, 139 Ala. 489, 37 So. 166.

"Crying is often symptomatic of pain, and, in connection with the other evidence of actual hurts received by plaintiff, the fact that she cried all the afternoon of the accident was admissible in evidence as of the *res gestæ* of the injury, as was also the fact that she complained of pain the next morning. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142." *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489, 37 So. 166, 170.

Evidence that witness was in the house when plaintiff received the telegram, "and saw her crying," was admissible to show mental suffering. *Western Union Telegraph Co. v. Manker*, 145 Ala. 418, 41 So. 850.

Continuous Suffering from Injury.—Where the evidence in a personal injury case showed that plaintiff had suffered from the injury from the time of its infliction to the time of trial, evidence that after the injury witness had heard plaintiff give expression to pain and suffering was proper. *Postal Tel. Cable Co. v. Jones*, 133 Ala. 217, 32 So. 500, cited in note in 24 L. R. A., N. S., 254.

§ 94 (5) Past Suffering or Condition.

"Whatever is, or might have been, the rule of evidence in other countries and states as to the admissibility, relevancy, and competency of declarations and exclamations of a person injured, indicative or expressive of pain and suffering, in actions to recover damages, the rule is firmly settled in this state, by a long line of decisions, extending from the case of *Phillips v. Kelly*, 29 Ala. 628, down to, and probably beyond, *Kansas, etc., R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207. The rule does not limit such declarations to those uttered at or very near the time of the injury, which could be said to be

a part of the *res gestæ*, but it is extended to those made several months, and even years, after the injury, and even to those made after suit is brought. They are admitted upon the ground of necessity, and are probably the best mode, and sometimes might be the only mode, of determining whether pain or suffering was endured. These expressions of pain, and of the locality, nature, extent, and character of it, are usually admissible evidence. True, the rule allows an opportunity for simulation and the perpetration of a fraud; but necessity and justice require it. The reality or the simulation of such expression is a question for the jury. The rule, however, has limitations. The declarations must be limited to the existence of pain or suffering at the time they are made, and do not extend to rehearsals or narrations of past conditions or sufferings; nor does the rule extend to declarations as to the cause of the pain or suffering." *Western Steel Car, etc., Co. v. Bean*, 163 Ala. 255, 50 So. 1012, 1013.

Previous Illness.—Declarations of a slave as to what had been the matter with him at a previous sickness, not made to a physician nor descriptive of the nature or symptoms of the disease under which he is at the moment laboring, are inadmissible on the question of a breach of warranty. *Barker v. Coleman*, 35 Ala. 221, cited in note in 24 L. R. A., N. S., 254.

Illness in Previous Years.—In an action for breach of warranty of soundness of a slave, her declarations to one not a physician, while owned by the vendee, that she was then sick, are admissible, but not declarations that she had been so off and on the last year or two. *Holloway v. Cotton*, 33 Ala. 529, cited in note in 24 L. R. A., N. S., 254.

Existence of Disease for Long Period.—The declarations of a slave that he had the dropsy, that it was an old disease and had been on him a long time, are inadmissible in an action for breach of warranty of soundness in regard to him. *Kelly v. Cunningham*, 36 Ala. 78, cited in note in 24 L. R. A., N. S., 254.

§ 95. — Statements to Physicians.

See ante, "In General," § 94 (1); "Not Contemporaneous with Occurrence of Injury," § 94 (3).

Expressions of pain and complaint made by an injured party to a physician are admissible on the grounds of *res gestæ* of the fact of the pain as well as on the principle of necessity: to physicians. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142; *Gregory v. State*, 148 Ala. 566, 42 So. 829; *Birmingham R., etc., Co. v. Moore*, 151 Ala. 327, 43 So. 841, cited in note in 24 L. R. A., N. S., 254.

"The physician who attended the plaintiff was permitted to testify that, when he first saw her, she was complaining of pain from an injury she said she had received. As to statements made to the physician by a party who is the subject of the injury, the rule of exclusion extends to declarations as to its cause, or the way in which it occurred, these being regarded as mere narratives of past events, which must be proved by other and independent evidence. But, from the necessity of the case, he may testify to the party's statements as to his symptoms, the locality and character of the pain, and explanation of his bodily condition, made while suffering, and for the purpose of enabling the physician to form an opinion of the nature and extent of the injury. *Eckles v. Bates*, 26 Ala. 655; *Roosa v. Loan Co.*, 132 Mass. 439; *Railroad Co. v. Sutton*, 42 Ill. 438. The statements of plaintiff, to which objection was made, come within the rule last stated; they related to the pain of which she was complaining, as having been produced by an injury, without reference to its cause or manner of occurrence. The court did not err in refusing to exclude the testimony." *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, 143.

Entitled to Greater Weight When Made to Medical Attendant.—A sick person's representations as to the true nature, symptoms, and effect of his malady, made while he is suffering under it, are original evidence to whomsoever they may be made; but are entitled to greater weight if made to a medical attendant. *Stone v. Watson*, 37 Ala. 279, cited in notes in 53 L. R. A. 541, 24 L. R. A., N. S., 254.

The declaration of the slave to a physician, as to the present existence of a pain in her breast, was clearly admissible, and the point has been repeatedly so adjudged by the court. *Wilkinson v. Mose-*

ley, 30 Ala. 562; *Barker v. Coleman*, 35 Ala. 221; *Stone v. Watson*, 37 Ala. 279, 288.

Declaration of a slave, where his soundness is in controversy, made to a person who was a physician, to the effect that "he had the dropsy, that it was an old disease, and had been on him a long time," are incompetent. *Kelly v. Cunningham*, 36 Ala. 78, cited in note in 24 L. R. A. 254.

In an action for injuries, there was no error in overruling an objection to a question propounded by plaintiff to a physician as to what plaintiff complained of when he was called to see her. *Birmingham Ry., Light & Power Co. v. Moore*, 151 Ala. 327, 43 So. 841, cited in note in 24 L. R. A., N. S., 254.

In an action for injuries to a servant, testimony by the physician attending plaintiff as to whether he complained of any suffering or pain is admissible, as it related to the expressions of plaintiff at the time he was being treated, and was not subject to the objection that it was a mere narrative of a past suffering. *Grasselli Chemical Co. v. Davis*, 166 Ala. 471, 52 So. 35.

Statement as to Remedy Used.—On a question of the soundness of a slave, a declaration of the slave to his physician that a specified remedy had once been used on him is not competent, where the past treatment has not so affected the character of the disease, or exerted such continuous and protracted influence over it, that a knowledge of the treatment would constitute a material element in judging of the disease. *Blackman v. Johnson*, 35 Ala. 252.

(C) SIMILAR FACTS, AND TRANSACTIONS.

§ 96. Relation to Issues in General.

§ 96 (1) In General.

Ownership of personal property is a fact, to which a witness may testify; but on cross-examination such witness can be required to state the particular facts, on which the claim of ownership rests. *Daftron v. Crump*, 69 Ala. 77.

Mortgage Having No Relation to Controversy.—In statutory ejectment by one claiming under a senior mortgage against one claiming under a junior mortgage, a

crop lien mortgage executed by the mortgagor to the senior mortgagee, which has no relation to the mortgage on the land, is properly excluded. *Davis v. Anderson*, 163 Ala. 385, 50 So. 1002.

Refusal to Receive Confederate Money.

—On an issue whether plaintiff agreed to receive eight per cent. Confederate bonds in payment of a note sued on, testimony in plaintiff's behalf, of a witness who, during the rebellion, was her debtor, that she refused to receive Confederate money, is irrelevant and inadmissible. *King v. Mitchell*, 52 Ala. 557.

Failure of Similiar Seed to Germinate.

—Where one of the questions of fact arising in the case was the germinating quality of cotton seed, sold by plaintiff to defendant, evidence which tended to show that some of plaintiff's cotton seed, bought at the same time, and kept in the same manner as that sold to the defendant, would not germinate, was admissible for the defendant. *Buchanan v. Collins*, 42 Ala. 419.

§ 96 (2) Difference in Time.

Date of Ticket.—In an action by a passenger to recover damages for his alleged wrongful ejection from a railroad train on which he had taken passage, where it was shown that the plaintiff offered the conductor a ticket stamped of the date the plaintiff took passage upon said train, and that the conductor upon looking at the ticket stated that it was out of date, and it was further shown that the stamp upon said ticket, while dim, was legible, and was so when the ticket was introduced on the trial, in order to show that the stamp date was legible on the date the plaintiff attempted to use the ticket, and that it was then in practically the same condition as when used on the trial, it is competent and permissible to prove by third persons that they saw the ticket in plaintiff's possession on the day he was ejected from the train, and that it bore the legible stamp of date on that day. *McGhee v. Cashin*, 130 Ala. 561, 30 So. 367.

Residence on Certain Date.—Where the point to be ascertained was the residence of an individual previous to the 9th of July, his act in giving a note and claiming his residence in a particular place on the

first Monday of August afterwards is not admissible evidence. *Bradford v. Haggerthy*, 11 Ala. 698.

Damages Subsequent to Commencement of Suit.—In a suit by riparian proprietors to recover damages caused by a diversion of the waters of a running stream, evidence of damages accruing subsequent to the commencement of the suit is admissible to show the effect of the diversion under similar circumstances before the suit. *Stein v. Burden*, 24 Ala. 130.

"It will be seen several of the interrogatories inquire into the fact of Pou's claiming a residence as entirely distinct from any other fact, and the answers, instead of giving his declarations explanatory of his acts, or showing they were made concurrent with the transactions or acts of which it is very possible they would be perfectly explanatory, proceed to state his declarations as a distinct matter of proof. This we think is clearly inadmissible, on the ground that it is merely hearsay, and would let in the declarations of persons who, if themselves examined as witnesses, might give a different account of the matter to be ascertained. [Queen of Hepburn] 7 Cranch, 290 [3 L. Ed. 348]; 3 Term, 708." *Bradford v. Haggerthy*, 11 Ala. 698, 701.

§ 96 (3) Similar Wrongful Acts.

One Wrongful to Prove Another.—One can not prove one vice or moral dereliction as a circumstance tending to show the existence on another not necessarily or vitally connected with it as cause or effect. *Supreme Lodge Knights and Ladies of Honor v. Baker*, 163 Ala. 518, 50 So. 958.

"The eleventh, twelfth, thirteenth, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, and twentieth assignments of error are all to the same effect. The defendant attempting to prove one vice or moral dereliction as a circumstance tending to show the existence of another not necessarily or vitally connected with it as cause or effect. This could not be done, and the court properly ruled thereon. *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810. As to the twelfth assignment, the question was leading, and was objected to on that ground. The objection was prop-

erly sustained." *Supreme Lodge Knights v. Baker*, 163 Ala. 518, 50 So. 958, 962.

Breach of Warranty.—In an action for the price of an automobile defended for breach of warranty, evidence as to whether complaint had been made of another car sold by plaintiff to another person was irrelevant. *Roden Grocery Co. v. Gipson* (Ala.), 62 So. 388.

In an action for false representation in the sale of a mule, evidence as to what the seller gave the plaintiff for two mules taken in a settlement between them, neither of which was the one as to which the alleged misrepresentation was made, was properly excluded. *Hall v. Cardwell*, 5 Ala. App. 481, 59 So. 514.

Gaming Transaction.—Where, in an action on a note by the indorsee, defendant set up that it was based on a gaming transaction, evidence as to similar transactions with others done with the payee's knowledge and consent was competent. *Birmingham Trust & Savings Co. v. Curry*, 160 Ala. 370, 49 So. 319.

Injury to Slave.—A witness who had examined a slave, alleged to have been cruelly whipped, can not be asked if he ever before saw a slave with such appearances, since the answer would not aid the jury in determining the question of reasonable or cruel whipping. *Hall v. Goodson*, 32 Ala. 277.

§ 96 (4) Similar Transactions.

Similar Sales of Property.—On a trial of right of property, evidence is not admissible to show that the claimant made sales of similar property to other persons than the execution defendant, without retaining the legal title in himself until the purchase money was paid, though claimant alleged that he had sold the property in dispute to the execution defendant, retaining the legal title until the purchase money was paid, and that it had not been paid. *Langworthy v. Goodall*, 76 Ala. 325.

Similar Sale of Cotton.—In a purchaser's action for breach of a contract to sell cotton, evidence that others contracted to sell their cotton to plaintiff for ten cents a pound delivered on a certain date was not admissible to show that defendant made such a contract. *Smith v. Wilson Mercantile Co.*, 6 Ala. App. 171, 60 So. 484.

"The mere fact, however, that other

people made contracts to sell their cotton to the plaintiff at ten cents per pound, the cotton delivered not later than December 15, 1909 had no tendency to show that defendant made such a contract, was irrelevant, and the court committed reversible error in permitting that evidence to go before the jury. *Langworthy v. Goodall, etc., Co.*, 76 Ala. 325." *Smith v. Wilson Mercantile Co.*, 6 Ala. App. 171, 60 So. 484, 486.

In an action for injuries caused by a defective sidewalk, evidence that others stumbled and fell at different times at the place is not admissible, especially where no time of such occurrence is stated. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525, modified. *Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

Similar Work by Witnesses.—Where an action on an implied contract for services raised the question as to who was the beneficial owner of the plantation on which such services were performed, it was proper to allow a witness to state that he was hired, under an express contract, by the same person to whom plaintiff claimed to be hired, and during the same time. *Wood v. Brewer*, 73 Ala. 259.

In an action on an account for work and labor done for, and on the plantation of a deceased person, brought by a transferee of the account, the fact that the transferer worked on the plantation, and the value of his services being shown by a witness, it is competent for the plaintiff to further prove by the witness that the latter worked on the plantation with the transferer for the purpose of showing the witness' opportunities of knowing that the transferer did work on the plantation, and the value of the services rendered by him. *Wood v. Brewer*, 73 Ala. 259.

In such action, the plaintiff's case being presented in two aspects, on an alleged contract made between the decedent and the transferer, and on an implied promise by the decedent to pay the transferer the value of the services rendered by the latter on the plantation of the former, with his knowledge and consent, and the defense being, that if such services were performed, they were performed at the instance and request of another, who had charge and possession of the plantation,

and was cultivating it as lessee of the decedent, it is competent for the witness to testify, at the plaintiff's instance, that he worked on the plantation the same year when the alleged services were performed by the transferer, under the employment of the decedent, and that the latter paid him for his services, as an act of control or proprietorship, furnishing some evidence that the crop on the plantation was being made on the decedent's account. *Wood v. Brewer*, 73 Ala. 259.

Previous Insurance Transactions.—

Where a parol agreement of insurance related to merchandise and household goods of the party seeking the insurance, and he had previously obtained two annual policies on the same merchandise, in the same location, from the same agent and insurance company, the previous policies were admissible in evidence, in an action on the parol contract, for the purpose of showing the stipulations in the agreement in issue; the inference being that, except where changed by its express terms, the agreement in question would be the same as the former ones. *Home Ins. Co. v. Adler*, 71 Ala. 516.

Settlements with Other Creditors.—

Where the issue in an action on account was as to whether the plaintiff had accepted the defendant's note for a part of the account in full payment of the whole, evidence that the defendant had made similar and independent settlements with other creditors was inadmissible. *Singleton v. Thomas*, 73 Ala. 205.

Offers of Same Rent by Other Persons.

—On the issue as to whether the rent per acre reserved in a written lease was to be computed on the entire tract, or only on that portion which was capable of being cultivated, parol evidence to the effect that another person had offered the same rent to be computed for the whole tract is not admissible, as the interpretation of the contract can not be aided in this way. *Williams v. Glover*, 66 Ala. 189.

Use of Corn by Overseer.—In an action by an overseer for services, in order to show plaintiff's neglect of duty, it was not permissible for defendant to show that during the year plaintiff was overseer a certain crib full of corn was consumed in a certain time, and that during another year under another overseer the

same quantity of corn lasted much longer, though fed to the same number of stock, as such testimony would raise collateral issues as to the extent and condition of the pastures and the amount of other forage used. *Spiva v. Stapleton*, 38 Ala. 171.

Transportation of Cotton.—The fact that owners of a flatboat in former years were engaged as common carriers in the transportation of cotton by flatboats on the same river is admissible to show that they were acting in the same capacity with regard to a contract in controversy. *Steele v. McTyler's Adm'r*, 31 Ala. 667.

Past Transactions.—In general assumption to recover from defendant bank a sum deposited by one who executed a chattel mortgage on mules to plaintiff, who afterwards rescinded for fraud and received an order from mortgagor for the amount of the deposit, as a refund of the loan, defendant sought to introduce evidence that plaintiff had a mortgage on the same property the year before and knew long before the present transaction that mortgagor was financially embarrassed, that mortgagee's dealings with mortgagor as a county official were the subject of criticism, that mortgagee's cashier, who made the loan, knew that mortgagor was not then extensively engaged in farming, and as to whether mortgagor was not giving commercial paper or mortgages all along. Held, that the circumstances sought to be shown were not relevant to put mortgagee on notice of the nonexistence of the mules claimed to be owned by mortgagor. *Batson v. Alexander City Bank (Ala.)*, 60 So. 313.

§ 97. Exclusion as Res Inter Alios Acta.

Matters Outside Issues of Case.—Evidence of transactions or of statements made in the absence of the party affected, relative to matters outside the issues of the case, and between different parties, is irrelevant and inadmissible. *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568.

Use to Contradict Witnesses.—Evidence that is hearsay and res inter alios acta can not be used to contradict answers of another witness called out by the party offering it. *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568.

Receipt of Cash at Time of Receiving Note.—Where, in an action on a lost note

payable in installments, the defense was non est factum, and a witness testified that defendant executed the note, which was delivered to a third person, it was error to allow the third person to testify that at the time he received the note from the witness he also received from him a sum in cash. *Martin v. Jesse French Piano & Organ Co.*, 151 Ala. 289, 44 So. 112.

"But we think the court erred in allowing Forbes, over the objection of the defendant, to testify that, at the time he received the note and the paper from Stewart, he also received from Stewart \$10 in money. This did not tend to prove any issue in the case. It was res inter alios acta, and could not bind the defendant. We can not say that this evidence worked no injury to the defendant, and must hold that the error in admitting the evidence must work a reversal of the case." *Martin v. Jesse French Piano, etc., Co.*, 151 Ala. 289, 44 So. 112, 113.

Advice of Physician as to Operation.

In an action for personal injuries, a question asked plaintiff's husband whether it was not a fact that about six months before the accident a physician had advised him to have an operation performed on his wife was properly excluded as res inter alios. *Town of Elba v. Bullard*, 152 Ala. 237, 44 So. 412.

Assumption of Payment by Third Persons.

In an action for the price of goods, evidence that a third person had agreed with the purchaser to assume the payment of the debt was properly excluded as res inter alios acta. *Key v. Goodall, Brown & Co. (Ala. App.)*, 60 So. 986.

Similar Accidents.—In an action for injuries received by a brakeman from contact with a bridge while on top of a car, a witness can not testify as to a man having once been knocked off by such bridge while climbing up the side of a car. *Schlaff v. Louisville, etc., R. Co.*, 100 Ala. 377, 14 So. 105.

Cutting Defective Ties.—"The court properly excluded the testimony offered by the defendants to show what proportion of the ties which they did cut and removed from the land were 'rejected.' The rejection referred to, we suppose, was that of some third party to whom defendants sold the ties. It was res inter alios

acta, so far as plaintiff's rights are concerned. And, if this were not so, it is inconceivable that the fact that defendants had cut defective ties from the land could have any bearing upon the inquiry as to how much timber suitable for ties remained." *Thornton v. Savage*, 120 Ala. 449, 25 So. 27, 29.

Contract with Third Person.—Where, in an action for damages for failure of title to timber sold plaintiff, the court charged that plaintiff was entitled to recover only upon the theory that there was an unconditional promise to pay him for a release, evidence tending to show that plaintiff had a contract with a saw-mill to cut the timber, and after making the alleged contract with defendant notified the mill not to cut it, was inadmissible, being a self-serving declaration, and not being a part of the *res gestæ* of the contract with defendant, but *res inter alios acta*. *Marsh v. Fricke*, 1 Ala. App. 649, 56 So. 110.

Previous Injuries on Cars.—In an action for injuries to a passenger while attempting to board a car, questions *prima facie* indicating the purpose of defendant to show that the passenger had sustained previous injuries on street cars, with a view of prejudicing him with the jury, and not indicating that the injuries affected the physical condition of the passenger, are properly excluded, in the absence of a statement of a purpose to show the relevancy of the evidence sought to be elicited. *Birmingham R., etc., Co. v. Selhorst*, 165 Ala. 475, 51 So. 568, cited in note in 41 L. R. A., N. S., 635.

Statement When Delivering Deed.—In ejectment in which the issue was as to the effectual delivery of a deed to the plaintiff, who was grantee therein, a statement of the deceased widow of the grantor, when she gave the deed to her stepson, that he should take it, as he knew what it was for, was inadmissible as *res inter alios acta*. *Napier v. Elliott* (Ala.), 58 So. 435.

In ejectment for land, which had been conveyed to defendant by persons in possession without title, the transactions between defendant and the possessors are not admissible against plaintiff. *Lay v. Fuller* (Ala.), 59 So. 609.

Compensation for Injury.—Ordinarily

it is not competent in an injury action to show compensation for an injury, where it comes from a collateral source wholly independent of defendant, as illustrating either the circumstances of the accident, or for abatement of damages, such compensation being as to defendant *res inter alios acta* with which defendant has no concern; and, in an action by a servant for alleged injury to his eye from a defective lubricator on a locomotive, evidence that plaintiff had been paid \$4,500 by a benefit association for the loss of his eye was not admissible to show interest, where plaintiff no longer had a questioned or litigated interest in the insurance money. *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52.

Settlements with Third Parties.—In an action by a subcontractor against the principal contractor for compensation for the construction of a railroad bed, settlements, between defendants and the railroad company, in which certain amounts were deducted because of a deficiency of a number of cubic yards of earth which plaintiffs had failed to move from the part of the road let to them by defendants were properly excluded, being *res inter alios acta* as to plaintiffs. *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34.

Similar Orders by Court.—To construe an order of sale made by the orphans' court, evidence of similar orders made by the same judge in other cases is *res inter alios acta*, and is inadmissible. *Wyatt's Adm'r v. Steele*, 26 Ala. 639.

Statement as to Newspaper Article.—Where defendant newspaper published certain observations of "a citizen" concerning plaintiff, which were written by a witness for defendant who had no connection either with defendant or its newspaper, a question asked him on cross-examination, if he had not told several persons that his article referred to plaintiff, was objectionable as hearsay and calling for *res inter alios acta*. *Parsons v. Age-Herald Pub. Co.* (Ala.), 61 So. 345.

§ 98. Similarity of Conditions.

Passing Train over Curve.—A witness may tell what effect the passing of trains over a certain curve would have, when he worked there and noticed it, though

this was three years before the derailment of the passenger train causing plaintiff's injury; the evidence showing that the same conditions existed at both times. *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40.

Difference in Height of Rails.—An accident, consisting of a derailment of a car, occurred in September, 1903, and a witness did not examine the track at the point of the accident until March 20, 1905. Held, that he was not then entitled to testify as to the difference in the height of the rails where they joined, in the absence of proof that the conditions were the same when he examined the track as at the time of the accident, though there was some evidence that no changes had been made at all to repair the track since the wreck. *Redus v. Milner, etc., R. Co.*, 149 Ala. 665, 41 So. 634.

Difference in Quality of Corn.—In an action to recover for services rendered as an overseer on a plantation, defendant, in order to show that plaintiff had neglected his duty, introduced evidence that during the year that plaintiff was overseer the corn was all consumed by June, and then offered to show that during the next year, under another overseer and with the same number of persons and stock, the same quantity of corn lasted till September. Held, that evidence of the quality of the corn raised on neighboring plantations, unaccompanied by proof of any general cause affecting all the crops raised in the neighborhood, was inadmissible to sustain a claim by plaintiff that the corn on the place when he took charge of the plantation was of a poor quality. *Spiva v. Stapleton*, 38 Ala. 171.

Manner of Building Warehouse.—Defendant may show in what manner a certain other warehouse "was built, that it was not burned, and the special efforts by which it was saved," if he first prove that it was fireproof, and was exposed to the same damage as plaintiff's; but without this preliminary proof such evidence is inadmissible. *Gibson v. Hatchett*, 24 Ala. 201.

Suit for Ward's Tuition.—In an action by a guardian against a third person, for money placed in his hands for the education of the ward, evidence that the guardian had been sued for the tuition of his

ward is *res inter alios acta*, and inadmissible to prove defendant's failure to apply the funds in the manner required. *Thweatt v. McCullough*, 84 Ala. 517, 4 So. 399.

§ 99. Showing Intent or Malice or Motive.

§ 100. — In General.

Failure to Deliver Cotton.—In an action on a note claimed to have been given by defendant to plaintiff's assignor for margins advanced and commissions for purchasing cotton evidence that, in other transactions between the parties, involving purchase of cotton for future delivery, there had never been any actual delivery, was admissible on the question whether they intended the purchases to be wagering contracts. *Birmingham Trust & Savings Co. v. Currey*, 175 Ala. 373, 37 So. 962.

Intent of Physician Rendering Services.—Where, in an action for personal injuries to plaintiff's wife, a physician testified that he performed medical services for plaintiff's wife at the request of other persons, a question to such physician, "Were the services rendered in behalf of plaintiff, or in behalf of the other persons?" was improper, as calling for a statement as to the witness' intent or motive. *Birmingham Ry., Light & Power Co. v. Humphries*, 172 Ala. 495, 55 So. 307.

Declarations as to Other Sales.—In an action to enjoin a foreclosure sale of land on the ground that the mortgagee had fraudulently concealed the existence of the mortgage from plaintiff when he purchased the land, declarations by the mortgagee when he negotiated a sale of another parcel of the land, subject to the mortgage to a third person, are not admissible. *Harrison v. Yerby (Ala.)*, 14 So. 321.

Gambling Transactions.—In an action on a promissory note claimed to have been executed by defendant to plaintiff's assignor for commissions and for margins advanced for purchasing cotton, evidence was admissible, on the question whether the parties intended the purchases to be wagering contracts, that there had never been any actual deliveries in other transactions between the parties involving the purchase of cotton for fu-

ture delivery, though evidence as to gambling transactions between plaintiff's assignor and third persons was not admissible. *Birmingham Trust, etc., Co. v. Currey*, 175 Ala. 373, 57 So. 962.

§ 101. — Fraud.

§ 101 (1) In General.

Concealing Insolvency.—A seller on credit may show, on an issue whether the buyer fraudulently concealed his insolvency when making the purchase, that a year before the sale the buyer misrepresented to him the amount of his indebtedness. *Maxwell v. Brown Shoe Co.*, 114 Ala. 304, 21 So. 1009.

§ 101 (2) Misrepresentations.

To Secure Signature to Instrument.—In the absence of any proof of false representations as to the contents of an instrument made for the purpose of securing defendant's signature thereto, evidence that his signature to another instrument of the same kind, between the same parties, had been secured by such false representations, shortly before the signing of the one in question, is inadmissible. *Martin v. Smith*, 116 Ala. 639, 22 So. 917.

§ 101 (3) Fraudulent Conveyances.

Previous Conveyances.—On an issue whether a conveyance to a relative was made to defraud creditors evidence that, just prior to the conveyance in question, the debtor conveyed other property to other relatives, and two days afterwards made an assignment of his remaining property for the benefit of creditors, is admissible, where there is other evidence showing that these conveyances were all parts of one transaction. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

§ 102. — Malice.

Different Attachment.—In an action on an attachment bond to recover for the wrongful and malicious attachment of plaintiff's property, evidence that defendant, one week subsequent to the first attachment, caused a second attachment to be levied on plaintiff's property, is admissible for the purpose of showing defendant's malice. *Ryall v. Marx*, 50 Ala. 31.

§ 103. Showing Knowledge.

Knowledge of Mental Condition.—On

the issue of the mental condition of the husband of the testatrix, who, it was alleged, was fraudulently induced by the proponent to transfer his property to his wife, that she might will it to proponent and his family, testimony of a physician that any person who frequently associated with the husband would readily observe that he was of unsound mind was competent to show that the proponent and his family knew of his mental condition when they induced him to so transfer his property. *Coghill v. Kennedy*, 149 Ala. 641, 24 So. 459.

§ 104. Part of Series Showing System or Habit.

Similar Transactions at Same Time.

On the question of fraud in the sale of goods, a common purpose between the purchaser and subpurchaser being shown in a contest with the original vendor, suing for conversion of the goods, and the transaction involved being attended with usual features, it is permissible to inquire into other transactions between the parties about the same time. *Loeb v. Flash*, 65 Ala. 526.

§ 105. Showing Custom or Course of Business.

Custom.—Evidence that it was a custom of young people of that neighborhood to go to parties without invitation was properly rejected. *Davis v. State*, 92 Ala. 20, 9 So. 616.

Custom Not Binding on Parties.—In an action on a note, a question as to the custom of witness, who had testified that he had shown a disputed memorandum of settlement to another person, to so submit other papers to such person for his inspection, is immaterial, as such custom would not be binding on the parties to the suit. *McCullars v. Jacksonville Oil Mill Co.*, 169 Ala. 582, 53 So. 1025.

§ 106. Other Injuries or Accidents from Same or Similar Causes.

Injuries from Defective Sidewalk.—In an action for injuries caused by a defective sidewalk, evidence that the witness stumbled and fell at the same place and about the same time plaintiff was injured is admissible. *City of Birmingham v. Starr*, 112 Ala. 98, 20 So. 424.

Damage from Flooding Land.—In an

action for the overflow of land, evidence is admissible of the damage caused since the suit commenced, for the purpose of showing the consequences of the overflow under similar circumstances before suit brought. *Polly v. McCall*, 37 Ala. 20.

"The circuit court did not err, in admitting evidence of the admissions of the defendant Polly. The facts which the admissions tended to prove were material, and, as against the defendant Polly, we can perceive no reason for excluding them from the jury." *Palmer v. Severance*, 9 Ala. 751; *Falkner v. Leith*, 15 Ala. 9; *Goodman v. Walker*, 30 Ala. 482." *Polly v. McCall*, 37 Ala. 20, 28.

Destruction of Goods by Fire.—Where defendant had placed his goods in the plaintiff's warehouse, where they were destroyed by fire, and the question was whether the warehouse was fireproof, it was competent for a witness to state how a certain warehouse, which was fireproof and had been on fire, was built, and special efforts made to save it. *Hatchett v. Gibson*, 13 Ala. 587.

Injury from Street Railway.—In an action against a street railway company for personal injuries received by reason of plaintiff having been thrown from his wagon while crossing a track at a place alleged to have been insufficiently surfaced and ballasted, evidence that other vehicles were constantly crossing the tracks safely at such place, and about the time of the accident, is admissible on behalf of defendants. *Birmingham Union Ry. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

§ 107. Showing Value.

§ 107 (1) Sales of Other Property in General.

Value of Coal Land.—In a proceeding under Code 1896, § 3979, to increase an assessment of lands in a certain coal field, evidence that the lands were of the same kind and quality as other lands in the same field was sufficient foundation for evidence as to the price for which lands in that field had been recently sold. *Tennessee Coal, Iron & R. Co. v. State*, 141 Ala. 103, 37 So. 433.

Sales of Similar Articles.—Evidence of recent actual sales of similar articles of property to that in question in the same

vicinity is admissible to establish the market value of the property in controversy. *Massey v. Fain*, 1 Ala. App. 424, 55 So. 936.

Value of Coal.—Where the quality of coal was in issue, a party could show the quality of exactly the same kind of coal, though not a part of the coal involved. *Home Ice Factory v. Howells Min. Co.*, 157 Ala. 603, 48 So. 117.

Fairness of Sale by Sheriff.—Where, in trover for goods levied on under an execution, the burden of proving fairness of the sale made by the sheriff is on defendant, he may inquire of the sheriff whether the property did not sell for as much as such property usually brought at sheriff's sale. *Wyatt v. Clepper*, 5 Ala. 703.

Value and Capacity of Machinery.—A material inquiry being as to the value and capacity of certain machinery sold by plaintiff to defendant, a witness who had practical knowledge of the operation and capacity of similar machinery which he thought was superior may state that its capacity was not equal to the representations made as to that in controversy; and if the two machines, or kinds of machinery, are similar in character, having a like combination of properties and qualities, and designed to accomplish like results, it is not necessary that they should be precisely alike in all respects to render the evidence admissible. *Blackman v. Collier*, 65 Ala. 311.

§ 107 (2) Difference in Location of Other Property.

Expense of Hauling Cotton.—On an issue as to the market value of cotton sold, evidence of what cotton sold for at specified dates in the market town of the locality thirty miles distant from the place where the cotton was to be delivered is admissible in connection with evidence as to the expense of hauling the cotton to market from that place. *Berry v. Nall*, 54 Ala. 446.

Value in Different Cities.—Evidence as to the value of goods in Huntsville or Decatur is admissible to prove their value in the other. *Corey v. Penney*, 165 Ala. 234, 51 So. 624.

§ 107 (3) Value of Other Property.

Value of Guano.—In an action on a note given for guano, proof that three

persons used some of the same kind of guano, and that it was "worthless," is irrelevant. *Preston v. Dunham*, 52 Ala. 217.

Diminution of Rental Value.—In an action against a railroad company for an injury done to a house and lot by the construction of a railroad cut in the street opposite thereto, it is incompetent to prove the diminution in the rental value of other premises similarly situated and affected by the same cause. *Selma & M. R. Co. v. Knapp*, 42 Ala. 480.

Royalty Paid for Land in Vicinity.—On an issue as to the value of certain coal lands, evidence that lands in the immediate vicinity had been leased at a royalty of so much per ton for the coal mined is not admissible. *Tennessee Coal, Iron & R. Co. v. State*, 141 Ala. 103, 37 So. 433.

On an issue as to the value of certain coal lands, evidence that in connection with the lease the lessee was given an option to buy at a certain price is not admissible. *Tennessee Coal, Iron & R. Co. v. State*, 141 Ala. 103, 37 So. 433.

Assessed Valuation.—In a proceeding by the state to raise the assessed value of certain land, evidence that an owner of similar land in the same neighborhood gave a certain valuation for taxation, or that his lands were assessed at a certain valuation, is inadmissible. *State v. Sage Land, etc., Co.*, 118 Ala. 677, 23 So. 637.

§ 107 (4) Services.

Services of Attorney.—In an action for attorney's services, proof as to what plaintiff had charged in other particular matters, varying in nature, was irrelevant. *Fuller v. Stevens* (Ala.), 39 So. 623.

Charge for Physician's Services.—In order to show the reasonableness of a physician's charge, evidence of what the same physician charged in other cases is not admissible. *Collins v. Fowler*, 4 Ala. 647.

(D) MATERIALITY.

§ 108. Importance in General.

Attempt to Find Railroad Pass.—In an action against a railroad for wrongful death, where it appeared that deceased was allowed to ride on a pass, a question to a witness as to whether the conductor "was trying to find Bernard's pass" after

the accident had happened was properly excluded as being immaterial and no part of the *res gestæ*. *Neyman v. Alabama, etc., R. Co.*, 174 Ala. 613, 57 So. 435.

Should Not Be Excluded Because of Weight.—It is error to exclude evidence of a material fact merely because, if unsupported, it would be insufficient to establish the case of the party offering it. *McNeill v. Reynolds*, 9 Ala. 313, cited in note in 52 L. R. A. 835.

Evidence pertinent to the issue can not be rejected by the court. It must be left to the jury to determine its bearing. *Sims v. Glazener*, 14 Ala. 695.

Primary and relevant evidence, however weak, can not be excluded from the jury because stronger evidence might have been adduced. *McCreary v. Turk*, 29 Ala. 244.

Redundant Evidence.—In an action upon a written promise to pay money, the consideration of the instrument is presumed, and, if there is no evidence attacking the consideration on the part of the defendant, evidence on the part of the plaintiff to prove the consideration is redundant, and the court is not bound to receive it. *Cowan v. Cooper*, 41 Ala. 187.

Made Relevant by Other Evidence.—Evidence relevant and material, considered in connection with other evidence, is admissible, though standing alone its relevancy might not be apparent. *Aycock v. Johnson*, 119 Ala. 405, 24 So. 543.

Storage of Cotton.—In assumpsit to recover for advances made on cotton, which was destroyed by fire while stored in plaintiff's warehouse, the defense was that defendant was entitled to recoup for its loss; and there was evidence tending to show that plaintiff had contracted to store the cotton in a fireproof warehouse. Held, that any evidence, however, slight, which tended to show defendant's assent to the storing of his cotton in a house not fireproof, was relevant and admissible for the plaintiff; and the fact that a certain aperture in the wall, through which the fire entered, was visible to the defendant, when he had once entered and examined the warehouse after his cotton had been stored, was relevant for this purpose. *Gibson v. Hatchett*, 24 Ala. 201.

Action on Note.—On the issue whether an indorser of a note knew that the note

which he indorsed, and which was signed after such indorsement, was signed by a firm name, and by his conduct ratified the signature, it was proper to admit evidence that on one occasion he "examined the note thoroughly." *Montgomery v. Cross-thwait*, 90 Ala. 553, 8 So. 498.

Slight and Inconclusive Testimony.—That testimony is inconclusive and slight does not render it inadmissible. *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55.

Execution of Note.—Where the only issue is as to the payment of an account, testimony that the creditors had executed their note to the debtor after an alleged settlement of the account is properly excluded, on an admission by the debtor's counsel that the note was not in any way connected with the settlement. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834, cited in note in 52 L. R. A. 598.

Ownership of Stock.—It is error to permit a witness to testify that he owned fifteen shares in said land company, that he paid twenty-five per cent on his subscription, and that he sold his stock before the compromise with plaintiff was effected, since the evidence is immaterial. *Brown v. Prude*, 97 Ala. 639, 11 So. 838.

Evidence of remarks of the plaintiff in an action for conversion that he would not have commenced the action if a creditor had not been pressing him is immaterial. *Stephens v. Head*, 138 Ala. 455, 35 So. 565.

Testimony to Arouse Sympathy.—"The court erred in not excluding the testimony of the plaintiff, 'I told him to look at all my twelve babies.' It was not material to the issue before the jury, and was highly prejudicial to the defendants, as it was calculated to arouse the sympathy of the jury in favor of the plaintiff." *Rasco v. Jefferson*, 142 Ala. 705, 38 So. 246, 248.

§ 109. Certainty.

Possibility of Animal Changing Color.—In detinue for a bay mule claimed by defendant under a mortgage of a sorrel mule, given by the person who sold the mule in question to plaintiff, a question whether a light or sorrel colored colt was likely to turn darker as it grew older was properly excluded, though the fact

that mules changed color was pertinent to the issues and admissible; the term "likely" being too indefinite for use in such connection. *Stickney v. Dunaway & Lambert*, 169 Ala. 464, 53 So. 770.

An inventory of an estate, made according to the laws of Louisiana, on a widow's petition to be permitted to renounce the community of acquits and gains between her and her deceased husband, mentioning no slaves, and stating that the property was shown by the widow of the deceased, and no other property shown, is not admissible evidence for the purchaser of a slave at sheriff's sale against the distributee, when sued by the husband's administrator. *Miller v. Jones' Adm'r*, 29 Ala. 174.

A written statement by the clerk of a steamboat, showing that a quantity of wood had been delivered on board the boat, is competent evidence of the indebtedness of the steamboat, though it does not show with precision the amount delivered. *Lynch v. Bragg*, 13 Ala. 773.

Lameness of Horse.—The mere fact that a horse was lame three weeks after its sale, without proof of the character or causes of such lameness, is not competent evidence of unsoundness at the time of the sale. *Sledge v. Scott*, 56 Ala. 202, cited in note in 23 L. R. A., N. S., 370.

Partnership Contract.—In an action on a note signed with a firm name by one of the partners, against the other partner, in which the fact of partnership is disputed, the partnership contract is admissible to prove the fact of the partnership, but its recitals or stipulations as to the powers or duties of the partners, not bearing on the execution of the note, are inadmissible. *Guice v. Thornton*, 76 Ala. 466.

Quality of Ore.—In an action for a breach of contract to permit plaintiff to mine ore in a specified territory, and to pay for it when delivered free from foreign substances in a manner satisfactory to a furnace company, evidence of the quality of the ore is immaterial. *Worthington v. Given*, 119 Ala. 44, 24 So. 739.

§ 110. Remoteness.

Physical Condition Ten Years Previous.—In an action for work and labor done, the controversy being as to the

amount of compensation agreed upon, defendant introduced evidence tending to show that at the time of the contract plaintiff was not in such health and physical condition as to command and earn the wages he claimed had been agreed upon. Held, that it was error to allow plaintiff, in rebuttal, to give evidence of his condition eight or ten years before. *Evans v. Horton*, 93 Ala. 379, 9 So. 534.

Course of Mails by Steamboat.—On an issue as to when a letter reached its destination, where the writer of the letter testifies that he mailed it at his country postoffice, and has no recollection of having ever written to his correspondent by boat, though "he may have done so," evidence of the course of mails by steamboat is too remote. *Miller v. Boykin*, 70 Ala. 469.

State of Account between Tax-Collector and Auditor.—In an action against the state auditor by an attorney of a tax collector for damages for a refusal to permit an inspection of the collector's account in the tax ledger, it appearing that plaintiff was employed by such tax collector to procure the allowance of a claim by the auditor for an alleged excess or overpayment of taxes, as shown by the books in the auditor's office, his compensation depending on the allowance and amount of the claim, evidence in relation to the state of the accounts between the tax collector, and the state is too remote. *Brewer v. Watson*, 65 Ala. 88.

§ 111. Tendency to Mislead or Confuse.

Efforts to Obtain Deposition.—On an issue as to a party's authority to control and collect a debt, proof of the debtor's efforts to find him and obtain his deposition is immaterial. *Gallbreath v. Cole*, 61 Ala. 139.

Evidence without Foundation.—There being no evidence that a train was approaching, testimony as to what a foreman should do with a hand car on which he was riding when a train was heard coming was properly excluded. *Kansas City, etc., R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

§ 112. Negative Evidence.

Failure to Include Animal in Mortgage.—In detinue for a mule claimed by

plaintiff under a mortgage executed to him on a sale of the mule to the mortgagor, the execution of a mortgage to a certain bank by plaintiff on all his property after he received the mortgage on the mule, in which mortgage to the bank the mule in question was not included, was immaterial and properly excluded. *Holman v. Clark*, 148 Ala. 286, 41 So. 765.

Want of Knowledge of Fact.—When the situation of a witness is such that, if a certain fact had existed he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist; and in such case, he will be allowed to state that if the fact existed he did not know it. *Nelson v. Iverson*, 24 Ala. 9; *Thomas v. Degraffenreid*, 17 Ala. 602; *Blakey v. Blakey*, 33 Ala. 611.

Want of knowledge of a thing open to the senses, by a witness who had the opportunity of knowing the fact if it existed, is some evidence, though slight, that the thing did not exist; but whether or not a person has money is not a fact so open to observation or patent to the senses as to render such testimony in relation thereto admissible. *Killen v. Lide's Adm'r*, 65 Ala. 505.

Ownership of Slaves.—The fact that one claiming to be the owner of certain slaves did not obtain credit on the strength of his ownership was not competent evidence to disprove his title. *Thomas v. De Graffenreid*, 27 Ala. 651.

Use in Rebuttal.—The defendant having proved by a witness a declaration of the plaintiff, the plaintiff will not be permitted, in rebuttal, to prove by another witness that "he had been intimate with the plaintiff for fifteen years, and had never been told any such thing by him." *Lawson v. Hicks*, 38 Ala. 279.

"The defendant having proved by a witness a declaration of the plaintiff, to rebut this evidence, and to impeach the defendant's witness, the plaintiff was permitted to prove, by another witness, that he had been intimate with the plaintiff for fifteen years, and had never been told any such thing by him. In admitting this evidence, the court erred. It has been decided in this state that, 'when the situation of a witness is such that, if a fact had existed, he would probably have

known it, his want of knowledge is some evidence, though slight, that it did not exist.' *Blakey v. Blakey*, 33 Ala. 611. The reason of this principle does not sustain the ruling of the court below, in permitting to witness to state, in general terms, that he had not at any time heard the party utter a declaration proved by another witness. The general rule, to which the point presented is no exception, is, that a party can not make evidence for himself, either by his conduct or declarations. *Chaney v. State*, 31 Ala. 342; *Bradford v. Edwards*, 32 Ala. 628." *Lawson v. Hicks*, 38 Ala. 279, 291.

Want of Knowledge of Existence of Note.—Testimony of a witness who has intermarried with one of the sureties on a note, who was a daughter of the principal, that he had not been notified of the existence of the note during the principal's life, is inadmissible on an issue as to whether the note has been paid. *Harwood v. Harper*, 54 Ala. 659.

Passing of Trains.—A witness who testified that, while looking for his own cattle, he saw plaintiff's near the railroad as he passed, and on returning, an hour and a half afterwards, saw them again, just as the train moved off, after stopping at the place where plaintiff alleges the cattle for which he seeks to recover damages were injured, is competent to state that, if any other train had passed, he would have heard it, and that none passed. *East Tennessee, V. & G. R. Co. v. Carloss*, 77 Ala. 443.

Failure to Purchase Guano.—Evidence that plaintiff made no arrangement for his tenant to get guano from any one else is irrelevant on the issue whether he arranged for him to get it of defendant. *O'Neal v. Curry*, 134 Ala. 216, 32 So. 697.

To Prove Sobriety of Plaintiff.—In an action for damages for ejection from a playhouse, where defendant introduced evidence that plaintiff was drunk and disorderly and was ejected for that reason, testimony, by a witness who had known plaintiff for several years, but had never employed him and did not know what plaintiff did at night, that he had never known of plaintiff's being drunk, was not relevant, for relevant evidence is that which logically tends to prove or disprove a fact in issue, and the knowledge

of the witness in question did not logically tend to prove whether plaintiff was drunk or sober. *Wells Amusement Co. v. Means*, 2 Ala. App. 574, 56 So. 594.

Indorsement Not upon Deed.—Where defendant in ejectment relies on an assignment, dated 1851, to his grantor, purporting to be executed by R., through whom plaintiff claims by inheritance, indorsed on the deed of the property to R., plaintiff may introduce the testimony of a witness that he saw the deed in 1859 and 1868, and that the indorsement was not on it in 1859 though it was in 1868. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

"The proponent had the right to rebut the evidence which the contestants had introduced, to show the state of feeling between the testator and the proponent, who was the principle legatee; and for this purpose, the testimony of the witness Logan, though entitled to but little weight, was relevant. The witness is shown to have had opportunities for knowing the state of feeling between the testator and his wife; and his testimony comes within the influence of the rule, adopted by this court, that when the situation of a witness is such, that if a certain fact had existed, he would probably have known it, his want of knowledge is some evidence, though slight, that it did not exist. *Nelson v. Iverson*, 24 Ala. 9; *Ward v. Reynolds*, 32 Ala. 384." *Blakey v. Blakey*, 33 Ala. 611, 618.

(E) COMPETENCY.

§ 113. Nature and Source of Evidence in General.

In an action for failure to deliver a telegram whereby plaintiff lost an employment, evidence as to a conversation between plaintiff's agent and another, in which a contract of employment was made for plaintiff, was competent. *Western Union Tel. Co. v. Bowman*, 141 Ala. 175, 37 So. 493.

Must Be Competent as to Parties and Subject-Matter.—"Evidence, to be competent, must be so, not only as it regards the subject-matter of the suit, but also in reference to the parties on the record." *Robinson v. Garth*, 6 Ala. 204, 211.

Admissibility and Sufficiency Distinguished.—The distinction between the admissibility and the sufficiency, of evidence

is well defined. Evidence may be admissible though insufficient; and in such case, the party against whom it is offered, may protect himself by calling upon the court to instruct the jury. *Bell v. Rhea, etc., Co.*, 1 Ala. 83.

Sale of House.—In an action by a firm, for use and occupation of a house: evidence that the house was sold to one of the firm, but whether on account of the firm or not, was not known by the witness, but that the vendee had his account with the firm, credited with the amount of the purchase money, and that the defendant rented the house of that member of the firm, held not incompetent testimony to go before the jury. *Hanks v. Hinson*, 4 Part. 509, 514.

Placing Special Advertisement on Goods.—In an action for the price of goods, evidence that the special advertising of defendant's name and place of business placed upon the papers of pins rendered them unsalable to other merchants is also incompetent. *Shrimpton & Sons v. Brice*, 102 Ala. 655, 15 So. 452.

Financial Rating of Defendant.—On an issue whether defendants bought certain pins from plaintiff, evidence as to defendants' financial rating, and as to the amount of pins suitable for their trade, is incompetent. *Shrimpton & Sons v. Brice*, 102 Ala. 655, 15 So. 452.

Conversations over Telephone.—Conversations relating to business had over a telephone are admissible in evidence, though the person or voice of the person at the telephone was not identified, the same as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business. *Western Union Telegraph Co. v. Rowell*, 45 So. 73, 153 Ala. 295.

Where, in an action for delay in the transmission of a telegram, there was evidence of delivery to the addressee of a message like that claimed to have been telephoned to defendant's sending office by S. at plaintiff's request, evidence that plaintiff came to S.'s office at 6.10 a. m. on the day the message was sent, paid S. 25 cents, and asked him to telephone to defendant a message like that in question to be sent to the addressee, and that S. thereupon picked up the receiver of the

telephone and called for a number unknown to plaintiff, and spoke into the phone the message to be transmitted and delivered, was competent. *Western Union Telegraph Co. v. Saunders*, 164 Ala. 234, 51 So. 176.

Contradictory Statements.—Although contradictory statements, when unexplained, may affect the credibility of the witness making them, the contradiction does not of itself render the statements incompetent as evidence. *Joseph v. Southwark Foundry & Mach. Co.*, 99 Ala. 47, 10 So. 327.

Opinion as to Construction of Contract.—It was error to admit in evidence the opinion of the city attorney as to the construction of a contract between the city and a water company on which the suit was based. *Crosby v. City Council of Montgomery*, 108 Ala. 498, 18 So. 723.

Decision on Previous Trial.—On a trial before a jury of a suggestion that an executor had not made a full inventory of property belonging to the estate, the testimony of a probate judge as to how he had decided the matter on a previous trial thereof is inadmissible. *Mims v. Sturdevant*, 36 Ala. 636.

Condition of Track.—Evidence of the condition of defendant's tracks from one to five months after the accident occurred is admissible, where there is further evidence that there had been no change in their condition since the time of the accident. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

To Show Safety of Crossing.—Evidence is admissible, in defendant's behalf, that other vehicles were constantly crossing the tracks safely at the place and about the time of the accident. *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133, 9 So. 525.

§ 114. Results of Experiments.

Experiment Two Years after Accident.—In an action to recover damages for personal injuries, which were caused by being thrown from a hanging scaffold as the result of alleged negligence on the part of the superintendent of the defendant, testimony respecting tests made by certain witnesses upon a scaffold, two years after the alleged accident, for the purpose of showing the action of a scaffold under

conditions similar to those surrounding the accident, is inadmissible and incompetent, when it is further shown that at the time of such tests the scaffold had been moved from its position at the time of such accident, and that it was not in the same condition as when the accident happened two years previous. *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646.

Experiment One Month after Accident.

—Whether children on a railroad track, and the fact that they were children, could have been discovered by the engineer in time to stop the train before reaching them, by the exercise of due care, can not be shown by an experiment made a month after the accident, by placing children on the track and noting the distance at which they were distinguishable by witnesses, looking from the direction from which the train had come. *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169.

To Prove Strength of Cornice.—It is error to admit proof of the strength of a similarly constructed cornice, as shown by experiments, to prove the strength of one in question, claimed to be defective. *Mayer v. Thompson-Hutchinson Bldg. Co.*, 116 Ala. 634, 22 So. 859.

“Evidence of the cost of a scaffold and the material of the roof was wholly irrelevant, and properly excluded. There was some evidence tending to show that the cornice was not properly constructed. Whether this defect existed, and caused the brick to fall was a question for the jury. The court, against the objection of the plaintiff, allowed the defendants to prove that one or more persons stood upon a cornice of the building, which the evidence shows was constructed similar to the one from which the brick fell. The courts are not uniform in their decisions upon this character of evidence. According to the rule which prevails in this state, we are of opinion the court erred in the admission of the evidence. In the case of *Evans v. State*, 109 Ala. 11, 19 So. 535, it was said: ‘The evidence of the witness Napper (allowed against defendant’s objection), that he had shot a pistol hole through a dry plank one time, as an experiment to ascertain the size of

the hole made as compared with the size of the ball which made it, as applicable to this case, is not distinguishable from like experiments denounced as improper and inadmissible in the case of *Tesney v. State*, 77 Ala. 33, and more recent case of *Miller v. State*, 107 Ala. 40, 19 So. 37.’ In the case at bar of one of the issues was whether the brick fell because of the improper construction of the wall and cornice. There was some evidence tending to this conclusion. In rebuttal, the defendants were permitted to prove that a cornice of the building similarly constructed held up the weight of a man. The reasons for excluding the evidence in the one case are equally applicable to the other. The leading principles of law which control the merits of the case seem to us so clear that we do not think there will be any difficulty in framing proper instructions for the jury on another trial.” *Mayer v. Thompson-Hutchinson Bldg. Co.*, 116 Ala. 634, 22 So. 859, 860.

§ 115. Testimony as to Intent, Motive, or Condition of Mind.

§ 115 (1) In General.

Motives, Wishes or Mental Status.

Witnesses can not testify to their motives, wishes, or mental status, and hence testimony that a certain person made statements to witness that made him wish to visit a certain family is not admissible. *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662, cited in note in 23 L. R. A., N. S., 369, 371.

Uncommunicated Thoughts or Suppositions.—On an issue of the right to ride on a pass, a witness may not testify whether she thought she had a right to ride on the pass, as uncommunicated thoughts or suppositions can not be testified to. *Broyles v. Central, etc., R. Co.*, 166 Ala. 616, 52 So. 81, cited in note in 34 L. R. A., N. S., 323.

A witness may not testify, on the issue whether she knew that she was riding on a pass furnished by her mother, that she would have gone if her mother had not said anything about the pass, since a witness can not testify as to uncommunicated motives or intentions, and for the same reason such witness could not

testify that she would have paid her fare if demanded, and that she had money to pay her fare if demanded. *Broyles v. Central, etc., R. Co.*, 166 Ala. 616, 52 So. 81, cited in note in 34 L. R. A., N. S., 323.

The motive or intent with which an act is done, or refused to be done, is an inferential fact, to which a witness can not testify for want of the requisite knowledge; and the principle is, with us, extended to a party testifying as a witness for himself, because such testimony is not susceptible of contradiction. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497, cited in note in 23 L. R. A., N. S., 368, 369.

"The action of the trial court in sustaining the plaintiff's objection to the question of the defendant, 'Why did you not pay the taxes on the land?' was proper. A witness can not testify as to his uncommunicated motive or reason. *Dent v. State*, 105 Ala. 14, 17 So. 94; *Ball v. Farley*, 81 Ala. 288, 1 So. 253." *Lawrence v. Alabama State Land Co.*, 144 Ala. 524, 41 So. 612, 614.

A claim to land in relation to its possession is a fact, and not a statement of mental attitude or undisclosed intention. *Hardy v. Randall*, 173 Ala. 516, 55 So. 997.

"The assignments numbered eight to fifteen, inclusive, are argued together in brief for appellant. They rest upon the action of the court in allowing the witnesses, over appellant's objections, to testify to the absence of claim of ownership of the land in controversy. The sole argument in brief for appellant is that such testimony improperly permitted the recital of a postentertained and unexpressed mental attitude. It was ruled in *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382, in opposition to the argument now presented, that a claim to land, in relation to possession thereof, was a fact, and not a statement of mental attitude or undisclosed intention." *Hardy v. Randall*, 173 Ala. 516, 55 So. 997, 999.

Purpose in Keeping Guard over Goods.—An uncommunicated purpose of a witness in keeping guard over certain goods was inadmissible in evidence. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770.

Effect of Occurrence upon Mind.—

"After the plaintiff, testifying as a witness in his own behalf, had detained the occurrence complained of, he was permitted, over objections duly interposed, to answer the questions, 'Did it embarrass you?'; 'Were you humiliated?' Under recent rulings it must be held that it is reversible error to admit such evidence as to the effect of an occurrence upon one's mind or sensibilities. *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80; *Louisville, etc., R. Co. v. Sharp*, 171 Ala. 212, 55 So. 139." *Interstate Amusement Co. v. Martin (Ala.)*, 62 So. 404, 405.

Secret Intentions.—A party testifying in his own behalf can not testify as to his secret intentions in doing or saying a certain thing. *Vest v. Speakman*, 153 Ala. 393, 44 So. 1017, cited in note in 23 L. R. A., N. S., 369.

Purposes in Withholding Telegram.—

In an action against a telegraph company for nondelivery of a message, a question to the sendee's brother to whom the message was delivered as to why he did not give the telegram to his brother was objectionable, as seeking to bring out the uncommunicated reason or motive of the witness. *Western Union Telegraph Co. v. Long*, 148 Ala. 202, 41 So. 965.

Existence of Malice.—A party can not testify directly as to the existence of malice, but malice as a motive must be gathered from a consideration of all the evidence in the case bearing thereupon. *W. F. Vandiver & Co. v. Waller*, 143 Ala. 411, 39 So. 136.

Motives or Purposes of Witnesses.—

Evidence concerning the uncommunicated motive or purpose of a witness with reference to certain acts to which he had testified was inadmissible. *Reeder v. Huffman*, 148 Ala. 472, 41 So. 177, cited in note in 23 L. R. A., N. S., 369, 371.

Failure to Pay Taxes on Premises.—A defendant, claiming title by adverse possession, can not, when sued in ejectment by a party showing a complete chain of title, testify why he did not pay taxes on the premises; for one can not testify as to his uncommunicated motives. *Lawrence v. Doe*, 144 Ala. 524, 41 So. 612, cited in note in 23 L. R. A., N. S., 369 371.

Injuries to a Servant.—In an action for injuries to a servant, plaintiff was not entitled to testify that he suffered much mental anguish. *Louisville, etc., R. Co. v. Sharp*, 171 Ala. 212, 55 So. 139.

Effect of Representation.—That the representation was relied on by the purchaser, and induced him to consummate the contract, is not a question of fact to which a witness may testify, even though he be the purchaser himself; but is an inference, or conclusion, to be drawn by the jury, from the character of the representation, the conduct of the parties at the time, and all the attendant circumstances. *Sledge v. Scott*, 56 Ala. 202, cited in note in 23 L. R. A., N. S., 370.

Knowledge of Another Person.—In ejectment, a witness may testify as to knowledge of another person that a lot belonging to a third person had been improved, as a person's knowledge of a thing is a fact to which a witness may testify. *Abbett v. Page*, 92 Ala. 571, 9 So. 332.

Testimony as to Advice.—Where defendant in action on a note set up an agreement that certain counterclaims against the payee of the note were to be considered as payments, but it was shown that he had recovered judgment in an independent action against the payee for those claims, testimony as to the advice which induced him to procure the judgment was inadmissible, as the question was the act, and not the motive, which induced it. *Aultman & Co. v. Gamble*, 88 Ala. 424, 7 So. 248.

Willingness to Surrender to Officer.—In trover for the conversion of a mule, where the question whether plaintiff had voluntarily surrendered possession to defendant was in issue, a statement made to plaintiff by her attorney, in the presence of defendant's agent, "to object to any one taking it but an officer of the law," was admissible. *King v. Franklin*, 132 Ala. 559, 31 So. 467.

Abnormal Mental Condition.—Testator was seventy years old at the time of his death, and was the father of five daughters and four sons. Twelve years before his death, he was stricken with paralysis, and his mind was greatly impaired. He then took into his household H., a woman whom he claimed was his illegitimate

daughter, and lived in immoral intercourse with her. He became estranged from his family, and with this woman moved to another county, and lived there with her till he died; children having been born of their intercourse. Testator devised and bequeathed all his property to J., one of his sons. Held, in a proceeding by the heirs to contest the probate of the will on the ground of the insanity of the testator, that it was competent to prove that H. resembled one of testator's daughters, and that she was in fact his illegitimate daughter, in order to show testator's insanity. *Johnson v. Armstrong*, 97 Ala. 731, 12 So. 72.

Evidence, in detinue for a horse, as to whether the defendant supposed that the person with whom he traded for the horse was the owner of it, or was acting as the agent of another, was immaterial, since his understanding would have had no effect on the title acquired. *Jones v. Journey*, 2 Ala. App. 488, 56 So. 850.

Capacity in Which Another Acted.—Evidence, in detinue for a horse, as to whether the defendant supposed that the person with whom he traded for the horse was the owner of it, or was acting as the agent of another, was immaterial, since his understanding would have had no effect on the title acquired. *Jones v. Journey*, 2 Ala. App. 488, 56 So. 850.

Motive of Another Person.—A witness can not be asked to state why another person did a particular act. *Clement v. Cureton*, 36 Ala. 120, cited in note in 23 L. R. A., N. S., 401.

Reason for Failure to Claim Damages.—"The 'reason why' the defendant did not make a claim for such damages, when he executed the note sued on, in the above view of the case, was immaterial, to say nothing of the objection that it was but an attempt to elicit evidence of an uncommunicated motive for his silence, which was not admissible. *Ball v. Farley*, 81 Ala. 288, 1 So. 253; *McCormick v. Joseph*, 77 Ala. 236." *Burks v. Bragg*, 89 Ala. 204, 7 So. 156, 157.

§ 115 (2) Execution and Delivery of Contracts and Conveyances.

Intention of Delivering Deed.—In an action of ejectment, where the material question at issue is whether there was

a sufficient delivery of the deed to pass title to the property involved in the suit, and the evidence shows that after signing and acknowledging the deed the grantor in question left it with his attorney, with no instructions to deliver it to any one it is not competent for such grantor, upon being examined as a witness, to testify that, "if he delivered the deed to his attorney, it was not with the intention of recalling it," or that he delivered it to his attorney to keep for him. *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 506, cited in note in 23 L. R. A., N. S., 371.

§ 115 (3) Wrongful Acts in General.

Suing Out Attachment.—On the issue of malice in suing out an attachment, the attaching plaintiffs can not testify that they entertained no malice or ill will towards the attachment defendant, this being for the jury to determine from the circumstances. *Hamilton v. Maxwell*, 119 Ala. 23, 24 So. 769.

Person Acting in Representative Capacity.—In an action for malicious prosecution, testimony by defendant's superintendent that he swore out the warrant on his own responsibility related to the capacity in which he acted, and not to his intention or motive, and was admissible. *Emerson v. Lowe Mfg. Co.*, 159 Ala. 350, 49 So. 69, cited in note in 23 L. R. A., N. S., 372.

Insulting Language by Theatrical Person.—In an action against a theater proprietor for damages for insulting and defamatory language addressed to plaintiff by a performer, it was reversible error to permit plaintiff to answer questions as to whether he was embarrassed or humiliated by the language. *Interstate Amusement Co. v. Martin (Ala.)*, 62 So. 404.

Mistake in Telegram.—One suing for mistake in a telegram, whereby he was led to believe his wife and baby were dying, could not testify what his mental condition was on receipt of the message. *Lay v. Postal Telegraph Cable Co.*, 171 Ala. 172, 54 So. 529.

Mental Anguish from Delay in Delivering Telegram.—In an action against a telegraph company for delay in delivering a telegram summoning plaintiff to his mother's deathbed, it was error to allow

him to testify that he suffered mental pain because he failed to arrive during her last conscious hours. *Western Union Telegraph Co. v. Cleveland*, 159 Ala. 131, 53 So. 80.

"There was error, also, in permitting the plaintiff to testify that he suffered much mental anguish. This court, after due consideration, has recently decided this point. *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80." *Louisville, etc., R. Co. v. Sharp*, 171 Ala. 212, 55 So. 139, 140; *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

"We think juries may be relied on to draw proper inferences from facts and circumstances capable of proof under the rule which has long prevailed in this state. They may and do infer mental suffering because it is recognized as a common result of those circumstances which establish a legal liability for damages to *Western Union Tel. Co. v. McMorris*, 158 Ala. 563, 48 So. 349. And, as a practical proposition, it is better so than that the plaintiff be allowed to embellish his story by recounting every operation of memory or imagination which may have added poignancy to his grief. The court below was induced no doubt, to its ruling by the decision in the *Heathcoat* case. It erred nevertheless. However, the plaintiff did no more than make the bare statement that he suffered pain and anguish, a fact which the jury would have inferred from other facts in evidence if believed to exist without the aid of his statement. *Western Union Tel. Co. v. Ayers*, 131 Ala. 391, 31 So. 78; *Joyce on Elec.*, §§ 818-820." *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80, 83.

"In the recent case of *Mattingly v. Houston*, 167 Ala. 167, 52 So. 78; *City Nat. Bank v. Jefferies*, 73 Ala. 183, was followed in *Western Union Tel. Co. v. Benson*, 159 Ala. 254, 48 So. 712, on the authority of *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117, and some cases decided by the supreme court of North Carolina, it was ruled that the plaintiff might testify that he would have been present at the funeral of his relative if he had received the telegram of notification. There are scores of cases in this state holding to the contrary of the *Heathcoat* and *Benson* Cases. We have consulted

the following: *Sledge v. Scott*, 56 Ala. 202, 207; *Sternau v. Marx*, 58 Ala. 608; *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Herring v. Skaggs*, 62 Ala. 180; *Wheless v. Rhodes*, 70 Ala. 419, 420; *Burns v. Campbell*, 71 Ala. 271, 291; *Baker v. Trotter*, 73 Ala. 277, 281; *McCormick v. Joseph*, 77 Ala. 236; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Ball v. Farley*, 81 Ala. 288, 1 So. 253; *Burks v. Bragg*, 89 Ala. 204, 7 So. 156; *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615, 8 So. 349; *Fitzpatrick v. Brigman*, 130 Ala. 450, 30 So. 500; *Burke v. State*, 71 Ala. 377, 382; *Wilson v. State*, 73 Ala. 527; *Johnson v. State*, 102 Ala. 1, 16 So. 99; *Dent v. State*, 105 Ala. 14, 17 So. 94; *Holmes v. State*, 136 Ala. 80, 34 So. 180. Consistently, it was said, with the rule of the foregoing cases, it was held in *Linnehan v. State*, 120 Ala. 293, 25 So. 6, that a party might, upon cross-examination, be required to testify as to his motives, intentions, or mental state where those facts are relevant to issues involved. That rule was also stated in the early case of *Peake v. Stout, etc., Co.*, 8 Ala. 647. It may be that, in principle, both these rules are illogical survivals of the common law rule of disqualification for interest, and certainly they are not within any exception of the statute abrogating the common law rule on the subject." *Western Union Tel. Co. v. Cleveland*, 169 Ala. 131, 53 So. 80, 82.

§ 115 (4) Negligence and Contributory Negligence.

Collision between Car and Wagon.—A statement by the motorman whose car collided with plaintiff's wagon and injured him that he considered plaintiff's actions in driving a signal for him to come ahead, was inadmissible as being opinion or belief. *Birmingham Railway & Electric Co. v. Franscomb*, 124 Ala. 621, 27 So. 508.

Injuries to Employee.—In an action by a father for injuries to his son owing to negligence of the son's employer, a question put to plaintiff as to whether he consented that the son might work at defendant's foundry was not objectionable as calling for an uncommunicated mental status. *Dimmick Pipe Co. v. Wood*, 139 Ala. 282, 35 So. 885, cited in note in 23 L. R. A., N. S., 372.

§ 116. Evidence Admissible by Reason of Admission of Similar Evidence of Adverse Party.

§ 116 (1) In General.

Evidence as to Physical Condition.—Where plaintiff testified, in an action for personal injuries, that he was permanently injured, and suffered in the arm, head, and groin, it was competent to admit evidence that he was able to, and did, perform police duty as a patrolman for the defendant city, five months after receiving such injury. *Abbott v. Mobile*, 119 Ala. 595, 24 So. 565.

Proof of Custom.—In an action on an attachment bond sued out on the ground that plaintiff was about to leave the state, where evidence was admitted, without objection, that she did leave the state in the summer of 1888, it was competent for plaintiff to rebut such evidence by showing that it was her habit to leave on a visit every summer. *Baldwin v. Walker*, 94 Ala. 514, 10 So. 391.

Cross-Examination.—Where defendant called out on cross-examination of the widow, in an action by heirs for the willful cutting of timber, that defendant's foreman went to her after the cutting and endeavored to get her sign a contract, plaintiffs may, irrespective of the materiality of the testimony, cross-examine the foreman as to whether he went to see the widow after the suit was brought. *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163.

The testimony of the widow and that of the foreman being at variance as to the number of interviews between them, such cross-examination is material, as tending to explain the discrepancy. *Louisville & N. R. Co. v. Hill*, 115 Ala. 334, 22 So. 163.

A witness in an action upon a contract, having testified to what took place at an interview between the parties at the plaintiff's house, may be asked on cross-examination how he happened to go with the defendant to the plaintiff's house. *Thomason v. Dill*, 30 Ala. 444, cited in note in 23 L. R. A., N. S., 372.

Introduction of Account.—Where a defendant sued on an open account introduces in evidence in his own behalf plaintiff's itemized account, he waives objection to its introduction by the plaintiff. Car-

ter v. Fischer, 127 Ala. 52, 28 So. 376, cited in note in 42 L. R. A., N. S., 728.

Amount of Rainfall.—"The defendant sought to introduce evidence tending to show the character of the rain that fell with the view of the showing that it was unprecedented. Plaintiff in rebuttal sought to show, that it was not even extraordinary in that section, and questions designed to bring out such evidence were not allowed. It is manifest, that under such conditions the court should have allowed the evidence. A municipal corporation, for the efficiency of its sewers, as has been held, is bound to make provision for such floods as may be reasonably expected, judging from such as have previously occurred, although at irregular and wide intervals of time, and is not liable for damages which could not have provided for or guarded against by the exercise of ordinary diligence, such as unprecedented rains. 10 Am. & Eng. Enc. Law, 243; 13 Am. & Eng. Enc. Law, 714; 24 Am. & Eng. Enc. Law (1st Ed.) 948; Columbus, etc., R. Co. v. Bridges, 86 Ala. 448, 5 So. 864." Arndt v. Cullman, 132 Ala. 540, 31 So. 478, 480.

Explaining Statement as to Assignment.

—And where an assignment was attacked for fraud, and it was shown that the assignor had said that he might make an assignment, and that he might be forced to make one, it is competent for him to rebut any prejudicial inference sought to be drawn from this evidence by any reasonable explanation he can give; but it is not competent for him to state in explanation the uncommunicated intention or purpose which actuated him to make the statement. Richardson v. Stringfellow, 100 Ala. 416, 14 So. 283, cited in note in 23 L. R. A., N. S., 372.

Can Not Call for Part of Conversation.

—A party is not allowed to garble an admission, or to call for part of a transaction only; if he calls for an admission, either by bill of discovery or interrogatories under the statute, the opposite party has the right to state all that was said at the time in relation to the same subject; if he seeks a discovery as to an act, the other party may legitimately state in his answer whatever would be part of the res gestæ. Pritchett v. Munroe, 22 Ala. 501.

§ 116 (2) Character or Reputation.

Nature of Intimacy.—The contestants of a will, for the purpose of showing an adulterous connection of the testator with the mother of his legatees, adduced evidence of his intimacy with her, his visits to her house, and her visits to his house, during her husband's absence, etc. Held, that the proponent might rebut this evidence by showing that this intimacy was characterized by a religious sentiment. Dunlap v. Robinson, 28 Ala. 100.

To Sustain Reputation.—Where the record shows that the credit and reputation of the plaintiff was put in issue by the evidence, he may offer evidence to sustain it. Goldsmith v. Picard, 27 Ala. 142.

To Sustain Character of Plaintiff.—Where a defendant is improperly permitted to assail the character of plaintiff, there is no error in permitting plaintiff to countervail it by evidence of good character. Findlay v. Pruitt, 9 Port. 195.

§ 116 (3) Title, Ownership, or Possession of Property.

In Action of Trover.—In trover by a mortgagee against a purchaser from the mortgagor the mortgagor testified for defendant that the mortgagee had obtained a judgment on the mortgage, which had been compromised, and paid to the mortgagee's agent. Held, that defendant was precluded from objecting to oral evidence of the amount and nonpayment of the judgment and execution. Beyer v. Fields, 134 Ala. 236, 32 So. 742.

To Show Financial Standing.—Where a property right is in issue, and plaintiff introduce evidence showing that claimant's means were too limited to have purchased the property, claimant may prove that he had sufficient means. Andrews v. Jones, 10 Ala. 460.

To Show Ownership of Property.—Evidence that a horse claimed by defendant was retained by plaintiff and offered for sale may be rebutted by evidence that such offer was by defendant's authority. Mobley v. Bilberry, 1 Ala. 428.

Correction of Tax Schedule.—Where plaintiff proved that the defendant did not include the slaves in controversy in the sworn schedule of his taxable property rendered to the assessor, but that they

were included in the plaintiff's schedule of property, which was returned at the same time with that of the defendant and in his presence, held, that the defendant could not be allowed, for the purpose of rebutting the presumption arising from this evidence, to show that he afterwards corrected his schedule, and the reasons assigned by him to the assessor for his conduct; and the fact that "he asked leave of the assessor to correct any mistake, and said something about getting advice," when first giving in his schedule, does not affect the principle. *McGehee v. Mahone*, 37 Ala. 258.

Showing Advancement.—That after plaintiffs had introduced evidence of declarations made by the deceased, as to his intention to give each one of his daughters the same amount of property, and of the amount given to the others, it was competent for the defendants to rebut this proof, evidence showing that the deceased had given money and property to plaintiffs by way of advancement, and had supplied them with the means of living for a number of years. *Harrison v. Cordle*, 22 Ala. 457.

§ 116 (4) Admission of Similar Evidence When First Evidence Was Inadmissible.

Inadmissible Evidence.—Where inadmissible evidence is allowed to be introduced on one side, similar evidence is rendered admissible in rebuttal. *Winslow v. State*, 92 Ala. 78, 9 So. 728. But see *Smith v. Pritchett*, 98 Ala. 649, 13 So. 569, where it was held in an action for rent, where defendant under a plea of the general issue, introduced evidence that the alleged lease of plaintiff was not made, and that he leased the premises of C., who was in possession, claiming to be owner, that, though defendant's evidence was not objected to, it was error to allow plaintiff to show in rebuttal that his title was superior to that of C., and that C. was his tenant the previous year.

Irrelevant Evidence.—It is not error to allow the admission of irrelevant testimony to rebut other irrelevant testimony, which has been previously introduced by the party objecting. *McIntyre v. White*, 124 Ala. 177, 26 So. 937.

Where immaterial or irrelevant evi-

dence has been admitted in behalf of one party, the other party may introduce similar evidence to rebut it. *Havis v. Taylor*, 13 Ala. 324; *Flinn v. Barber*, 59 Ala. 446.

Hearsay Evidence.—Calling for a question put by the witness to a third person gives the party no right to call for the answer also, it being mere hearsay. *Floyd v. Hamilton*, 33 Ala. 235.

§ 116 (5) Documentary Evidence.

Incorporated Papers.—Where, on a certain issue between plaintiff and garnishees, plaintiff had introduced a part of certain incorporation proceedings, showing that all the steps necessary to a complete incorporation had been taken, except the issuance of the final certificates, it was competent for the garnishees to introduce the balance of such proceedings, including the issuance of such final certificate. *Curtis v. Parker & Co.*, 136 Ala. 217, 33 So. 935.

Statement of Account.—Where an attorney suing for services relied on a paper in the form of an account rendered defendant, which recited that the sum due was for services in certain suits, and on which paper defendant had indorsed "Correct" and his name, and introduced testimony tending to show what services were not comprehended in the account, it was error not to permit defendant to introduce testimony tending to show what was comprehended. *Pollak v. Gunter*, 162 Ala. 317, 50 So. 155.

§ 116 (6) Care, Skill, Competency, or Mental Condition.

Competency as a Painter.—Where a defendant refused to permit plaintiff to complete a contract to paint a number of houses because he thought the work was not being done in a workmanlike manner, and a witness was called to testify that plaintiff was a competent painter, the exclusion of testimony offered by defendant to show that he was not a competent painter was error. *J. B. Anderson & Co. v. Brammer*, 4 Ala. App. 596, 58 So. 941.

Quality of Corn.—In an action to recover for services rendered as an overseer of a plantation, defendant, in order to show that plaintiff had neglected his duty, introduced evidence that during the year that plaintiff was overseer the corn was

all consumed by June, and then offered to show that during the next year, under another overseer and with the same number of persons and stock, the same quantity of corn lasted till September. Held, that plaintiff could show in rebuttal the bad quality of the corn on the place when he took charge of the plantation. *Spiva v. Stapleton*, 38 Ala. 171.

Manifestation of Hostility.—In trover for the conversion of a slave, which the evidence tended to prove had been stolen by the defendant, the plaintiff having introduced evidence to show that the defendant and his accomplice, by whom the slave was run off, "were quite intimate and friendly, and acted in concert," it was held that the defendant might rebut this evidence by proving that his alleged accomplice "manifested great hostility to him." *Martin v. Martin*, 25 Ala. 201.

Mental Condition of Defendant.—When non est factum is pleaded to a declaration on a promissory note, and the defendant has introduced evidence tending to show that he was insane "at, before, and after the execution of the note" by him, the plaintiff may rebut this evidence by proof of the defendant's condition seventeen days after its execution. *Walker v. Clay*, 21 Ala. 797.

"It is insisted that the court erred in allowing the witness Austin, introduced by the plaintiffs, to testify as to the condition of Walker seventeen days after the execution of the note. The bill of exceptions shows, that the defendant introduced testimony tending to show that the said Walker was insane 'at, after, and before the time of the execution of the said note.' This testimony, we presume, was offered under the plea of non est factum, seeking to avoid the note on the ground of insanity; and we think it clear that the testimony of Austin was admissible, as tending to rebut the testimony of the defendant on this issue. 2 Greenleaf Ev., § 371; *McLean v. State*, 16 Ala. 672; *McAllister v. State*, 17 Ala. 434. We do not think that seventeen days after the execution of the note was too remote to render the testimony irrelevant." *Walker v. Clay*, 21 Ala. 797, 806.

Mental Condition at Time of the Execution of Note.—When non est factum is pleaded to a declaration on a promissory

note, and the defendant has introduced evidence tending to show that he was insane, "at, before and after the time of the execution of the note" by him, the plaintiff may rebut this evidence by proof of the defendant's condition seventeen days after its execution. *Walker v. Clay*, 21 Ala. 797.

§ 116 (7) Declarations or Conversations as Rebuttal.

Sale of Land.—Plaintiff and the owner having stated what passed between them and between the owner and defendant as to the authority given plaintiff and defendant regarding a sale of the land, it was error to refuse to permit defendant to give his version of what passed between him and the owner. *Wefel v. Stillman*, 151 Ala. 249, 44 So. 203.

Evidence as to Conversation.—Where plaintiff has given evidence as to a conversation, defendant may also give his version of it. *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Evidence Brought out by Both Parties.—A statement forming a part of a conversation, portions of which have been called out by both parties, is properly received in evidence. *Advertiser Co. v. Jones*, 169 Ala. 196, 670, 53 So. 759.

Qualified Refusal to Deliver Property.—In detinue, after a demand and refusal to deliver the property has been proved by the plaintiff, the defendant may show that his refusal qualified, but can not be allowed to prove his own declarations at the time relative to his title to the property. *Brown v. Brown*, 5 Ala. 508.

Instructions Relative to Collection of Note.—When a witness for the defense states that a note was left with an individual as a friend to receive payment, it is not erroneous to permit the plaintiff to prove by that person that it was left with him as an attorney, and to state what were his instructions relative to it. *Armstead v. Thomas*, 9 Ala. 586.

Testimony as to Different Conversations.—Where a witness testifies that the plaintiff, in answer to a question, made certain admissions in one conversation, and the plaintiff testifies that the question was asked in a different conversation, it is error to refuse to permit the plaintiff to testify what reply he made, on the as-

sumption that the question relates to a different conversation from that about which the witness testified. It is a question for the jury to determine, under appropriate instructions from the court. *Cousins v. Jackson*, 52 Ala. 262.

§ 116 (8) Damage or Injuries.

Value of Land.—In an action against a railroad company for trespass to land by constructing a track thereon, it was not error to allow plaintiff to show the value of a house on the land, where chiefly suited to manufacturing purposes. *Southern Ry. Co. v. McEntire*, 169 Ala. 42, 53 So. 158.

Proof of Contract.—Where, in an action against a third person for destroying plaintiff's lien as a landlord on a crop, plaintiff testified as to the terms of the tenancy contract, what he had furnished under it, how much rent he had received, and what was due under it, it was error to refuse to permit defendant to show by the tenant the substance of the contract. *Fairbanks v. Chunn*, 2 Ala. App. 642, 56 So. 847.

Action for Failure to Deliver Cattle.—Where, in an action against a carrier for failure to promptly deliver cattle intrusted for shipment, the defendant by cross interrogatories to deponents for the plaintiff and by direct interrogatories to its own witnesses, sought proof as to the place and hours of making delivery, it can not complain of the admission of such evidence on behalf of the plaintiff. *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513.

Leaving Bomb in Public Alley.—In an action for injuries to plaintiff resulting from defendant's wrongful act in leaving a bomb in a public alley, after defendant had introduced evidence tending to show that children were not in the habit of playing in the alley, plaintiff was entitled to introduce evidence in rebuttal thereof. *Wells v. Gallagher*, 144 Ala. 363, 36 So. 747.

Rebutting Evidence of Suicide.—Where, in an action for the death of one run over by a railroad train, defendant, by the introduction of certain evidence, tendered an issue of suicide, it was competent for plaintiff to offer evidence in rebuttal. *Alabama Great Southern R. Co. v. Guest*, 144 Ala. 373, 39 So. 654.

Ability to Perform Duties.—Where plaintiff testified, in an action for personal injuries, that he was permanently injured, and suffered in the arm, head, and groin, it was competent to admit evidence that he was able to, and did perform police duty as a patrolman for the defendant city, five months after receiving such injury. *Abbott v. Mobile*, 119 Ala. 595, 24 So. 565.

§ 117. Evidence Inadmissible by Reason of Exclusion of Similar Evidence of Adverse Party.

When evidence is offered as a whole, parts of which are inadmissible, the primary court may, without error, exclude the whole. *Warren v. Wagner*, 75 Ala. 188.

Action for Wrongful Death.—Where, in an action for the death of one run over by a railroad train, defendant, by the introduction of certain evidence, tendered an issue of suicide, it was competent for plaintiff to offer evidence in rebuttal. *Alabama, etc., R. Co. v. Guest*, 144 Ala. 373, 39 So. 654, 655.

Injury from Train.—A witness testified that he was standing behind the team when it started across the track; that he heard the train coming, and looked up and saw it; that he called to the driver, and told him not to attempt to cross, but the driver seemed excited, and whipped up the team; and that he did not stop before crossing, nor appear to look or listen. Held, that it was error not to permit the witness to state whether the driver could have seen the cars in time to have avoided the accident. *Alabama, etc., R. Co. v. Linn*, 103 Ala. 134, 15 So. 508.

V. BEST SECONDARY EVIDENCE.

§ 118. Necessity and Admissibility of Best Evidence.

See, also, post, "Writings Collateral to Issues," § 130.

§ 118 (1) Existence of Better Evidence as Ground of Exclusion.

Statement of Rule.—It is a general rule, that the best evidence a fact is susceptible of, must be produced, if in existence, and its production be practicable. *Wiggins v. Pryor*, 3 Port. 430, 433; *Sally v. Capps*, 1 Ala. 121, 122; *Patton v. Rambo*, 20 Ala.

485; *Watson v. Simmons*, 91 Ala. 567, 8 So. 347; *Thomas v. Williams*, 170 Ala. 522, 54 So. 494, 495; *Sommerville v. Stephenson*, 3 Stew. 271, 277; *Mitchell v. Mitchell*, 3 Stew. & P. 81, cited in note in 5 L. R. A. 975; *Mordecai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 584.

The reason of the rule is founded in this idea; if there be better evidence extant than that offered, the inference is fair, that if it were produced, it would make against the party offering such secondary proof; hence the requisition that the best attainable evidence must be offered. *Wiggins v. Pryor*, 3 Port. 430, 433; *Sally v. Capps*, 1 Ala. 121, 122; *Mordecai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 584.

§ 118 (2) Admissibility of Best Evidence.

Primary Evidence Admissible.—When all the evidence is of a primary character it must go to the jury, and can not be excluded because more conclusive proof might have been offered. *Patton v. Rambo*, 20 Ala. 485.

Failure to Produce Legal Evidence.—By the established rule, the best evidence the nature of the question admits of may be received, but not the best evidence the exigencies of the particular case admit of; and the inability of a party, through accident or misfortune, to adduce legal evidence, does not authorize the admission of illegal evidence. *Comer v. Hart*, 79 Ala. 389.

To Prove Population of Town.—On the issue of the population of a town, evidence of any person having knowledge of the fact was competent. *Louisville & N. R. Co. v. Johnson*, 135 Ala. 232, 33 So. 661.

Examination by Public Examiner.—The fact that the examiner of public accounts has made an examination of the accounts of a certain department is provable by parol. *Culver v. Caldwell*, 137 Ala. 125, 34 So. 13.

Ownership of Property.—"Though the general rule be as we have stated, it can not be laid down as a universal rule, that where written evidence of a fact exists, all parol evidence of the same fact must be excluded. In many cases, it is competent for a witness to depose to a fact, though proof of the same fact might be shown by a writing. If it become neces-

sary to prove the ownership of an article of personal property in a particular individual, it is competent for a witness to state that that individual informed him he was the owner. Saying nothing of any writing evidencing his ownership; or in a case where an alleged vendor was seeking to recover, it might be shown that he admitted the sale, though there was evidence in existence to prove the conveyance." *Wiggins v. Pryor*, 3 Port. 430, 434.

§ 118 (3) Existence of Better Evidence.

Presumption as to Existence of Better Evidence.—When secondary evidence is offered which, *ex natura rei*, supposes a higher degree of secondary evidence, the best should be produced; as, a certified or examined copy of an instrument required to be recorded, or a letter press copy of a writing, if shown to be in existence; but, where there is no ground for legal presumption that better secondary evidence exists, any proof is received which is not inadmissible by the rules of law, unless the party objecting can show that better was known to the other, and might have been produced. *Jaques v. Horton*, 76 Ala. 238.

Best Evidence Should Be Produced.—"If the secondary evidence be not fully satisfactory, they who are presumed to have had control of the best, should have produced it, for in this case they had been notified to do so. Although it was not entirely satisfactory, yet under these circumstances, we think it was right to admit it. See *Bright v. Young*, 15 Ala. 112, 117." *Mim v. Sturtevant*, 18 Ala. 359, 364.

Existence of Better Evidence Must Be Shown.—Where a witness had testified to the execution of an instrument purporting to be a transfer of the property and assets of a corporation, it was error to exclude, as not the best evidence, his testimony that its officers were duly authorized by vote to execute such transfer, as neither the statement itself, nor the other evidence, showed that there was in existence written evidence of the vote referred to. *Martin Mach. Works v. Miller*, 132 Ala. 629, 32 So. 305.

"In the absence of any charter prohibition, a vote of a private corporation to confer authority on an agent to execute

a conveyance of personal property may or may not be evidenced by writing, and when not shown to be so evidenced, may be proved orally. *Morrill v. Manufacturing Co.*, 32 Hun 543; *Moss v. Averell*, 10 N. Y. 454; *Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Preston v. Lead Co.*, 51 Mo. 43. See, also, *Cook, Stockh.*, § 714." *Martin Mach. Works v. Miller*, 132 Ala. 629, 32 So. 305, 306.

Proof of Cause of Action.—In an action to recover money had and received, it was shown that the defendant in the pending suit had previously instituted an attachment suit against the plaintiff; that, in said attachment suit the defendant claimed the property levied upon as exempt; that there was no contest of the claim of exemption, and judgment was rendered, in which it was declared that as against the recovery, there was no claim of exemptions as to personal property by the defendant in said suit. Upon the sale of the property levied upon under the writ of attachment, the plaintiff in the attachment suit was paid the amount of the judgment. On appeal to the supreme court, the judgment in the attachment suit was amended or modified by striking therefrom the waiver as to the exemption of personal property; and, thereupon, the present plaintiff, who was the defendant in the attachment suit, brought the pending action against the plaintiff in said suit to recover the amount so paid out of the proceeds of the sale under the attachment. Held, that it was competent to show by the clerk of the court in which the attachment suit was brought, the identity of the cause decided in the supreme court with the attachment suit between the same parties, and that, therefore, the testimony of said clerk that there was no other case pending in said court between the same parties, except the one appealed from, and in which the plaintiff therein was paid the amount sought to be recovered by the pending suit, is admissible. *First Nat. Bank v. Lippman*, 129 Ala. 608, 30 So. 19.

Parol Evidence of Lost Telegram.—In an action by a foreman for injuries from the derailment of a car, he testified that he received instruction from the conductor, by telegram signed by M., and that he had lost the telegram and could

not produce it. Held, that an objection that the telegram spoken of by plaintiff was not the original, but a mere copy, was untenable, as it did not appear from the evidence, or from judicial knowledge of the method used in train dispatching, that any copy was made. *Southern Ry. Co. v. Howell*, 135 Ala. 639, 34 So. 6.

Earning Capacity of Railroad Man.—

In an action for death of a railroad employee, his earning capacity could be shown without proving the contract between him and the railroad company. *Central of Georgia Ry. Co. v. Alexander*, 144 Ala. 257, 40 So. 424.

To Prove Award.—Where a witness states that, according to his best recollection, written evidence of an award exists, it is sufficient, in the absence of opposing proof, to exclude parol testimony of the award. *Scarborough v. Reynolds*, 12 Ala. 252.

Receipt of Letter.—Where a witness stated that he had received a letter inclosing a remittance and containing instructions as to its application, this was not parol evidence of the contents of the letter, such as should be excluded. *Andrews v. Jones*, 10 Ala. 460.

Action on Tax Collector's Bond.—In an action on a tax collector's bond, where the issue is that the principal obligor had assessed, collected, and paid over the taxes, it is competent for the plaintiff to inquire of a witness as to the probable amount of the taxes; there being no proof of better evidence. *Adams v. State*, 1 Ala. 627.

§ 118 (4) Degrees of Oral Evidence.

Handwriting of Justice.—The handwriting of a justice of the peace to an execution issued by him may be proved by a third person, without calling the justice himself. *McCaskle v. Amarine*, 12 Ala. 17.

Declarations of Competent Witness.—

In an action brought by the assignee of a note given for the purchase money of land, the declarations of the vendor can not be given in evidence that he had no title to the land, as he is competent to testify for the defendant. *Clemens v. Loggins*, 1 Ala. 622.

§ 118 (5) Matters Not Required to Be in Writing or Recorded.

To Identify Writ.—Where two writs of

ad quod damnum are issued on the same day, parol evidence is admissible to show which first issued. *Hendricks v. Johnson*, 6 Port. 472.

To Show Homestead.—Whether one's land is his homestead may be shown by parol. *Sloss-Sheffield Steel & Iron Co. v. House*, 157 Ala. 574, 47 So. 572.

Failure to Reinstate Insured.—An officer of a mutual benefit association could be asked whether an insured was reinstated as provided by the by-laws, in order to show that he had not been reinstated; since, if he was not reinstated, there was no record of that fact. *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354.

§ 118 (6) Matters Required to Be in Writing or Recorded.

General Rule.—What ought to be of record must be proved by the record. *Milbra v. Sloss-Sheffield Steel, etc., Co. (Ala.)*, 62 So. 176.

Written Evidence of High Grade.—“Written evidence is esteemed a higher grade of testimony than that which exists merely in the memory of witnesses, and in general supersedes it. To illustrate the proposition, parol proof of the conveyance of property, where there is written evidence of the fact, would not be evidence in favor of a purchaser against his vendor, unless the nonproduction of the writing was satisfactorily accounted for.” *Wiggins v. Pryor*, 3 Port. 430, 433.

§ 118 (7) Matters Made Best Evidence by Statute.

Certificate of Toll Commissioner.—When the charter of a corporation invested it with power to take tolls, and provided also for the appointment of a commissioner to certify to the governor when the river on which the tolls were collectible is out of order, no other evidence than the commissioner's certificate is admissible to show that the river was out of repair. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82.

§ 118 (8) Exclusion of Documentary Evidence as Inferior to Oral Evidence.

Books of Private Corporation.—Where a pledgor authorizes a pledgee to sell a pledge of stock through any broker on

the stock exchange, a private corporation, are not admissible in an action between the pledgor and pledgee to show that it was sold as directed, without accounting for the absence of the secretary who made the entries. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, cited in note in 53 L. R. A. 521, 542.

Book of Sales.—A. employed B. to ship goods to a particular house. In an action by B. against A. it was held that the account of sales of the goods by such house was not objectionable, as secondary evidence, to show that the goods had been shipped according to agreement. *Black v. Richards' Adm'r.*, 2 Stew. & P. 338.

§ 119. Facts or Transactions Described in or Evidenced by Writing.

§ 119 (1) In General.

Contents of Written Instruments.—

“For the best evidence of the contents of a written instrument, consists in the actual production of it; and secondary evidence of it can not be admitted, until the impossibility of producing it, has been manifested to the court. 1 Starkie, 329.” *Mitchell v. Mitchell*, 3 Stew. & P. 81, 84, cited in note in 5 L. R. A., N. S., 976.

“Copies of letters can not be classed as original evidence, and were admissible except upon proof of notice to produce the original, or after properly accounting for the absence of the original. 13 Am. & Eng. Enc. Law, 261, 262, 21 Am. & Eng. Enc. Law, 984-989.” *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

Copies of Telegrams.—The general rule which requires the production of the best evidence, and excludes secondary evidence of a writing which can be produced, is applicable to messages sent by telegraph; but, whether the message given to the telegraph office to be sent, or that delivered at the place of destination to the party to whom it is sent, be regarded as the original, the latter may be received in evidence, when it is shown that the custodian of the other, and the office to which it was delivered to be sent, are beyond the jurisdiction of the court; and an admission by the party against whom it is offered, that the mes-

sage received is correct, renders it admissible evidence. *Whidden & Sons v. Merchants', etc., Nat. Bank*, 64 Ala. 1.

Value of Goods Assigned.—A witness may testify to the value of certain goods conveyed by deed of assignment, although he had made out a written invoice or schedule of the goods six or seven weeks previously to the assignment. *O'Neal v. Brown*, 20 Ala. 510.

§ 119 (2) Payment or Release.

Payment of contracts, and sometimes of judgments, may be proved by parol, although there may be written or record evidence. The rule requiring agreements, deeds, etc., to be produced, applies only where they form part of the issue or become material to it. *Planters' & Merchants' Bank v. Borland*, 5 Ala. 531; *Planter's & Merchants' Bank v. Willis*, 5 Ala. 770, cited in note in 35 L. R. A. 347.

Parol evidence is admissible to show the payment of money, though a receipt was given at the time, where the party testifying speaks from knowledge of the transaction itself, and not from the fact of having seen the receipt. *Wiggins v. Pryor*, 3 Port. 430.

Need Not Show Destruction of Receipt.—Parol evidence of the payment of money by the witness, for which he received a receipt, is admissible without producing the receipt, or showing its loss or destruction. *Wiggins v. Pryor*, 3 Port. 430.

§ 119 (3) Ownership, Possession, or Control.

Ownership of land can not be proved by parol evidence. *Tutwiler Coal, etc., Co. v. Wheeler*, 149 Ala. 354, 43 So. 15.

Parol evidence can not be received to prove a title to land by patent or deed, until a proper foundation is laid for its introduction. *Hussey v. Roquemore*, 27 Ala. 281.

In an action for damages to real property, the question to plaintiff, "How many acres do you own there?" is objectionable, as involving the question of title to land. *Tutwiler Coal, Coke & Iron Co. v. Wheeler*, 149 Ala. 354, 43 So. 15.

"The plaintiff averred his ownership of the land and undertook to prove it by parol evidence. This he could not

do under the well settled rules of evidence. The question to the plaintiff 'How many acres do you own there?' embraced in the inquiry something more than the number of acres in a particular tract, and extended to proof of title to the land. For this latter purpose this evidence was incompetent. The court erred in overruling the defendant's objection to this question. *Withers v. State*, 120 Ala. 394, 45 So. 568. But, if this were the only error, the cause would not be reversed, as it was rendered harmless by the defendant subsequently introducing evidence showing that the land in question was the plaintiff's land." *Tutwiler Coal etc., Co. v. Wheeler*, 149 Ala. 354, 43 So. 15, 16.

Claimant to rebut the force of a showing made by plaintiff that the property at the time of the levy was on the premises occupied by defendant, could not show by parol that the title to such premises was in her. *Arnold v. Cofer*, 135 Ala. 364, 33 So. 539.

Deed as Best Evidence.—A question as to when a person acquired real estate, if referring to title, is not the best evidence, but the deed conveying the land is the best evidence. *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725.

Parol Proof of Possession as Indicative of Title.—In an action against a railroad company to recover damages resulting from a fire alleged to have been caused by the negligent escape of sparks from a locomotive on the defendant's road, in order to prove title to the lands on which the house that was burned was located it is not incumbent upon the plaintiff to introduce written evidence thereof; but parol proof of the possession of such property by the plaintiff under a claim of ownership is admissible as evidence of title, and is sufficient to raise a presumption of ownership, in the absence of evidence of ownership in another. *Alabama G. S. R. Co. v. Johnston*, 128 Ala. 283, 29 So. 771.

The ownership of personal property may be proved by oral testimony, unless the question of the transfer of the title arises between the parties to the conveyance, and is the direct issue in the cause, then the highest and best evidence must be produced, or its absence ac-

counted for. *Street v. Nelson*, 67 Ala. 504.

"It was of prime importance in this case to prove a joint ownership in plaintiffs of the property charged to have been converted by defendant. Ownership of personal property, as a rule, can be proved as a fact by oral testimony, without producing the documentary evidence which creates the title, unless the question of such transfer of titles arises between the alleged parties to the conveyance. When that is the case, and the question of transfer vel non is the direct issue in the cause, then the highest and best evidence must be produced, or its absence accounted for. *Graham v. Lockhart*, 8 Ala. 9; *Dixon v. Barclay*, 22 Ala. 370; *Snodgrass v. Branch Bank*, 25 Ala. 161, 1 Brick. Dig. 856, § 752; *May v. May*, 1 Port. 229; *Peck v. Dinsmore*, 4 Port. 212; *Cloud v. Patterson*, 1 Stew. 394." *Street v. Nelson*, 67 Ala. 504, 507.

§ 119 (4) Authority, Appointment, or Commission.

Appointment of Agent of Corporation.—Where it is claimed by a foreign corporation that the appointment of its state agent is in writing, the agency can not be proved by a copy of the appointment, unless the necessity for the introduction of secondary evidence be shown. *Newby v. New England Mortg. Security Co.*, 110 Ala. 663, 17 So. 940.

§ 119 (5) Judicial Acts, Proceedings, and Records in General.

Contest of Will.—Since Code, § 2317, requires that when a will is contested the grounds of contest shall be filed in writing and become part of the record, secondary evidence of them can not be received without proper proof of their loss or destruction. *Donegan v. Wade*, 70 Ala. 501.

Parol Proof of Basis of Judgment.—In an action on a judgment, it was error to allow witnesses to testify that it was based on certain coupons, without producing them or accounting for their absence. *City Council of Eufaula v. Hickman*, 57 Ala. 338.

Proceedings before Justice.—As the proceedings before a justice of the peace in actions for forcible entry and detainer or for unlawful detainer are re-

quired to be in writing, secondary evidence of the contents of such writings is inadmissible, until the absence of the originals is accounted for. *Watson v. State*, 63 Ala. 19.

§ 119 (6) Recovery, Entry, or Enforcement of Judgment.

Enforcement of Judgment.—Where one of two joint owners of crops has been evicted by the other in an action of unlawful detainer, the record or papers of such action is the best evidence of the eviction, in a subsequent proceeding under Code, §§ 3521-3529, for partition of the crops. *Gassenheimer v. Huguley*, 64 Ala. 83.

"The introduction of the complaint and the pleas in the former ejectment suit tended to show, and were admissible for the purpose of showing a repudiation of plaintiffs' title, and the assertion of a possession hostile to them. For this purpose, the objection interposed, that the pleas were not marked 'Filed,' and were simply found in the file of papers in that cause, was not good. The evidence of W. H. Smith established the fact, that before the trial of the cause, the original pleas had been lost, but that these were substituted for them, and the cause was actually tried on those identical substituted pleas. This identification of them was as full as if the originals had been produced, and there was no error in the admission of this evidence, as tending to show notice to and knowledge of plaintiffs that defendants repudiated their title. If the evidence was competent for this purpose, and was admitted generally, the opposite party could not move its exclusion, but if he desired, should have requested instructions from the court, limiting its operation. *Scruggs v. Bibb*, 33 Ala. 481; *Park v. Wooten*, 35 Ala. 242." *Ponder v. Cheaves*, 104 Ala. 307, 16 So. 145, 147.

§ 119 (7) Orders of Court.

To Show Reversal by Appellate Court.—The certificate of the clerk of the supreme court to the court below that a judgment of the circuit court has been reversed is not sufficient to support a plea of reversal. A duly certified copy of the record is necessary. *Draughan v. Tombeckbee Bank*, 3 Stew. 54.

Reversal of Suit in Attachment.—The clerk's certificate of reversal of the judgment rendered in an attachment suit is not competent evidence to prove the fact of such reversal in a suit on the attachment bond, a properly certified and exemplified transcript of the record being the best evidence thereof. *Dothard v. Sheid*, 69 Ala. 135.

§ 119 (8) Attachment, Garnishment, or Execution.

Garnishment.—Proceedings in garnishment before a justice of the peace must be produced or proved by sworn copies. Only upon a proper predicate can they be proved by parol. *Blackman v. Dowling*, 57 Ala. 78.

"But in allowing parol evidence of the garnishment against the appellee, as the debtor of appellant, and the judgment before the justice of the peace, the circuit court erred. The proceedings before the justice were necessarily in writing, though not technically records, and must have been produced or proved by sworn copies. *Ware v. Roberson*, 18 Ala. 105; *Jones v. Davis*, 2 Ala. 730; *Kennedy v. Dear*, 6 Port. 90." *Blackman v. Dowling*, 57 Ala. 78, 80.

The delivery of an execution to a sheriff may be proved by a memorandum made on the execution docket, and the oath of the clerk that it was issued in conformity thereto, without the production of the writ or notice to produce it. *Neale v. Caldwell*, 3 Stew. 134.

Levy of Execution.—Parol evidence is inadmissible to prove an execution, unless its loss or destruction is first proved, or its absence accounted for, or a transcript of the record containing it is produced. *Smelser v. Drane*, 19 Ala. 245.

A question whether a sheriff took possession of goods under a writ of execution called for secondary evidence of the writ, and was properly excluded. *Stephens v. Head*, 138 Ala. 455, 35 So. 565.

An execution should be proven by the original or by a certified copy, not by entries from the execution docket of the court. *Ayers v. Roper*, 111 Ala. 651, 20 So. 460.

In a suit for the conversion of a mule alleged to have been removed by defendant to another state after the con-

version in order that it might be levied on under process issued by a justice of the latter state, testimony is admissible to show that the mule was so levied on, without producing the process, or a certified copy thereof; the purpose in removing the mule being merely a collateral fact. *East v. Pace*, 57 Ala. 521.

Failure to Return Execution.—Parol evidence is inadmissible to prove the sheriff's return on an execution, unless the absence of the higher evidence is first accounted for. *McDade v. Mead*, 18 Ala. 214.

In proceedings against a sheriff for failing to return an execution, parol evidence is admissible to show such failure. *Anderson v. Cunningham*, Minor 48.

§ 119 (9) Judicial Sales.

Sum Realized from Sale.—In an action to recover money had and received, which was alleged to have been improperly paid the defendant, who was the plaintiff in an attachment suit, out of the proceeds of the sale under a writ of attachment, it is competent for the attorney of one of the parties, who was present at the sale made by the sheriff, to testify as to the total amount realized from said sale. *First Nat. Bank v. Lippman*, 129 Ala. 608, 30 So. 19.

Sale of Land.—Parol evidence that the land claimed by adverse possession was sold at sheriff's sale as claimant's land is inadmissible. *Goodson v. Brothers*, 111 Ala. 589, 20 So. 443.

Purchase at Administrator's Sale.—In an action of ejectment against a purchaser of lands sold under a probate order or decree, it is competent for a witness, without producing his deed, to testify to the fact that he purchased the land at an administrator's sale. *Jay v. Stein*, 49 Ala. 514.

Directing Sale.—To establish the fact of the sale of land under an order of a court of chancery, the record of the order directing the sale must be produced. *Phillips v. Costley*, 40 Ala. 486.

Foreclosure and Sale of Mortgaged Premises.—A witness can not testify to the foreclosure and sale of mortgaged premises. The record of the suit is the proper evidence. *Kennedy's Heirs v. Reynolds*, 27 Ala. 364.

To Show Appointment of Officer Conducting Sale.—Where the validity of a sale of land made under the order of the orphans' court on the application of an executor de bonis non is collaterally impeached, parol evidence is admissible to prove the death of the sheriff, who, ex officio, was the previous administrator, as a jurisdictional fact on which the court acted in appointing the succeeding administrator. *Saltonstall v. Riley*, 28 Ala. 164.

§ 119 (10) Administration or Distribution of Estates.

To Show Grant of Administration.—In the absence of all evidence showing the jurisdiction of the court of ordinary in Georgia, a transcript from its records, recognizing a person as administrator, is not admissible to show a previous grant of letters to him, although the records of the court are proved to have been destroyed by fire; nor can the grant of administration, which is a judicial fact, be proved by a party's admissions on oath in another case. *Shorter v. Urquhart*, 28 Ala. 360.

The record of the appointment of an administrator is higher evidence of the fact than the recital of it in the administration bond. *Elliott v. Eslava*, 3 Ala. 568.

Price of Land Per Acre.—To show that decedent owed a large amount of money, the person who wrote his will testified that decedent left out of it, to pay his debts, specified property, which embodied lands worth \$65 to \$70 an acre. Held, that it was not competent to ask him, on cross-examination, whether such land did not lack a fraction of bringing \$45, as the record of the administrator's sale was the best evidence of what the land brought. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, cited in note in 63 L. R. A. 986.

"With the view of showing that the deceased owed a large amount of money, one W. C. Glover, a brother of the plaintiff, was introduced by the plaintiff, and testified that he drew the will of deceased, who left out of it, to pay his debts, about thirty acres of land on the river, worth \$65 or \$70 per acre, and forty acres of mountain land, worth from \$1 to \$1.50 per acre, or about three or four hundred

dollars worth of personal property. On his cross-examination he was asked by defendants, 'If that river land did not lack a fraction of bringing \$45 per acre?' To this question the plaintiff's counsel objected, on the ground that the record of the administrator's sale was the best evidence of what the land brought. The objection was well taken. The evidence was merely collateral to the subject-matter in dispute. *East v. Pace*, 57 Ala. 521; 3 Brick. Dig. 439, § 486." *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, 40.

To Prove Docketing of Claim.—Under Code, § 133, providing that when presentation of a claim against a decedent's estate is by filing the claim, or a statement thereof, in the office of the judge of probate, the claim or statement "must be docketed, with a note of the time of such presentation," the docket entry is the best evidence of the filing. *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36.

§ 119 (11) Insolvency or Bankruptcy.

Parol Evidence Admissible.—In trover for a promissory note, the insolvency of the maker may be shown by parol evidence. *McPeters v. Phillips*, 46 Ala. 496.

§ 119 (12) Official Acts, Proceedings, and Records in General.

Acts of Interstate Commerce Commission.—Where, in an action against a carrier for failure to deliver goods, it was proved that special rates of transportation had been given as the consideration for an exemption from liability, it was error to allow a witness to testify that the rates given were approved by the interstate commerce commission, as such fact should have been established by the best evidence—the rulings of the commission. *Mouton v. Louisville & N. R. Co.*, 128 Ala. 537, 29 So. 602.

§ 119 (13) Assessment, Levy, and Collection of Taxes.

Return of Taxes.—On an issue as to whether one had returned certain lands for taxation the assessment books were the best evidence of such fact, they being required to be made up from the tax lists returned under oath of the property owner, and such lists not being required by law to be permanently kept. Code 1867, §§ 472, 473; Code 1876, p. 267, art. 5.

c. 2; Code 1886, § 511; Code 1896, § 3978. *Doe ex dem. Anniston City Land Co. v. Edmondson*, 141 Ala. 366, 37 So. 424.

Amount of Assessment.—On an issue as to the price at which lands were assessed in certain years, the tax books were the best evidence. *Southern Ry. Co. v. Leard*, 146 Ala. 349, 39 So. 449.

Payment of Taxes.—In ejectment, testimony of a witness that his father paid the taxes on the place, for he saw the receipts, was improperly admitted; the receipts being the best evidence. *Fletcher v. Riley*, 169 Ala. 433, 53 So. 816.

§ 119 (14) Acts of Municipal Boards.

Action of County Commissioner's Court.—Under Code, § 827, requiring the county commissioners' court to keep a record of its proceedings, and § 2574, providing that no suit shall be brought against a county until the claim has been presented to the court of county commissioners, presentation of a claim must be proved by the records of the court as being the best evidence. *Crenshaw County v. Sykes*, 113 Ala. 656, 21 So. 135.

§ 119 (15) Official Character, Election, Appointment, or Resignation.

Official Capacity.—A witness may state that he is a public officer without producing his commission. *Moody v. Keener*, 7 Port. 218.

Appointment of Sheriff.—Oral evidence of the appointment of the deputy sheriff, by whom a tax sale was made, is admissible, in an action of trover in which the plaintiff relies on a tax title, although such appointment was made in writing. *Rodgers v. Gaines*, 73 Ala. 218.

§ 119 (16) Record of Land Office.

An entry of land can not be proved by parol, unless sufficient reason has been shown for the admission of secondary evidence. *Yarborough v. Hood*, 13 Ala. 176.

Parol proof of an entry under a pre-emption right is inadmissible, without first showing that the record evidence thereof can not be had. *Phillips v. Beene*, 16 Ala. 720.

To Show Use of Land.—Parol evidence is not admissible to prove whether land was or was not an Indian reservation, as

higher evidence exists of the fact at the general land office. *Mitchell v. Cobb*, 13 Ala. 137.

§ 119 (17) Corporate Acts, Proceedings, and Records.

To Prove Railroad Rule.—Oral testimony will not be admitted in regard to a rule of a railroad company, printed in a book, when the book is not produced, or its absence accounted for. *Louisville & N. R. Co. v. Orr*, 94 Ala. 602, 10 So. 167.

Action of Stockholders of Corporation.—The action of stockholders of a street railroad in changing the location of its right of way, may be shown by parol evidence, where no minutes have been kept of their proceedings. *Birmingham Ry. & Electric Co. v. Birmingham Traction Co.*, 128 Ala. 110, 29 So. 187.

Claim against City.—The only evidence of the presentation and disallowance of a claim against a city to the board of aldermen is the record of the proceedings of the board of aldermen, and a letter of the city clerk is no evidence of such action. *City of Birmingham v. Chestnutt*, 161 Ala. 253, 49 So. 813.

The book containing the minutes of the proceedings of a municipal corporation is the best and only evidence to prove whether or not a claim was allowed by the council. *Perryman v. City of Greenville*, 51 Ala. 507.

Officers of Railroad.—It is competent to show that certain persons were officers of a railroad company by testimony that they acted in the capacity of such officers, without producing evidence of their appointment. *East Tennessee, V. & G. Ry. Co. v. Davis*, 91 Ala. 615, 8 So. 349, cited in note in 23 L. R. A., N. S., 368, 370.

Acceptance of Subscription by Institute.—Where a subscription to an endowment fund of an institute had been made on certain conditions, the books of the corporation not having been made evidence by law, it was permissible for witness to testify that it was his understanding that the institute had accepted certain subscriptions, although he could not tell when or where they did so. *Jones v. Trustees of Florence Wesleyan University*, 46 Ala. 626.

§ 119 (18) Conveyances, Contracts, and Other Instruments.

Relinquishment of Interest in Contract.—To prove that one, in consideration of the unconditional payment of a debt by a relinquishment in writing to that effect, had conveyed his interest in a contract for the delivery of certain personal property to him, parol evidence is admissible, without producing the writing or accounting for its absence. *McGehee v. Hill*, 1 Ala. 140.

Failure to Execute Note.—Where, by a bill to enjoin a judgment recovered on a promissory note, the record of the proceedings at law and the note are all made evidence, proof in respect to the nonexecution of the note should not be excluded because the note is not produced. *Givens v. Tidmore*, 8 Ala. 745.

Transfer of Judgments.—The fact that a transfer of judgments was made, though made in writing, may be proved by parol. *Elliott v. Dyche*, 80 Ala. 376, cited in note in 52 L. R. A. 565, 605.

Ownership of a street railway can not be proved by oral testimony that it has been conveyed by a written contract, which the witness has seen, and to which he was a party. *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353.

To Show Character of Notes.—The question whether certain notes given by defendant "were waiver exemption notes," being collateral to the issue, may be asked of a witness without producing the notes. *Wollner v. Lehman, Durr & Co.*, 85 Ala. 274, 4 So. 643.

A witness having stated that one of the firm sued had borrowed a sum of money from a third person, of which a part had been paid from the firm effects since its dissolution, also stated that he thought that the note of the firm was given for the money so borrowed, but was not certain whether it was the note of the firm sued or the note of another firm of which the same partner was a member. Held, under these circumstances, that the evidence was admissible, though the note was not produced, or its absence accounted for. *Hogan v. Reynolds*, 8 Ala. 59.

Proof of Indebtedness.—The issue being whether the defendant was able to

pay a debt barred by the statute of limitations, and of bankruptcy, he may prove his indebtedness to third persons, without producing the written evidence of that indebtedness, or accounting for its nonproduction. *Duffie v. Phillips*, 31 Ala. 571.

Sale of Property.—Where a verbal sale of chattels is perfected by delivery, and a bill of sale subsequently accepted from the vendor, the verbal sale may be proved by parol, without the production of the writing. *Sanders v. Stokes*, 30 Ala. 432.

A witness may testify to the fact "that the said W. R. sold him the said land for \$2,000," without producing the written evidence of the sale, or accounting for its absence. *Robinson's Adm'r's v. Tipton's Adm'r*, 31 Ala. 595.

Bills and Notes.—A witness may testify to the existence of notes or bills of exchange for the purpose, of showing the existence of an indebtedness on the part of the maker, although they are not produced, nor their absence accounted for. *Snodgrass v. Branch Bank*, 25 Ala. 161.

Shipment of Goods.—Parol evidence that goods were shipped by the shipper as agent of the plaintiff is not admissible after an admission that the contract for carriage was in writing. *Peck v. Dinsmore*, 4 Port. 212.

Mortgage of Land.—The execution of a mortgage on land can not be proved as a fact tending to show ownership or possession, without either producing the mortgage or accounting for its absence. *Bell v. Denson*, 56 Ala. 444.

Mortgage of Horse.—In an action by one claiming a horse under a mortgage against a purchaser of the horse, the court did not err in excluding a question whether defendant did not have a mortgage on such horse prior to the plaintiff's mortgage; the mortgage itself being the best evidence. *Hutto v. Garner (Ala.)*, 61 So. 477.

Admissibility of Tract Book to Prove Grant of Land.—Where there is no statute making a tract book and entries therein admissible in evidence, the admission of such evidence in an action to recover possession of land is error; the best evidence of a grant from the government being the patent, or a certified copy thereof, under Code 1896, § 1812,

providing that land patents must be received in evidence without further proof, and § 1813, providing that a transcript of any document pertaining to any land office in the state, certified by the register, must be received as prima facie evidence of the facts contained therein. *Hammond v. Blue*, 132 Ala. 337, 31 So. 257.

Transfer of Lease.—On an issue whether a lease was transferred, the written transfer was the best evidence. *Southern Ry. Co. v. Leard*, 146 Ala. 349, 39 So. 449.

Contract for Construction of Railroad.—In an action against a railroad company and a contractor engaged in construction of its road for damages by such construction, the admission of testimony for plaintiff that the contractor was under a written contract for construction of the road is reversible error, where the contract itself is not produced, and no reason is assigned for its nonproduction. *Alabama M. Ry. Co. v. Coskry*, 92 Ala. 254, 9 So. 202.

Articles of Partnership.—A creditor of a firm, seeking to enforce a debt, may prove the partnership by other evidence, without producing the articles of copartnership. *Griffin v. Stoddard*, 12 Ala. 783.

"Although as between the partners, the articles of copartnership might be the highest evidence of the existence of the partnership, strangers can not be held to this proof, but may prove its existence, when proof of that fact is necessary, by any other competent testimony. After what has been said, it is scarcely necessary to add, that there was no objection to the proof, that there were unsatisfied judgment creditors of the firm. Indeed, without this proof, it might well be doubted, whether the trustees could have maintained this action, it being shown that the defendant was a purchaser at sheriff's sale, under a judgment against the grantor individually." *Griffin v. Stoddard*, 12 Ala. 783, 788.

A partnership may be proved by parol evidence that the alleged partners severally admitted the fact, or held themselves out as such, and although it appear on the trial that there was a written agreement, and no notice to produce it is proved. *Thornton v. Kerr*, 6 Ala. 823.

Bill of Lading.—A sale and delivery of

goods need not be proved by the introduction of the bill of lading. *M. Weinstein & Sons v. Yielding Bros. & Co.*, 167 Ala. 347, 52 So. 591.

In an action on a claim growing out of a shipment of corn by plaintiff to defendant, proof of the shipment by plaintiff of a car of corn, without a production of the bill of lading, was admissible; the shipment being a substantive fact existing independently of a bill of lading. *Dorough v. Harrington & Son*, 146 Ala. 305, 42 So. 557.

Receipt for Shipment of Corn.—In an action on a claim growing out of a shipment of corn by plaintiff to defendant for sale, a receipt which defendant's drayman gave to the carrier on beginning delivery of the corn was admissible, as against the objection that it was secondary evidence, and that the bill of lading was not produced, nor its absence accounted for, was the best evidence. *Dorough v. Harrington & Son*, 146 Ala. 305, 42 So. 557.

Proposition of Compromise.—A witness may testify to the fact that a debtor made a written proposition of compromise, without producing the writing, or accounting for its absence. *Snodgrass v. Branch Bank*, 25 Ala. 161.

§ 119 (19) Books of Account, Private Memoranda, and Correspondence.

Record of Work in Mine.—In an action by a servant against his master for personal injuries received in a mine, it was sought to exclude evidence as to the time that a certain person went from mine No. 1 to mine No. 2. That person testified that he did not know whether the company's books showed the date and another testified that the pay roll might not show it, but that a small ledger would. Held, that these books were not such a record as to exclude evidence of the facts of which the witnesses had independent knowledge, this testimony not being analogous to proof by parol of what the books contained. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 So. 48.

Record of Stockholder's Meeting.—That a report made by officers of defendant corporation at a meeting of the stockholders was not rejected by the stock-

holders at the meeting may be shown by testimony of defendant's secretary and bookkeeper that no part of the report was rejected, so far as the books show, there being nothing therein relative to the matter. *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 135, 18 So. 565.

To Show Sale.—In an action on an account, a merchant's books are no better evidence than the positive testimony of his clerk, who swore to the sale and delivery of the articles. *Godbold v. Blair*, 27 Ala. 592, cited in note in 52 L. R. A. 349.

Corporation Books.—When an effort is made to prove the fact that one is agent of a corporation, by an order upon the corporation books, the books themselves must be produced, or secondary evidence of the contents, after notice to produce them. *Montgomery R. R. v. Hurst*, 9 Ala. 513.

§ 119 (20) Notices.

Demand of Possession.—Under Code, § 3697, making a written demand of possession indispensable to the maintenance of an action of unlawful detainer, parol evidence of such demand can only be received after a predicate for it has been laid by notice and failure to produce it. *Littleton v. Clayton*, 77 Ala. 571.

A previous demand in writing for the surrender of possession being necessary to the maintenance of an action for unlawful detainer, under Code, § 3697, secondary evidence thereof will not be received except upon proper predication being made by a notice to produce. *King v. Bolling*, 77 Ala. 594.

In an action of unlawful detainer, secondary evidence of the demand in writing is not admissible without the predicate being laid for its introduction. *Bates v. Ridgeway*, 48 Ala. 611.

Secondary evidence of the written demand and notice, which the statute makes necessary to the maintenance of an action of unlawful detainer, can not be received until the proper foundation has been laid for its introduction. *Dumas v. Hunter*, 30 Ala. 75.

Notorial Certificate.—Though a notorial certificate is by statute competent evidence of the facts stated therein, notice may be proved otherwise. *Martin v. Brown*, 75 Ala. 442.

Arrival of Goods.—The question being whether a railroad company had by postal card notified a consignee of the arrival of goods, it is not necessary to produce the postal card, as evidence that it was mailed is sufficient. *Collins v. Alabama G. S. R. Co.*, 104 Ala. 390, 16 So. 140.

§ 120. Facts of Making or Existence of Writing.

Signing of Receipt.—Evidence that witness saw a receipt signed is inadmissible, the receipt itself being the proper evidence. *Steed v. Knowles*, 97 Ala. 573, 12 So. 75, cited in note in 14 L. R. A., N. S., 290.

Preliminary to Introduction of Written Instrument.—In an action to recover the statutory penalty for a failure to enter the satisfaction of a mortgage on the margin of the record, there was no error in permitting the mortgagor to testify that he had made a written demand therefor, where such testimony was preliminary to the introduction of the written notice. *Pickett v. Frost (Ala.)*, 61 So. 476.

Receipt of Letter.—A part may testify as to a letter which he received from the adverse party where the question does not call for the contents of the letter, but only for the fact of the existence or receipt of the letter. *McLendon v. Rubenstein (Ala.)*, 61 So. 902.

Identification of Papers.—Where two papers had not been offered in evidence, it was proper to allow a witness to state that they were copies, or that both were originals; the evidence being introduced to identify them, and not to prove their contents. *R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263.

Proof of Signature to Note.—Parol proof that a firm name was signed to a note, of which firm the defendant was a member, is admissible without the production of the note itself, when it is not the foundation of the suit, and is not in the possession or control of the party offering the evidence. *Dixon v. Barclay*, 22 Ala. 370.

§ 121. Contents of Writings.

Necessity of Producing Document, If Accessible.—Parol evidence of the contents of a written instrument is inadmissible, where the instrument itself can be

produced. *Rinaldi v. Rives*, 1 Stew. 174; *Cloud v. Patterson*, 1 Stew. 394; *Wiswall v. Knevals*, 18 Ala. 65.

Where there is written evidence in the power of the party to procure, parol evidence is inadmissible. *Rinaldi v. Rives*, 1 Stew. 174.

Power of Attorney.—The contents of a power of attorney can not be proved by parol, unless the power be lost, or in possession of the opposite party to the one offering such proof. *May's Adm'r v. May*, 1 Port. 229; *Cloud v. Patterson*, 1 Stew. 394.

Settlement of Arbitration.—Where a settlement was based upon an arbitration in writing, evidence can not be given of the terms of the settlement, without producing the award. *Smith v. McGehee*, 14 Ala. 404.

§ 122. — Judicial Acts, Proceedings, and Records.

Claim in Probate Court.—The best evidence of the filing and docketing of a claim in the probate court against the estate of a decedent is the docket entries there made. *Gillespie v. Campbell*, 149 Ala. 193, 43 So. 28.

"In *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36, it was decided that the highest and best evidence of the filing and docketing of the claim in probate court is the docket entries there made." *Gillespie v. Campbell*, 149 Ala. 193, 43 So. 28, 29.

Contents of Verdict.—In trespass by a riparian owner on account of the building by defendant of a dam on his premises, defendant claimed that a verdict had been rendered in writing by a jury appointed several years before to assess the damages, to which the parties assented. Held that, in the absence of any foundation laid, parol evidence of the contents of the verdict was inadmissible, as when a relevant fact consists of the substance of a record, the writing is the best evidence. *Hames v. Brownlee*, 71 Ala. 132.

Proceedings before Justice.—A justice of the peace is not competent to prove by parol proceedings had before him in his official capacity, which were reduced to writing, without first showing the loss of the writing. *Bullock v. Ogburn*, 13 Ala. 346.

"In the case of *Kennedy v. Dear*, 6

Port. 90, the court ruled, the justice who was offered as a witness, would not be permitted to speak of the papers connected with the suit, unless they were produced." *Bullock v. Ogburn*, 13 Ala. 346, 348.

Attachment Proceedings.—In an action to recover the purchase price of certain property, where the defendant claims that the property sold had been taken back by the plaintiff, oral evidence offered by the plaintiff that he had taken such property in attachment proceedings is not admissible. *Tanner, etc., Engine Co. v. Hall*, 86 Ala. 305, 5 So. 584.

Exemption in Bankruptcy Court.—The records of the bankruptcy court being the best evidence whether a shipper claimed in the bankruptcy court that his claim against a carrier for loss of freight was exempt, the fact can not be shown by oral proof. *Northern Alabama Ry. Co. v. Feldman*, 1 Ala. App. 334, 56 So. 16.

§ 123. — Official Acts, Proceedings and Records.

The official registry of the arrival and departure of mails is the proper evidence to prove any facts therein recited, and the postmaster can not testify from memoranda made from the registry. *Miller v. Boykin*, 70 Ala. 469.

§ 124. — Corporate Acts, Proceedings, and Records.

Application for Life Insurance.—The contents of an application for a life policy can not be proved by secondary evidence, unless its loss or destruction is shown, or, if it is in the possession of the company, until there has been some proper effort to procure it. *Lewis v. Hudmon*, 56 Ala. 186.

Rules for Railroad Employees.—Parol evidence of the purport of printed rules for brakemen carried on trains was properly rejected when the absence of the printed rules was not accounted for. *Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1, 7 So. 635.

§ 125. — Conveyances, Contracts, and Other Instruments.

§ 125 (1) Contracts in General.

Conveyance of Land.—In an action for trespass, there was no error in sustaining an objection to the question, "Did

M. ever execute to you a deed conveying twenty acres of the land involved in this suit?" propounded to a witness, since the question was not only indefinite in form, but called for matter of which the deed was the best evidence. *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

"There was no error in the ruling of the court sustaining plaintiffs' objection to the question, propounded to the witness Smith: 'Did Martha Pugh ever execute to you a deed conveying twenty acres of the land involved in this suit?' Aside from the indefinite form of the question, it called for a matter of which the deed was the best evidence—secondary evidence, without laying a predicate therefor." *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48, 51.

Where the testimony of a witness was received in ejectment in reference to the alleged deed to plaintiff's predecessor in title, without predicate being laid for such evidence, the purport and contents of the alleged deed is inadmissible, as violating the rule against secondary evidence. *Fletcher v. Riley*, 169 Ala. 433, 53 So. 816.

Possession of Land Described in Deed.

—Testimony of a witness in ejectment on the issue as to whether another had possession of land described in a certain deed is inadmissible, since the deed is the best evidence of what it describes. *Hardy v. Randall*, 173 Ala. 516, 55 So. 997.

Contracts.—Parol evidence is inadmissible to show the terms of a written contract, when the writing itself is in existence, and obtainable. *Brewton's Heirs v. Driver*, 13 Ala. 826; *Foster v. State*, 88 Ala. 182, 7 So. 185.

Contract of Shipment.—A purchaser of car loads of hay, insisting that consignment was to be made to the seller's order "Notify J. E. C.," could not show by its general manager that the commercial agent of the carrier phoned him that such was the fact, since the written contract of shipment was the best evidence. *St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.*, 167 Ala. 442, 52 So. 904.

Letters Showing Terms of Contract.

A letter admitted by the adverse party to correspond with a written contract will not authorize the admission of the

letter in evidence, without first satisfactorily accounting for the omission to produce the written contract. *Fletcher v. Weisman*, 1 Ala. 602.

The contents of a bill of sale can not be proved by parol, until the instrument itself is produced or its absence accounted for. *Yarbrough v. Hudson*, 19 Ala. 653.

Receipts of Goods.—In an action against a carrier for failure to deliver goods, his receipt of the goods may be proved without producing a bill of lading or accounting for its absence. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

Contents of Letters Showing Agency.

—If a witness state that he was agent for another, and derived his authority from a letter, the letter must be produced, or announced for, before the witness can be allowed to state its contents. *Planters' & Merchants' Bank v. Willis*, 5 Ala. 770, cited in note 35 L. R. A. 347.

Credit on Mortgage Record.—The question whether a witness had made certain entries on the record of credits on a mortgage was properly excluded; the record being the best evidence. *Baker v. Cotney*, 150 Ala. 506, 43 So. 786.

§ 125 (2) Contracts of Partnership or Lease.

Stipulation in Lease.—Where the absence of a written lease is not satisfactorily accounted for by proof of its loss or destruction, it is proper, in an action on a note given for rent, which contains no such stipulation, to exclude evidence tending to prove a stipulation in the lease to make repairs, or evidence of any damages suffered in the destruction of goods by rains, in consequence of the failure to make such repairs. *Burks v. Bragg*, 89 Ala. 204, 7 So. 156, cited in note in 23 L. R. A., N. S., 369.

§ 125 (3) Sealed Instruments.

Parol evidence of the contents of a sealed instrument can not be given, until its loss has been proved. *Allen v. Smith*, 22 Ala. 416.

But it is error to admit parol evidence of the contents of a deed, against the objection of the opposite party. *Allen v. Smith*, 22 Ala. 416.

§ 125 (4) Negotiable Instruments.

Notes.—In an action in which a deed

of trust is attacked, it was competent for the grantee of the deed given to secure a note held by such grantee to testify concerning other notes he had held against the grantor, without producing them, as their existence was a collateral matter. *Howell v. Bowman*, 99 Ala. 100, 10 So. 640.

When a witness states that "the contract" (of which he was testifying), was evidenced by a promissory note, he must be understood to mean the entire contract; and parol evidence is not admissible to prove any of its terms, unless the absence of the note is first accounted for. *Hooks v. Smith*, 18 Ala. 338.

§ 126. — Books of Account.

Statements of a witness, derived, not from personal knowledge of the matters testified about, but from an inspection of the books of an insurance company, are not legal evidence. *Mobile Life Ins. Co. v. Egger*, 67 Ala. 134.

In Action of Detinue.—Testimony by a witness for the plaintiff in an action of detinue as to entries made in the plaintiff's account books was inadmissible, since the books themselves were the best evidence. *Jones v. Journey*, 2 Ala. App. 488, 56 So. 850.

Books of Banks.—A bank officer can not testify as to the contents of books of the bank, without producing them. *Roden v. Brown*, 103 Ala. 324, 15 So. 598.

§ 127. — Private Memoranda and Statements.

Written Statement.—The best evidence of a statement reduced to writing is the writing itself, and oral testimony thereof is inadmissible. *Advertiser Co. v. Jones*, 169 Ala. 196, 670, 53 So. 759.

Bill of Lading.—Where no effort is made to account for the absence of a bill of lading which had been attached to a draft paid by plaintiff, secondary evidence of its contents is inadmissible; and the fact that plaintiff resides without the jurisdiction of the court is no excuse. *Alabama G. S. R. Co. v. Mt. Vernon Co.*, 84 Ala. 173, 4 So. 356.

Written Instructions as to the Forwarding of Goods.—In assumpsit for goods, wares, and merchandise sold and delivered, parol evidence is inadmissible to prove that the goods were shipped and

forwarded to the defendant by her written instructions, unless the writing itself is produced, or its absence satisfactorily accounted for. *Boykin v. Collins*, 20 Ala. 230.

§ 128. — Letters, Telegrams, and Other Correspondence.

Letters.—Parol evidence of the contents of a letter, which is not produced or accounted for, is not admissible. *Simpson v. Wiley*, 4 Port. 215; *Kidd v. Cromwell*, 17 Ala. 648.

Admissions of a defendant, in a letter, as to the publication of a libel, can not be proved, where the letter itself is not produced, or its absence accounted for. *Simpson v. Wiley*, 4 Port. 215.

Telegram.—The contents of a telegram can not be proved by parol without accounting for the absence of the original. *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796, cited in note in 50 L. R. A. 253.

In an action by a vendor to recover possession of a part of a car load of flour because of the fraud of the vendee in the contract of purchase, it was held that the contents of a lost telegram received from the delivery office could not be proved by oral evidence, where an excuse for the nonproduction of the original telegram from the receiving office was not given. *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796, cited in note in 50 L. R. A. 253.

As to which message is the original, it is generally held that the despatch given to the telegraph company is the original, and should be proved. The exception to this rule, where the party commences correspondence by telegraph, he makes the company his agent, and then the message delivered at the destination is the original. The following case holds that the despatch given to the telegraph company is the original. *McCormick v. Joseph*, 83 Ala. 401, 3 So. 796, cited in note in 50 L. R. A. 252.

Cablegram.—Delivery of a cablegram to the addressee by the company as coming from "Victoria," with proof that was the cipher name of the addressee's correspondent at the place from which the message was sent, is prima facie sufficient to show as against the company that it was sent by such correspondent; and

where the message delivered to the addressee has been lost or destroyed, and that delivered for transmission is without the jurisdiction of the court, secondary evidence of their contents is admissible, whichever be regarded as the original. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844.

"The cablegram was delivered to plaintiff as coming from Victoria. Its delivery by defendant is the equivalent of an admission that Victoria was the sender; and, in connection with proof that Victoria is the cipher name of Roth, is prima facie sufficient to show, as against the defendant, that it was sent by him. The general rule that secondary evidence of the contents of a writing is inadmissible unless the absence of the original is accounted for, is applicable to cablegrams. It is immaterial in this case, which is considered the original, the message delivered by the sender to the forwarding office, or the telegram delivered by the company to the sender at the point of destination. If the message delivered by Roth at the office in Bremen be the original, it is without the jurisdiction of the court; if the cablegram delivered to the plaintiff be regarded the original, the preliminary proof of loss was, prima facie, sufficient. In either case, the secondary evidence, of the contents was properly admitted. *Whilden & Sons v. Merchants', etc., Nat. Bank*, 64 Ala. 1." *Western Union Tel. Co. v. Way*, 83 Ala. 542, 4 So. 844, 847.

§ 129. — Notices.

Notice to Abate Nuisance.—In an action for damages for overflowing plaintiff's land, oral testimony is admissible to prove the contents of a notice in writing by plaintiff to defendant requiring an abatement of the cause of overflow; such notice being collateral to the issue. *Polly v. McCall*, 37 Ala. 20.

"Neither did the court err, in admitting oral testimony of the written notice served in this case. This fact was collateral to the issue—was not necessary to the plaintiff's success in the suit, either in consequence of any requirement of the law, or of the pleadings in the cause. This case, then, is within the exception to the general rule in regard to the proof

of writings. *Dumas v. Hunter*, 30 Ala. 75; 1 Greenl. Ev. § 561; 2 Phil. Ev. (ed. 1849), 225; 4 ib. 433." *Polly v. McCall*, 37 Ala. 20, 29. See, generally, the title NUISANCE.

Duplicate Copies.—Where plaintiff's agent, having four copies of a notice, served a copy on each of the defendants, and retained one copy, such copy is admissible without notice to produce the copies served, since the notices are all duplicate originals. *Westbrook v. Fulton*, 79 Ala. 510, cited in note in 12 L. R. A., N. S., 510.

§ 130. Writings Collateral to Issues.

See, also, ante, "Existence of Better Evidence as Ground for Exclusion," § 118 (1).

Statement of Rule.—"Where a written instrument is only a collateral incident to the matter in issue, and its existence, rather than its contents, is the matter desired to be proved, the rule which in general requires the production of the writing as the best evidence of its contents is not applicable." *Griffin v. State*, 129 Ala. 92, 29 So. 783; *Costello v. State*, 130 Ala. 143, 30 So. 376; *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667." *Gulf Compress Co. v. Jones Cotton Co.*, 172 Ala. 645, 55 So. 206, 207.

Letters Relating to Collateral Fact.—Where a fact collateral to the main issue is described in a letter, a witness may testify that he received a letter in relation to that fact, without producing the letter. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Former Suit Collateral to One at Issue.—Where the inquiry as to facts of a former suit between the parties was merely incidental and collateral to the issues, parol evidence showing the nature of such suit was admissible, even if the record therein was the best evidence of the facts sought to be shown. *Garden v. Houston Bros.*, 163 Ala. 300, 50 So. 1030.

"There was no error in admitting parol evidence relative to the suit instituted by appellant against appellee in the justice's court. If the record were the best evidence of the facts inquired about, the subject of the inquiries was merely incidental, collateral, to the issues in the case; and hence secondary evidence was admissible

in reference thereto. *Pollak v. Gunter*, 162 Ala. 317, 50 So. 155." *Garden v. Houston Bros.*, 163 Ala. 300, 50 So. 1030, 1031.

"The ground of objection by the defendant to the question to the witness Irene Prichard: 'Did you not institute a suit for this property through Mr. Faith in the chancery court in 1897?' to wit, that the record was the best evidence, was not sufficient to authorize the exclusion of the evidence, as it was a mere collateral matter, and for certain purposes the mere fact that a suit was brought could be proved otherwise than by the record. *Griffin v. State*, 129 Ala. 92, 29 So. 783; *Allen v. State*, 79 Ala. 34. But the matter inquired of was irrelevant to the issues in this case. The fact that a previous suit had been brought for this property did not have bearing upon the forcible entry or on the title to the land, consequently the court can not be placed in error for excluding the testimony." *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667, 669.

Evidence Not Collateral.—It was error on a will contest to admit secondary evidence of an unaccounted for newspaper clipping, on the ground that the clipping was merely collateral, and, further, that it was not evidence of the fact to which it related, where it gave an account of a bigamous marriage of contestant, and had been read by testator, and was relevant as accounting for contestant's disinheritance. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348, cited in note in 37 L. R. A., N. S., 598.

Commencement of Prior Suit.—Where, in forcible entry and detainer, the commencement of a prior suit was a mere collateral matter, it was not necessary that it should be established by the record as the best evidence. *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667.

Contract to Construct Railroad.—In an action by a millowner for damages caused by the filling up of the millpond with dirt thrown into it by a contractor for a railroad, the contractor may not testify as to the terms of the contract under which he was working, without producing the contract or explaining its absence, since such contract might tend to change the liability of defendant, and was not purely collateral to the issue. *Atlanta & B. Air Line Ry. v. Wood*, 160 Ala. 657, 49 So. 426.

Contract for Sale of Cotton.—Where

complainant claimed as damages for injuries to cotton stored and shipped, the increased price which it was required to pay for cotton in the open market with which to fulfill a contract with the consignee, such contract was a collateral incident to the cause of action, and hence the rule requiring the production of the writing as the best evidence of its contents is not applicable. *Gulf Compress Co. v. Jones Cotton Co.*, 172 Ala. 645, 55 So. 206.

Subcontractor's Estimate of Work.—In an action by a subcontractor against the original contractor for breach of the subcontract, plaintiff's estimate of the total excavation required by the subcontract and of what remained to be done at the time the work was stopped by the defendant was properly received, rather than the plans and specifications on file in the office of the city engineer, as tending to show the reasonableness of the plaintiff's preparations for performance of his contract. *Southern Bitulithic Co. v. Hughston (Ala.)*, 58 So. 450.

In an action by a subcontractor for breach of his contract with an original contractor for the improvement of city streets, the plaintiff's estimate of the total excavation required by the contract, and of what remained to be done at the time there was an interruption of performance by defendant, was properly received, rather than the plans and specifications prepared by and on file in the office of the city engineer, as tending to demonstrate the reasonableness of the outfit maintained in anticipation of the resumption of work and the necessary loss suffered thereby. *Southern Bitulithic Co. v. Hughston (Ala.)*, 58 So. 450.

Payment on Written Order.—Where, in an action by a mortgagee for conversion, the mortgagee showed that defendant purchased mortgaged chattels and procured a third person to pay therefor, the third person was properly permitted to testify that he made a payment to the mortgagor on a written order of defendant, though the written order was not produced. *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111.

Balance Due on Mortgage.—Where, in an action by a mortgagee for the conversion of mortgaged chattels by defendant,

who bought them from the mortgagor, the amount due on the mortgage was not in issue, the mortgagee, who knew the amount due on the mortgage, might testify as to the balance due. *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111.

Nature of Attorney's Services.—In action to recover attorney's fees for services rendered defendant in a certain case, it was not a violation of the rule requiring the best evidence to permit the attorney to testify generally as to the nature of the suit, since the written instruments filed therein were only collaterally in issue in the action for services. *Davis v. Walker*, 125 Ala. 325, 27 So. 313.

Giving of Chattel Mortgage.—To show that defendants had purchased property subject to a landlord's lien with notice, the fact that the seller and tenant had given them a mortgage on crops raised on the rented place, which was known and called by a certain name, may be shown by parol; such evidence being collateral to the main issue, and not within the rule requiring the highest and best evidence. *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1.

Payment of Judgment.—In garnishment proceedings, plaintiff testified as to a certain claim alleged to have been paid by defendant through garnishees which was the same debt testified to by the garnishees as a judgment paid by them; the evidence tending to show its amount. Held that, it being an incidental or collateral matter, the production of the judgment record was not necessary. *Curtis v. Parker & Co.*, 136 Ala. 217, 33 So. 935.

Authority to Hire Plaintiff.—In an action for breach of contract for personal services, where defendant questioned the authority of D., who hired plaintiff, to bind it in the premises, because he had been discharged, evidence that plaintiff received a circular letter from D., stating that he did not recognize the authority of defendant's president to discharge him, was admissible; this being collateral and incidental matter, and consequently the best evidence, the production of the letter, not being necessary. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Notes Collateral to Action.—A question asking a witness to describe notes referred to in certain letters attached as exhibits to a deposition of another witness

is not subject to the objection that the notes are the best evidence, where the notes are not the foundation of the action, since in such case, coming up collaterally, they need not be produced. *Bunzel v. Maas*, 116 Ala. 68, 22 So. 568.

Ownership of Land.—Where the ownership of certain land was collateral and incidental to the matters in issue in a suit for the price of standing timber, plaintiff was entitled to show the ownership of such land by parol. *Garrison v. Glass*, 139 Ala. 512, 36 So. 725.

Meaning of "Cypher Words."—A witness was properly permitted to testify to the meaning of "cypher words" used in certain telegrams if he knew the meaning without being compelled to produce the key. *McCleskey & Whitman v. Howell Cotton Co.*, 147 Ala. 573, 42 So. 67.

§ 131. Admissions as to Contents of Writings.

Assessed Value of Land.—Testimony, on cross-examination of the owner of land sought to be taken in proceedings to lay out a highway, as to the price at which he had assessed it, was not objectionable because it was secondary evidence of the assessment. *Gayle v. Court of County Com'rs*, 155 Ala. 204, 46 So. 261.

Copy Produced by Objecting Party.—Defendant, having testified he wrote a letter, and, on question by plaintiff, said he had a copy thereof, and produced it, admits its correctness, so that he can not object to its introduction that it is secondary evidence. *Barnett v. Wilson*, 132 Ala. 375, 31 So. 521.

"When he produced the copy, and gave it to plaintiff, admitting its correctness, the reason of the rule in the interest of defendant for requiring the original, lest there might be errors in the copy, was satisfied. The copy was an admission by defendant of all that the original contained, and this was all he was entitled to. No possible harm was done him in the introduction of the admitted copy of a letter, under which defendant was claiming an interest. 1 Greenl. Ev., § 571." *Barnett v. Wilson*, 132 Ala. 375, 31 So. 521, 523.

Contents of Deeds.—Parol admissions of a party in regard to the contents of a deed are inadmissible, unless a proper

foundation for the introduction of secondary evidence has been laid. *Fralick v. Presley*, 29 Ala. 457.

Contents of Judgment.—The parol admissions of a party, made out of court, are not admissible to prove the contents of a judgment rendered against him by a justice of the peace, and the proceedings connected therewith, unless it be shown that the higher and better evidence can not be produced. *Ware v. Roberson*, 18 Ala. 105.

§ 132. Original Writing as Best Evidence.

§ 133. — In General.

§ 133 (1) Copies in General.

Code Provision.—"Under § 992 of the Code, a transcript of a conveyance is admissible in evidence only when 'it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof.' *Farrow v. Nashville*, etc., R. Co., 109 Ala. 448, 20 So. 303; *Hines v. Chancey*, 47 Ala. 637; *Hendon v. White*, 52 Ala. 597; *Florence Land, etc., Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384." *Burgess v. Blaké*, 128 Ala. 105, 28 So. 963, 964.

Code, § 992, authorizing the introduction in evidence of a certified copy of a deed when the original has been lost, or is not in the custody or control of the party offering the copy, did not prevent the admission of the record of a mortgage recorded on the day of its execution, to show that alterations had not been made in the mortgage since execution. *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450.

Loss Must Be Proven.—In the absence of proof of loss of the originals, copies of deeds are not admissible in evidence. *Potier v. Barclay*, 15 Ala. 439.

Under Code, § 992, providing that the transcript of a conveyance shall be admitted in evidence only when it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof, it was error to admit a transcript in evidence without proof of loss or destruction of the original, or that it could not be produced. *Burgess v. Blake*, 128 Ala. 105, 28 So. 963.

Exhibits Attached to Deposition.—There was no error in excluding exhibits

attached to a deposition, which were copies, where it did not appear that the originals could not have been obtained. *Marx v. Ely*, 148 Ala. 659, 41 So. 411.

Copies of original documents intended per se to show such mental operations of testator as are shown by the originals are inadmissible, unless a proper showing is made for nonproduction of the originals. *Council v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Copy of Foreign Grant.—The absence of an original must be satisfactorily explained before testimony can be introduced to prove the correctness of a copy of a foreign grant. *Hallett v. Eslava's Heirs*, 3 Stew. & P. 105.

§ 133 (2) Books of Account.

"The testimony of Howze as to what account against the decedent was shown by Mayer's books should have been excluded. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892." *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36, 38.

§ 133 (3) Conveyances, Leases, and Other Sealed Instruments..

"The ancient and well settled rule, which requires the production of the best evidence to prove a fact, of which it is susceptible, would render inadmissible the copy of a deed, where the original is extant, and within the reach of the party offering the copy. Its admission could only be legalized by statute." *Sommerville v. Stephenson*, 3 Stew. 271, 277.

A copy of a deed is inadmissible, where no effort is made to produce the original, and there is no proof of its loss or destruction. *Branch v. Smith*, 114 Ala. 463, 21 So. 423.

Copy of Bond.—In a summary proceeding against a constable, a transcript of his bond, being defective and not admissible under the statute, could not be admitted in evidence of a bond good at common law without first explaining the absence of the original. *Monts v. Stephens*, 43 Ala. 217.

§ 133 (4) Notices, Letters, and Telegrams.

"Copies of letters can not be classed as original evidence, and were not admissible except upon proof of notice to produce the original, or after properly accounting for the absence of the original. 13 Am. &

Eng. Enc. Law, 261, 21 Am. & Eng. Enc. Law, 984-989." *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

When an original telegram is shown to be in another state, beyond the jurisdiction of the court, a copy thereof is admissible as evidence. *Pensacola R. Co. v. Schaffer*, 76 Ala. 233.

§ 133 (5) Contracts.

When the sole purpose of secondary evidence of the contents of a written contract is to explain the contract on which the suit is based, and shows the inducement to its execution, the rule requiring the highest and best evidence does not apply, but when a written contract defines and determines the relative rights of the parties between themselves, and is a main issue in the cause, it is error not to require its production as the best evidence of its terms. *Street v. Nelson*, 67 Ala. 504.

Carbon Copies.—Where a contract was typewritten, and three carbon copies made, there could be no question of primary or secondary evidence, since each was an original until signed, and the copies signed became the contract, and, if no changes were made, the unsigned ones were copies with the signatures missing. *R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263.

§ 134. — Public Records or Documents.

"Hence, a copy of public documents is admitted, to prevent inconveniences, or danger of loss, from the removal of the original. And the rule does not apply where the adversary has admitted the facts which are to be proved, for he is in general, barred by his own admission or representation." *Sally v. Capps*, 1 Ala. 121, 123.

Certified Copy of Record.—When a certified copy of a record is competent, the original, if it can be produced, is equally competent. *Lawson v. Orear*, 4 Ala. 156; *Carwile v. House*, 6 Ala. 710.

"The rule that the best evidence must be produced, has been relaxed in the case of records, from the necessity of the case, and secondary evidence, by an exemplified copy, admitted. But it would be strange if in cases where the original can be produced, it should be rejected be-

cause the inferior evidence of the fact was not offered. It can not admit of doubt that the evidence was properly admitted, although an exemplification of the record would also have been competent testimony." *Lawson v. Orear*, 4 Ala. 156, 158.

Manner of Proving Record.—"Records may be proved either by mere production or by copy. In 1st Starkie 151, we are told that copies of records are either, first exemplifications, or secondly, copies made by an authorized officer, or thirdly, sworn copies. Exemplifications are always proved by the seal of the office at which they are made out. These papers do not come within this description, for it is not pretended that there is any official seal known to the office to which field notes are required to be returned." *Hamner v. Eddins*, 3 Stew. 192, 198.

Field Notes of Surveyors.—Copies of field notes of surveys of public lands, transmitted by the surveyor-general to the several land offices in the districts where the public lands are sold, are not admissible in evidence. *Hamner v. Eddins*, 3 Stew. 192.

"Taking it for granted that the papers which were offered in evidence emanated from his office, but it is far from being certain that there was sufficient proof of this fact, still they could not come within the description of copies of records issued by an authorized officer. It follows, therefore, that nothing but a sworn copy of the field notes, taken from the originals in the office of the surveyor-general, would be legal evidence. The circuit court, therefore, erred in permitting these papers to go to the jury." *Hamner v. Eddins*, 3 Stew. 192, 199.

§ 135. Grounds for Admission of Secondary Evidence.

§ 136. — In General.

Where the best evidence is lost or can not be produced, proof of a secondary nature may be adduced. *Sally v. Capps*, 1 Ala. 121.

Primary Evidence Out of Jurisdiction.

—When the primary evidence is out of the jurisdiction, secondary is admissible. *Shorter v. Sheppard*, 33 Ala. 648; *Snow v. Carr*, 61 Ala. 363; *Whilden v. Merchants' & Planters' Nat Bank*, 64 Ala. 1; *Elliott v. Stocks*, 67 Ala. 290; *Ware v.*

Morgan, 67 Ala. 461; *Gordon v. Tweedy*, 74 Ala. 232; *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442; *Pensacola R. Co. v. Schaffer*, 76 Ala. 233; *Young v. East Alabama Ry. Co.*, 80 Ala. 100; *Elliott v. Dyche*, 80 Ala. 376; *Memphis & C. R. Co. v. Hembree*, 84 Ala. 182, 4 So. 392.

When original letters or documents are in a foreign country, beyond the jurisdiction of the court, secondary evidence of their contents is admissible, although the witness has the original in his possession. *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442.

Writing Out of State.—Where it is shown that writing is out of the state, parol evidence is admissible to prove its contents. *Hoyle v. Mann*, 144 Ala. 516, 41 So. 835.

The statute provision that a duly certified copy shall be received as evidence in lieu of the original deed, "not in the party's power to produce," applies to a deed in the possession of a grantee residing in another state. *Scott v. Rivers*, 1 Stew. & P. 19.

Secondary evidence of the execution of a lost instrument or one which is not in the state was refused in some cases, where an excuse was not given for producing the witness. *Hughes v. Southern Warehouse Co.*, 94 Ala. 613, 10 So. 133.

"The only objection made to the question to the witness George Hoyle, asking for the contents of his second proposition to Chiapella, was that it was incompetent to prove by parol the contents of a written instrument. This objection was not well taken. As it had been proved that the writing was out of the state, the court erred in sustaining it. *Manning v. Maroney*, 87 Ala. 563, 6 So. 343; *Young v. East, etc., R. Co.*, 80 Ala. 100; *Elliott v. Dyche*, 80 Ala. 376; *Alabama, etc., Land Co. v. Kyle*, 99 Ala. 474, 13 So. 43; *Pensacola R. Co. v. Schaffer*, 76 Ala. 233; *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232." *Hoyle v. Mann*, 144 Ala. 516, 41 So. 835, 837.

"It is an established rule, many times reiterated by this court, that, if any documents or papers which are necessary as evidence in a court in one state be in possession of a person residing in another state or jurisdiction, secondary evidence may be admitted to prove the contents of such documents or papers, without giv-

ing any preliminary notice to produce them. *Young v. East, etc., R. Co.*, 80 Ala. 100; *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442; *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232, 236; *Steph. Dig., Ev. (Reyn. Ed.) art. 71*; *Burton v. Driggs*, 20 Wall. 125. The court, under this principle, erred in refusing to permit the defendant to prove by the witness White, the contents of the written claim which the plaintiff had filed with McGaughey for the illegal killing of the ox. The paper was shown to be in possession of a person in another state, and not to be, in any manner, subject to the control of defendant." *Memphis, etc., R. Co. v. Hembree*, 84 Ala. 182, 4 So. 392, 394.

The fact that a letter was written to a person residing in another state raises a presumption that it is beyond the jurisdiction of the court, and its contents may be proven by secondary evidence without proving its loss or destruction. *Manning v. Maroney*, 87 Ala. 563, 6 So. 343.

In an action against the insured for money had and received, by one who claimed that his goods were covered by the policies of insurance, the amount of which the insured had collected, secondary evidence may be given of the contents and terms of the policies, where they have been cancelled, and returned to the insurer in a foreign country. *Snow v. Carr*, 61 Ala. 363.

Written Proof Not the Best Evidence.—Where written proof would not be evidence of the fact to which it relates, parol evidence of such fact is admissible. *Ware v. Morgan*, 67 Ala. 461.

Failure of Opposite Party to Purchase Writing.—Where a party has been notified to produce certain writings, and the same are shown to be within the state, copies may be introduced. *Tennessee & C. R. Co. v. Danforth*, 99 Ala. 331, 13 So. 51.

Written Evidence Inadmissible.—Where a written instrument, if produced, could not be received as evidence of the matter to which it relates, parol proof of the same fact is competent testimony. *Sparks v. Rawls*, 17 Ala. 211.

Nonresidents of Grantor of Deed.—The nonresidents of the grantor of a deed does not authorize the introduction of secondary evidence to prove title under it in

the grantee, until its loss or nonexistence is established. *Hussey v. Roquemore*, 27 Ala. 281.

Incompetency of Subscribing Witness.

—If a subscribing witness to an instrument becomes incompetent from interest, without the fault or agency of the party who claims under it, secondary evidence is admissible to prove its execution. *Robertson's Ex'rs v. Allen*, 16 Ala. 106, cited in note in 35 L. R. A. 338.

It is not necessary that a party should introduce a subscribing witness to an instrument, who is incompetent to testify, and give the opposite party an opportunity of waiving all objection to his competency, before he is allowed to prove its execution by other testimony. *Robertson's Ex'rs v. Allen*, 16 Ala. 106, cited in note in 35 L. R. A. 338.

Failure to Introduce Subscribing Witnesses.—Where a contract on which depended rights of the parties to the suit was in court in possession of the plaintiff's attorney, but had been excluded as the subscribing witnesses, and no excuse was given for failing to introduce them, held error to allow parol evidence of its contents. *Street v. Kelly*, 67 Ala. 478; *Street v. Nelson*, 67 Ala. 504.

Showing Errors in Books.—In summary proceedings against a defaulting tax collector, an expert, whether employed or not, who has examined the assessment book and added up the entries in the different columns, may, with the book before the jury, point out the errors in addition previously made; the additions, as correctly made; and the true aggregate amount of the value of the taxable property of the county as shown by the book. *Timberlake v. Brewer*, 59 Ala. 108.

§ 137. — Destruction or Loss of Primary Evidence.

§ 137 (1) By Party Offering Secondary Evidence.

Negligent Destruction.—Where a party has negligently destroyed the primary evidence, he can introduce secondary evidence to prove its contents. *Rodgers v. Crook*, 97 Ala. 722, 12 So. 108.

"The fact that a writing has been negligently destroyed by the party who offers its contents in evidence, affords no ground for the exclusion of his testimony

of such contents; and if the rule were otherwise we can not say, from the evidence here, that Crook, under the circumstances, negligently destroyed the letter from Rogers to Harris, the contents of which he was allowed to depose to. Moreover, the declarations of Rogers, testified to by Crook as constituting the contents of that letter, were collateral to the issues in the case, and were competent without reference to the existence vel non of the letter itself, or the manner of its destruction. *East v. Pace*, 57 Ala. 521; *Street v. Nelson*, 67 Ala. 504; *Winslow v. State*, 76 Ala. 42; *Smith v. Dinkelspiel*, 91 Ala. 528, 8 So. 490. And, further, the action of the court in admitting this testimony against plaintiff's objection may be sustained on the consideration that the grounds of the objection were not stated as required by a rule of practice adopted by this court in April 13, 1891, and published in 90 Ala. ix., 9 So. iv." *Rodgers v. Crook*, 97 Ala. 722, 12 So. 108, 109.

It is error to permit a witness to state the contents of a letter, which he testifies was in his possession, on his mere statement that it is lost, misplaced, or destroyed, where he further testifies that only the day before he destroyed a number of letters and papers, but he made no special search for the one in question. *Taggart v. State*, 143 Ala. 88, 39 So. 293.

§ 137 (2) Writings in General.

The existence of a record or office paper and its subsequent loss being admitted by one against whom it is desired to use it, secondary evidence of its contents may be given. *Pentecost v. State*, 107 Ala. 81, 18 So. 146.

§ 137 (3) Records.

Provable by Parol.—The contents of a lost or destroyed record may be proved by parol. *Lyon v. Bolling*, 14 Ala. 753; *Smith v. Wert*, 64 Ala. 34.

Probate Records.—In an action for medical services rendered by M., plaintiff's assignor, where the defense was that M. had no license to practice medicine, the president of the medical board of W. county testified that a license to practice was issued to M., signed by witness; that witness told M. it had to be signed by the probate judge; that M. stated that he would go and have it done, and started

towards the probate judge's office, but whether the license was signed and registered witness did not know; and that from the time the license was issued M. practiced medicine in W. county, until he left the state, about sixteen years later. It also appeared that the probate court records had been burned. Held, that this was sufficient to warrant the introduction of secondary evidence as to whether the license was duly signed and registered, and to justify the refusal of the general charge in favor of defendant. *Kilgore v. Stanley*, 90 Ala. 523, 8 So. 130.

"The destruction of the probate records when the courthouse was burned, rendered it impossible to obtain 'the certificate of the judge of probate that the name of such person [Dr. Monroe] is registered on his book as a licensed physician.' These proven facts authorized the introduction of secondary evidence. 3 Brick. Dig., p. 440, § 516." *Kilgore v. Stanley*, 90 Ala. 523, 8 So. 130, 131.

§ 137 (4) Judicial Papers.

Pleadings.—Where pleadings in another case, which would be admissible in evidence, are lost, the copies thereof, upon which the case was tried, and which were found in the files of the case, though not marked "filed," are competent evidence. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

Agreed Statement of Facts.—Where an agreed statement of facts on which a decision of a court was based becomes lost, on a subsequent trial of the cause in which it was made secondary evidence of its contents is admissible. *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600.

Affidavit and Process.—It is competent, on the plea of nul tiel record, for the plaintiff, in scire facias against bail, to prove that the affidavit and process have been lost, and to show their contents by parol evidence. *Kenan v. Carr*, 10 Ala. 867.

Exhibits.—Oral evidence is admissible to prove the contents of exhibits to a bill in equity, upon proof of the loss of the originals. *Dawson v. Burrus*, 73 Ala. 111.

Attachment.—The contents of an attachment which is shown to be lost may be proved by secondary evidence. *Derratt v. Alexander*, 25 Ala. 265.

Execution.—Where an execution has

been lost, and the indorsement of the levy thereon does not appear of record, the contents of the indorsement may be shown by parol evidence. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

Where execution has been lost, a memorandum of the execution, its levy, and the sale thereunder made by the sheriff in the course of his official duty is admissible to show such sale. *Baucum v. George*, 65 Ala. 259.

Where a justice's summons and complaint were shown by parol to be lost, their contents were provable by parol. *Southern Ry. Co. v. Dickens*, 163 Ala. 114, 50 So. 109.

Affidavit and Warrant of Arrest.—

There was evidence that after an arrest had been made the sheriff inclosed the affidavit and warrant in an envelope, and mailed it; but to whom the envelope was addressed was not shown. The magistrate before whom the affidavit was made and who issued the warrant testified that he made diligent search for the affidavit and warrant, without finding them, and that he had never received them from the sheriff. Held, that it would be presumed that the sheriff mailed them to the magistrate, and that secondary evidence of their contents were admissible. *Mark v. Hastings*, 101 Ala. 165, 13 So. 297.

§ 137 (5) Letters and Telegrams.

Letters.—Where testatrix devised the most of her property to her son with whom she had been living for the last ten years, and the will was contested on the ground of undue influence, and letters written by testatrix to the widow of a deceased son, in which she offered to help the latter financially, had been destroyed, it was error to exclude evidence of their contents as not the best evidence. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687.

§ 137 (6) Appointments.

Authority to Exclude Sealed Instrument.—Where, in testifying to his authority to execute a sealed instrument, an agent can not produce it in writing or account for its absence, he may be cross-examined as to its contents. *Elliott v. Stoks*, 67 Ala. 336.

§ 137 (7) Notices and Publications.

In an action for a libel, copies of the al-

leged libelous publication were admitted in evidence, the originals being lost. *Weir v. Hoss*, 6 Ala. 881.

§ 138. — Possession or Control of Primary Evidence.

§ 138 (1) In General.

Rules of Railroad.—In an action for personal injuries due to the negligence of a railway company's employee, where the fact that the company had certain rules for the conduct of employees, which were not brought out in the pleading, but developed incidentally in the examination of a witness, when there was no opportunity for demanding a printed copy, which was in the hands of the defendant, the plaintiff may show the contents of the rules by the testimony of the witness. *Northern Alabama Ry. Co. v. Key*, 150 Ala. 641, 43 So. 794.

"It is next insisted that the court erred in permitting the witness to testify as to the contents of the rules prescribing the duties of the hostler as it was shown that such rules were written or printed. While our court has laid down the principles that, when the defendant seeks, to prove by parol the contents of its own rules which were printed, it could not be done. *Georgia Pac. R. Co. v. Propst*, 90 Ala. 1, 7 So. 635; *Louisville, etc., R. Co. v. Orr*, 94 Ala. 602, 10 So. 187, yet where the fact of there being such a rule is not brought out in the pleading, and the matter is developed incidentally in the examination of a witness, when there is no time nor opportunity for demanding the printed copy, which is in the hands of the defendant, we think it would be unjust to deprive the plaintiff of the benefit of the testimony as to what are the duties of the hostler. It is within the power of the defendant to produce the book and show what the rules are. The company can not prevent the plaintiff from proving what the duties of its servants are (which is a matter known to all of its employees) by showing that the duties are stated in a printed rule." *Northern, etc., R. Co. v. Key*, 150 Ala. 641, 43 So. 794, 796.

Notes and Securities.—Where notes and other written securities are described as the consideration of a deed of trust, parol evidence may be given of them, without producing them to the jury, when they

are not within the control of the party offering the evidence. *Graham v. Lockhart*, 8 Ala. 9.

Record Book of Deed.—Where plaintiff in ejectment claimed title through a sale made by a trustee, and testified that the deed had never been in his possession or under his control, and that he was not the legal custodian of it, it was proper to allow in evidence the original record book in which the deed was recovered. *Jones v. Hagler*, 95 Ala. 529, 10 So. 345.

"The plaintiff claimed title through a sale and conveyance made by Moses McGuire as the trustee in a deed of trust in which David G. Jones was the grantor. To prove the deed of trust the plaintiff offered the original record thereof, as contained in one of the record books of deeds kept in the office of the probate judge of Tuscaloosa county. Objection was made to this evidence on the grounds that the defendant had made demand on the plaintiff to produce the original of said deed of trust, and that a certified copy should have been offered, instead of the original record. The plaintiff testified, without contradiction, that the original of the deed of trust had never been in his possession or custody or under his control. He was not the legal custodian of the instrument. That being the case, it was not incumbent upon him to produce it or to account for its absence. The instrument could as well be proved by the original record as by a certified copy therefrom. *Stevenson v. Moody*, 85 Ala. 33, 4 So. 595; *Miller & Co. v. Boykin*, 70 Ala. 469. The objection to this evidence was properly overruled." *Jones v. Hagler*, 95 Ala. 529, 10 So. 345, 347.

Transcript of Record.—Where, in ejectment, there was proof that plaintiffs were not in control of certain deeds, they were entitled to introduce certified transcripts of the record thereof, as provided by Code 1907, § 3374, though there was no sufficient proof of the loss of the deed; defendant having made no affidavit that the conveyance was a forgery. *Wise v. Spears*, 172 Ala. 8, 55 So. 114.

Where plaintiffs in ejectment were not the grantees under a deed, it being an ancient document, nearly fifty years old, there was no presumption that they were in possession or control thereof; and

hence they were entitled to introduce the transcript of the record to prove it. *Wise v. Spears*, 172 Ala. 8, 55 So. 114.

"The deeds in question were duly acknowledged or proved according to law, and a transcript of the record of same was admissible in evidence, if it appeared to the trial court that the original was lost, or that the party offering the transcript was not in the custody or control of the deeds. Section 3374 of the Code of 1907. We may concede that there was not sufficient proof of the loss of said deeds; but there was proof sufficient to show that these plaintiffs were neither in the custody or control of same. Whether or not the Ward deeds were lost, or in the possession of Mrs. Spears or Mr. Simmons, they were beyond the immediate custody or control of the plaintiffs, and the proof on the subject met the requirements of the case of *Hammond v. Blue*, 132 Ala. 337, 31 So. 357." *Wise v. Spears*, 172 Ala. 8, 55 So. 114, 115.

"Whether or not the Russell deed was shown to have been lost, or was traced into the possession of Mrs. Spears or Simmons, it was an ancient document, nearly fifty years old, and the plaintiffs were not the grantees thereunder, and no presumption arises that they were in the possession or control of same. *Allison v. Little*, 85 Ala. 512, 5 So. 221." *Wise v. Spears*, 172 Ala. 8, 55 So. 114, 115.

§ 138 (2) Possession by Adverse Party.

Statement of Rule.—Where the primary evidence is in the possession, or under control, of the adverse party, who fails or refuses to produce it, secondary evidence is admissible. *Robinson v. Curry*, 6 Ala. 842; *Loeb v. Huddleston*, 105 Ala. 257, 16 So. 714.

Doubt as to Possession by Adverse Party.—Where both parties claim under distinct purchases made at sales under several executions against the same defendant, it can not be presumed that either party is in possession of the title papers of the defendant in these executions, so as to make the mere failure of either to produce them, on a notice by the other, sufficient to let in secondary evidence of their contents. *Thompson v. Ives*, 11 Ala. 239.

Deed for Slave.—A., or his wife, both

being present, handed a paper to the witness, saying, "There is a deed I intended for my daughter, B." The witness read the paper and returned it to A., and, when examined as to its contents, could only recollect the words, "I give to my daughter, B., my negro woman, Penny, and to the heirs of her body." Held, that this, though not of the most satisfactory character, was evidence sufficient, both of the execution and contents of the deed, to go to the jury, especially as it was shown that the deed could not be found, and that the opposite party, in whose possession it was presumed to be, had been notified to produce it, and had failed to do so. *Mims' Ex'rs v. Sturtevant*, 18 Ala. 359.

Where the deed of gift, under which plaintiff claimed title to a slave, was more than twenty years old, and it was proved that the defendant's testator had possession of the deed, admitted its execution, and that he declared his intention to keep the negro for the female plaintiff until after her marriage, and that he died before her marriage, and the defendant, who was one of his executors, failed to produce the deed on due notice, it was held it was competent to prove its contents by parol. *Fralick v. Presley*, 29 Ala. 457.

Identity of Notice.—Plaintiff, having given defendant notice to produce the notice given him to mark the record of a certain mortgage satisfied, may, on defendant's producing a notice, which he claimed was the one he received from defendant, to mark another mortgage satisfied, testify this was not the one he gave defendant, and introduce copy of the one he testifies he did give him. *Barnett v. Wilson*, 132 Ala. 375, 31 So. 521.

Train Sheet.—Where, in an action against a railroad company for injuries to a servant by the alleged negligent operation of a train on which he was employed between two telegraph stations, it was in dispute that the distance between such stations was twelve miles, and plaintiff claimed that the train was run over such distance in fourteen minutes, while the engineer testified that the train was operated at a speed of twenty-five miles an hour, plaintiff in open court having demanded of defendant the production of the dispatcher's train sheet for the date

in question showing the time of departure of the train from such stations, and defendant having failed to produce the same, plaintiff was entitled to show by a witness who had seen the sheet the same week of the trial that it showed that fourteen minutes were consumed in operating the train between such stations. *St. Louis & S. F. R. Co. v. Sutton*, 169 Ala. 389, 55 So. 989.

"Appellant's counsel cite in their brief in support of the contention that the train sheet would not be competent and legal evidence a line of cases in which it is held that reports of the circumstances or facts in regard to accidents made by an agent or servant of a railroad company to the company subsequent to the occurrence the subject of the report are not evidence against the company. These cases are *Culver v. Alabama*, etc., R. Co., 108 Ala. 330, 18 So. 827, and *Alabama*, etc., R. Co. v. *Taylor*, 129 Ala. 238, 29 So. 673. The principle upon which these cases proceeded is a sound one, and will not be disturbed here. Such reports as were therein made are not of the *res gestæ*. They are merely narratives by the agent or servant of past transactions." *St. Louis*, etc., R. Co. v. *Sutton*, 169 Ala. 389, 55 So. 989, 994.

Request to Enter Satisfaction of Mortgage.—In an action for the statutory penalty for failure to enter satisfaction of a mortgage on the margin of the record, a copy of the request therefor to defendant was admissible, where it appeared that demand had been made on him for the original, and that he had denied having it, or having received it. *Pickett v. Frost* (Ala.), 61 So. 476.

A witness may testify to the existence of notes or bills of exchange, although they are not produced, nor their absence accounted for. *Snodgrass v. Branch Bank*, 25 Ala. 161.

Policy of Insurance.—Where the local secretary of a fraternal insurance company was the agent of the order for the purpose of obtaining the policy upon the death of an insured, a delivery to such secretary was a delivery to the lodge, so as to charge it with the custody of the policy and permit secondary evidence of its contents after demand for production.

District Grand Lodge v. Jones, 5 Ala. App. 367, 59 So. 313.

§ 138 (3) Possession by Third Persons.

Deed.—On proof that plaintiff had not the custody or control of a deed to certain land in question, a certified copy was admissible as provided by Code 1907, § 3374, though the deed was executed to and the note for the price executed by defendant as trustee. *Lamar v. King*, 168 Ala. 285, 53 So. 279.

Books of Firm.—In an action against a sheriff and his sureties for the levy of an attachment on goods alleged to have been purchased by plaintiffs from the attachment debtors, defendants sought to show the insolvency of the debtors at the time of the sale, and had given legal notice to produce the books of the firm. They were not produced, and defendants then sought to introduce evidence of their contents. Held, that such evidence was admissible. *Smith v. Collins*, 94 Ala. 394, 10 So. 334, cited in note in 52 L. R. A. 839, 53 L. R. A. 534.

Person Holding Writings Outside of State.—The defendant can prove the contents of letters by secondary evidence after the testimony of the plaintiff had shown that the recipient, in whose possession they were last seen, was out of the state. *Webb v. Gray* (Ala.), 62 So. 194.

Where a written document is shown to be in the possession of a person in another state, and not to be, in any manner, subject to the control of the party wishing to introduce it in evidence, the latter may prove its contents by parol. *Memphis*, etc., R. Co. v. *Hembree* 84 Ala. 182, 4 So. 392.

Contents of Note.—Where trover was brought for a promissory note, which had passed from the possession of the defendant to that of the plaintiffs witness, and the plaintiffs had done all in their power to have it produced on the trial, it was held that evidence of its contents might be introduced. *Blevins v. Pope*, 7 Ala. 371.

Where the action is in trover, for the conversion of a note, charge the defendant with the possession of the instrument, the rule as it regards the preliminary proof previous to giving secondary evi-

dence of the contents, does not apply. Nor does it vary the case, that it comes out in proof, that the note is not then in possession of the defendant, but is in the possession of the maker; in the absence of proof to the contrary, it will be presumed that he placed it there, it is still under his control. *Blevins v. Pope & Son*, 7 Ala. 371.

"The rule in relation to the right to give secondary evidence of the contents of a written instrument, does not apply where the action charges the defendant with the possession of the paper, as in this case. In *How v. Nichols*, 14 East. 274, which was trover for a bond, Lord Ellenborough remarks, 'The plaintiff is to show, as well as he can, what the instrument is, which he seeks to recover as his own, from the possession of the defendant; and if he give a wrong description of it, the defendant may set it right by producing the thing. The rule as above laid down, is admitted, but it is said, that where, as in the present case, it is shown that the note is not in the possession of the defendant, the rule does not apply.' *Blevins v. Pope & Son*, 7 Ala. 371, 375.

Secondary Evidence of Land Patents.—Under Code 1896, § 1812, providing that land patents must be received in evidence without further proof, and § 1813, providing that a transcript of any document pertaining to any land office in the state, certified by the register, must be received as prima facie evidence of the facts contained therein, the original patent or a certified copy thereof is the best evidence of a grant from the government in ejectment, and proof that none of the conveyances relating to title to land in controversy are in possession of a party does not establish a predicate for the introduction of a certified copy of an entry in the tract book in the office of the probate judge of a county. *Butt v. Mastin*, 143 Ala. 321, 39 So. 217.

"The trial court properly excluded the certificate of the copy from the tract book in the office of the judge of probate of Mobile county. As has been heretofore held by this court, the original patent, or a certified copy of same, is the highest and best evidence of the grant from the government to the patentee. Sec-

tions 1812, 1813, Code 1896; *Hammond v. Blue*, 132 Ala. 337, 31 So. 357. We do not think the proof of plaintiffs that they did not have the original established the predicate for the introduction of the certificate in question. It was not a certified copy as would bring it within the provision of § 1813 of the Code of 1896. It was in no sense a certified copy of the original patent. It was simply an extract from the tract book of Mobile county." *Butt v. Mastin*, 143 Ala. 321, 39 So. 217, 218.

§ 138 (4) Presumptions as to Possession.

Possession of Deed.—Where a deed is made to one person for life, remainder to life tenant's children, there is no presumption that the remaindermen have possession of the instrument, and the failure of any of them to testify that it is not in their possession does not of itself prevent proof of its loss. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

§ 139. Preliminaries to Admission of Secondary Evidence.

§ 140. — In General.

"It is a general proposition that a party offering secondary evidence must show that he has, to a reasonable degree, exhausted all means of locating the paper, and it is also stated that it must be shown that search has been made of the place where the paper has been kept. 8 Ency. Ev. 30 et seq.; 17 Cyc. 543 et seq.; *McGuire v. Bank*, 42 Ala. 589, 592; *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 903." *Whitsett v. Belue*, 172 Ala. 256, 54 So. 677, 680.

"There is perhaps no rule of evidence which allows of more exceptions than that which requires the best evidence to be adduced, which the case admits of. This rule is founded upon a reasonable suspicion that the substitution of inferior for better evidence, arises from some sinister notice, and an apprehension that the best evidence, if produced, would alter the case to the prejudice of the party. It assumes that the transaction, admits of better evidence; and though this may be true, yet if such better evidence is lost, or can not be produced, proof of a secondary character may be adduced." *Sally v. Capps*, 1 Ala. 121, 122.

Proof of reasonable, written notice to produce, or destruction of, the paper or document, of its absence from the state, would let in oral evidence of its contents. 3 Brick. Dig., pp. 439, 440, § 486 et seq.; Id. 505 et seq.; Id., p. 516; *Street v. Kelly*, 67 Ala. 478; *Pensacola R. Co. v. Schaffer*, 76 Ala. 233. No reason is assigned why the better evidence was not produced, and for this error the judgment of the circuit court must be reversed. Alabama, etc., *R. Co. v. Coskry*, 92 Ala. 254, 9 So. 202.

Best Evidence Not Voluntarily Withheld.—To introduce secondary evidence, satisfactory proof must be made that the best is not voluntarily withheld. *Mordecai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 584.

Proper Predicate Must Be Laid.—Parol evidence can not be received to prove the existence of title to land by patent or deed, until the proper predicate is laid for its introduction. *Hussey v. Roquemore*, 27 Ala. 281.

Reason for Failure to Produce Original Must Be Shown.—"It is a familiar rule, that secondary evidence of the contents of a written private contract, is not admissible, until a sufficient excuse is shown for a failure to produce the contract itself. *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567; *Lewis v. Hudmon*, 56 Ala. 186." *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 903, 904.

Efforts to Have Letters Produced.—Evidence of the contents of letters written by a plaintiff to a defendant was incompetent, in the absence of evidence that plaintiff had made any effort to have the letters produced. *Powers v. Hatter*, 152 Ala. 636, 44 So. 859.

Testimony of a witness as to contents of a letter which he claimed to have received from the insured, without sufficiently accounting for the failure to produce the original, is inadmissible. *Mutual Life Industrial Ass'n of Georgia v. Scott*, 170 Ala. 420, 54 So. 182.

Original Documents Unavailable.—In an action for false imprisonment and malicious prosecution, secondary evidence of the affidavit and warrant of arrest was properly excluded where plaintiff failed to lay a proper predicate by showing that the original documents were

not available. *Engle v. Patterson*, 167 Ala. 117, 52 So. 397.

Execution of Deed Must Be Proven.—Parol evidence of the contents of an alleged deed is inadmissible, where its execution or the genuineness of the signature is not established. *Potts v. Coleman*, 86 Ala. 94, 5 So. 780.

Cases Enumerating Rules as the Introduction of Secondary Evidence.—"The rules with regard to the introduction of secondary evidence are familiar and frequently repeated in our decisions. *Singer Mfg. Co. v. Riley*, 80 Ala. 314, 316; *Potts v. Coleman*, 86 Ala. 94, 101, 5 So. 780; *King v. Scheuer*, 105 Ala. 558, 16 So. 923; *Alabama Const. Co. v. Meador*, 143 Ala. 336, 39 So. 216; *McEntyre v. Hairston*, 152 Ala. 251, 44 So. 417; *Perry v. State*, 155 Ala. 93, 46 So. 470." *United States Fidelity, etc., Co. v. Dothan*, 174 Ala. 480, 56 So. 953, 955.

§ 141. — **Proof as to Existence of Primary Evidence.**

Existence of Deed Must Be Shown.—Before secondary evidence of the contents of a deed can be considered, it must be shown that such an instrument has once existed. *Rucker v. Jackson (Ala.)*, 60 So. 139.

Proof of Execution of Written Lease.—Parol evidence of the contents of a written lease, alleged to have been lost, is not admissible without first producing the subscribing witness to prove its execution, or showing a legal excuse for its absence. *Hughes v. Southern Warehouse Co.*, 94 Ala. 613, 10 So. 133, cited in note in 35 L. R. A. 339.

Circumstances Showing Execution and Identity of Deed.—When a deed is not produced after due notice to the party having the control of it, the court will be liberal in the application of the rule which allows secondary evidence; and, though there be no direct evidence of the identity and execution of the deed, proof of circumstances tending to establish these facts is admissible and proper to be submitted to the jury. *Bright v. Young*, 15 Ala. 112.

The oral admissions of the grantee, as detailed by witnesses twelve years after they were made, that he had given up his property to his grantor, his uncle, and

had conveyed it all back to him, being unable to pay, were in this case held insufficient to establish the execution and contents of a deed of reconveyance, alleged to have been lost. *Shorter v. Sheppard*, 33 Ala. 648.

Where the execution of a deed alleged to be lost, and which had never been recorded, is denied, testimony of an attorney that he drew such a deed, and of a witness that he had seen such a deed purporting to be signed by the alleged grantors, is inadmissible to prove its execution. *Comer v. Hart*, 79 Ala. 389.

Execution and Loss of Memorandum.—Unless the existence and subsequent loss of an execution are proved, a memorandum in the handwriting of the clerk on the margin of the execution docket is not evidence of the issue and return of an execution. *Hanna v. Price*, 23 Ala. 826.

Proof of Judgment.—Proof that a judgment was rendered in a suit by A. against the executor of B., and that the note sued on was executed by B., and that the record of the judgment had been destroyed by fire, is not sufficient evidence to prove the identity of the note in a chancery suit, in which the judgment was not evidence of the original debt; first, because the note itself is not produced, nor its absence sufficiently accounted for by proof of the destruction of the record, the note not being a necessary part of the papers in the cause; second, because there was no proof of the identity of the note, when made, to whom and by whom made, for what amount, and when payable. *Borland v. Phillips*, 3 Ala. 718.

Interlineations in Contract.—Where defendant had made interlineations in his typewritten copy of the contract, and the questions in dispute were whether they were made before or after execution, and whether the document with the interlineations or the one without them was the contract, each party was properly allowed to introduce evidence to prove his theory. *R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263.

What Constitutes Sufficient Predicate.—In proving the execution of a deed, the testimony of old residents of Mobile, who had resided there before and since the execution of the deed, that they never knew

or heard of such persons as the witnesses to the deed in the state, is *prima facie* sufficient to prove the nonresidence, and to let in secondary evidence. *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, cited in note in 35 L. R. A. 340.

Sufficient Evidence of Deed's Existence.—Proof that a deed was placed in the hands of counsel for instituting the action, and that it had been sent to another state in a commission for taking depositions, and that the person to whom it was sent stated in a letter that he had returned it to the court issuing it, together with the testimony of one of the parties tending to prove that he executed the original deed, was sufficient to establish its former existence. *Swift v. Fitzhugh*, 9 Port. 39, cited in note in 5 L. R. A., N. S., 976.

As to the alleged deed from Cothan & Elliott to Cadow, the court holds, as on the former appeal *Elliott v. Dycke*, 78 Ala. 150, that the proof of its existence and destruction was sufficient to let in secondary evidence of its execution and contents. *Elliott v. Dycke*, 80 Ala. 376, cited in note in 52 L. R. A. 565, 605.

§ 142. — Proof as to Destruction or Loss of and Search for Primary Evidence.

§ 142 (1) Method of Proof.

Secondary proof of the contents of a writing is inadmissible, where no proper predicate is laid by proof of the loss of the original. *Thomas Bros. v. Williams*, 170 Ala. 522, 54 So. 494.

A copy of an instrument is inadmissible, without a proper predicate accounting for the absence of the original. *Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272, 50 So. 906.

It is no objection to the preliminary proof of loss of a paper that only one of three who made the search for it is produced as a witness, where the other two are shown to have been in the state, but in counties distant from the scene of the trial. *Jernigan v. State*, 81 Ala. 58, 1 So. 72.

Evidence of Each Custodian.—Before secondary evidence of a lost instrument should be admitted, the loss and search for same should be shown by each and every custodian thereof. *Huggins v.*

Southern Ry. Co., 159 Ala. 189, 49 So. 299.

Search Necessary.—Where a party testified that he could not find an instrument, that he had hunted for it in the place last seen by him, but had been unable to find it, a sufficient predicate was laid for the admission of secondary evidence. *Saunders v. Tuscumbia Roofing, etc., Co.*, 148 Ala. 519, 41 So. 982.

To render secondary evidence of the contents of an instrument admissible, it is necessary to show that search has been made in the place where the instrument was last seen, or in the place where it would be likely to be found, if in existence, and that it was not found; but it is not necessary to prove that search has been made in every possible place. *Saunders v. Tuscumbia Roofing, etc., Co.*, 148 Ala. 519, 41 So. 982.

"From a general review of our cases, we may gather that it is not sufficient for the witness to state that he has not seen the paper and is satisfied that it is lost; also that it is not necessary to prove that search has been made in every possible place, but it is necessary to prove that search has been made in the place where the instrument was last seen, or kept, or in the place where it is likely it would be found, if in existence. *Green v. State*, 41 Ala. 419, 422; *Preslar v. Stallworth*, 37 Ala. 402, 406; *Jernigan v. State*, 81 Ala. 58, 1 So. 72; *Bogan v. McCutchen*, 48 Ala. 493; *Foster v. State*, 88 Ala. 182, 7 So. 185; *O'Neal v. McKinna*, 116 Ala. 606, 22 So. 905; *Burks v. Bragg*, 89 Ala. 204, 7 So. 156; *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663; *Stuart v. Mitchum*, 135 Ala. 546, 33 So. 670." *Saunders v. Tuscumbia Roofing, etc., Co.*, 148 Ala. 519, 41 So. 982, 983.

Bill of Lading.—Secondary evidence of the contents of a bill of lading may be received, when it is shown that the document is beyond the jurisdiction of the court, in the hands of a person residing in another state. *Young v. East, etc., R. Co.*, 80 Ala. 100.

"The bill of lading being shown to have been out of the jurisdiction of the court, in the hands of persons resident in the state of Ohio, the court properly ruled that it was competent to prove the contents of the paper by oral evidence.

Under this state of facts such secondary evidence was admissible. *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232; *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442." *Young v. East, etc., R. Co.*, 80 Ala. 100, 101.

Custodian Should Testify to Loss.—As a general rule, where it is sought to introduce secondary evidence of the contents of a paper alleged to be lost, the person to whose custody the paper belonged should be called and sworn to account for it, if he is within the reach of the process of the court. *Bogan v. McCutchen*, 48 Ala. 493.

"In the present case the last known custodian of the paper was examined as a witness, and testified to his inability to find the paper, though he made careful search for it at the place at which it was last known to be, and at other places where it might possibly have been left. The testimony of several other witnesses tended to show that the paper had been lost. In view of such evidence, and of the absence of any showing that there was a motive for withholding the paper, it can not be said that the court was in error in holding that a sufficient preliminary showing was made to let in secondary evidence. *Jernigan v. State*, 81 Ala. 58, 1 So. 72; *Jones on Evidence*, § 213." *Gossett v. Morrow*, 4 Ala. App. 306, 58 So. 799, 800.

A party seeking to introduce secondary evidence of the execution and contents of a document is required; first, to reasonably convince the court that the original has been lost or destroyed, or is beyond the reach of the court's process, by proving that a diligent search has been made for it in a place where it is most likely to be found, which has not been successful. *Gossett v. Morrow*, 4 Ala. App. 306, 58 So. 799.

Party Who May Prove Loss or Destruction.—Preliminary proof of the destruction or loss of a written contract, to introduce parol evidence of its contents, may be made by the party himself seeking to recover thereon, when the facts are within his knowledge. *Glassell v. Mason*, 32 Ala. 719.

Oath of Party.—Where evidence was offered tending to show that certain papers once existed, and that they came to

the party's possession, the loss may be proved by the oath of such party. *Bass v. Brooks*, 1 Stew. 44.

An affidavit of the loss of a bond, for the purpose of letting in secondary evidence, may be made in the body of the bill or separately. *Evans v. Bolling*, 5 Ala. 550.

"We do not think it important whether the affidavit of the loss of the bond for title, so as to let in secondary evidence of its contents, was incorporated in the bill, or made upon a distinct and separate paper. The substance of the affidavit of loss is, that after diligent search it can not be founded in the clerk's office, where it was deposited to be recorded, or among the private papers of complainant, and he has never been able to find the same. This is certainly open to the objection that it is very cautiously and guardedly drawn. It does not state the belief of the party that the paper is lost or destroyed, but that it can not be found in two places which are named. From the view, however, which we take of the case, it is not necessary to pass on its sufficiency, and we will therefore proceed to the consideration of the merits of the case." *Evans v. Bolling*, 5 Ala. 550, 556.

§ 142 (2) Admissibility of Evidence.

Witness Who Can Not Read.—In order to show that a deed has been destroyed, the testimony of a witness, who can not read, that she has destroyed a paper which she understood to be the deed in question, is incompetent. *Mitchell v. Mitchell*, 3 Stew. & P. 81, cited in note in 5 L. R. A., N. S., 976.

Affidavit of Arbitrator.—Where a submission has been delivered to an arbitrator, his affidavit is the best evidence of its loss; and while his evidence can be obtained that of a party is not admissible. *Pryor v. McNairy*, 1 Stew. 150.

§ 142 (3) Weight and Sufficiency in General.

Strictness of Proof Varies.—Strictness of proof of loss or destruction of an instrument, to admit of secondary evidence, varies in accordance with the importance and value of the instrument; and if of little value, and there is no ground for suspicion that it is designedly withheld, slight evidence may suffice. *Agee v.*

Messer-Moore Ins., etc., Co., 165 Ala. 291, 51 So. 829.

"The strictness of the proof also varies in accordance with the importance and value of the document. If it be of little value, and there be no ground for suspicion that it is designedly withheld, very strict proof is not required. Very slight evidence may suffice in such case. *Jones on Ev.*, § 215. Here the document was of no intrinsic value. There existed no apparent reason for withholding it. There was no dispute or doubt that the copy made was correct, and showed the land in exactly the shape and condition that all the parties thought it was in at the time of the transaction. So, if error intervened, it clearly appears that it was without injury." *Agee v. Messer-Moore Ins., etc., Co.*, 165 Ala. 291, 51 So. 829, 831.

Recorded Instrument.—Where an instrument alleged to be lost has been recorded, much less stringent proof will be required of its loss than in other cases. *Adams v. Shelby*, 10 Ala. 478.

Circumstantial Evidence.—Loss or destruction of an instrument, admitting of secondary evidence, may be proved by circumstantial evidence. *Agee v. Messer-Moore Ins., etc., Co.*, 165 Ala. 291, 51 So. 829.

Not Beyond Possibility of Mistake.—Loss or destruction of an instrument need not be proved beyond the possibility of mistake to allow of secondary evidence. *Agee v. Messer-Moore Ins., etc., Co.*, 165 Ala. 291, 51 So. 829.

"The loss or destruction of the original need not be proven beyond the possibility of mistake. It is enough if the testimony satisfies the court of the fact with reasonable certainty. The loss or destruction may be proven by circumstantial evidence. The proof necessary to establish the loss of a writing, so as to let in secondary evidence of its contents, must depend upon the nature of the transaction to which it relates, its apparent value, and other circumstances. If suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons of its nonproduction; but if there is no such suspicion, all that ought to be required is reasonable diligence to obtain the original, in respect to which the courts extend great liber-

ality.' *Juzan v. Toulmin*, 9 Ala. 662." *Agee v. Messer-Moore Ins., etc., Co.*, 165 Ala. 291, 51 So. 829, 831.

Testimony of Custodian and Other Witnesses.—Evidence that the last known custodian of a paper was unable to find it, after making a careful search for it in the place where it was last known to be, and at other places where it might possibly have been left, and the testimony of several other witnesses tending to show that the paper had been lost, was sufficient to justify secondary evidence, in the absence of any evidence showing that there was a motive for withholding the paper. *Gossett v. Morrow*, 4 Ala. App. 306, 58 So. 799.

Diligent Search for Dying Declarations.—Where dying declarations were reduced to writing at the time by the witness, testimony that he had given such writing to the grand jury, and had not seen it since, though he had searched diligently through his own papers, and, together with the clerk, through the grand jury papers, is insufficient to authorize the admission of oral evidence of the declarations. *Boulden v. State*, 102 Ala. 78, 15 So. 341.

Contents of Notice Posted One Year before.—Where plaintiff in trover relies on a tax sale, he may show by parol evidence the fact and contents of the posted notices of sale, put up more than a year before the trial, without proof of their destruction, as that will be presumed. *Rodgers v. Gaines*, 73 Ala. 218.

Search Carefully Made.—"The search appears to have been carefully made, and there is an absence of proof of fact or circumstance tending to show a motive for withholding the papers. We think the proof of loss was sufficient to let in the secondary evidence. *Beard v. Ryan*, 78 Ala. 37; 1 Greenl. Ev., § 559, and notes; *Foster v. Mackay*, 7 Metc. 531; 1 Brick. Dig. 848, §§ 632-634; *Donagan v. Wade*, 70 Ala. 501." *Jernigan v. State*, 81 Ala. 58, 1 So. 72, 74.

Search for Bill of Lading.—Where an attorney testified that he made a copy of a bill of lading, and had made diligent search for the original, and could not find it among his papers, and was under the impression that he had returned it to his employers (partners), the survivor of

whom testified that he had searched among the papers of the firm, and not found it, and, in looking over the papers of the deceased partner, had not seen it, the copy was admitted in evidence. *Jones v. Scott*, 2 Ala. 58.

Search by Recording Officer.—The affidavit of a party that a power of attorney forming a link in his chain of title had been deposited with the recording officer to be recorded, and that such officer had since informed him that it was in his office, and that he (the party) had made diligent search, and could not find it, and believed it to be lost or mislaid, is sufficient to let in secondary evidence. *Ward v. Ross*, 1 Stew. 136.

Possession by Person in Foreign State.—Proof that a deed for a chattel (a slave) once existed and was in the possession of a person who intermarried with the grantee of the deed; that the deed had been demanded of him and not produced; that he resided "now" in another state; that further search and inquiry had been made of the persons who might possibly be in possession of the deed and without effect, was deemed sufficient to rebut the presumption of fraud and admit secondary evidence. *Mordecai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 584.

Lack of Search Shown.—Papers left with a justice of the peace in the trial of a cause can not be proved after his death by secondary evidence in a subsequent suit, where no search was shown to have been made through his papers or no showing that they were lost. *Sibley & Sibley v. Smith*, 167 Ala. 158, 52 So. 27.

§ 142 (4) Records.

Record of Probate Court.—The written grounds of contest to a will being matter of record in the probate court, a certificate of the probate judge, attached to a transcript which purports to contain a full copy of the proceedings probating the will, but which does not include the grounds of contest, is not sufficient to authorize the admission of secondary evidence, without proof of a recent search for them in the office. *Donagan v. Wade*, 70 Ala. 501.

Justice's Docket.—The mere fact that the docket of a justice was in the courthouse six or eight months before it was

burned does not justify the admission of parol evidence of the proceedings before him. *Watson v. State*, 63 Ala. 19.

Record of Bridge, Contract.—In an action against a county to recover damages for a defective bridge, it was proved that diligent search had been made in the proper office for records and papers pertaining to the letting out and building of the bridge; that only some of them could be found, and that others had never been recorded. Held, that a sufficient foundation had been laid for the introduction of secondary evidence, and that it was competent to prove by the contractor who did the work the contents of such as had not been found. *Williams v. Colbert County*, 81 Ala. 216, 1 So. 74.

§ 142 (5) Negotiable Instruments and Receipts.

It is sufficient, to authorize parol evidence of the contents of a paper alleged to be lost, that it can not be found where last seen, nor among the papers of those most likely to have it. *Sledge's Adm'r's v. Clopton*, 6 Ala. 589.

Note Used in Former Action.—Plaintiff delivered the note sued on, more than six years previously, to his attorney, to be used in a chancery suit then pending, and never recovered possession of the same. Held, upon claim of loss, that proof of diligent search for same in the register's office, and in the office of the attorney, where there did not appear to be any probable motive for withholding it, laid a sufficient predicate to let in secondary evidence of the contents of the note. *Katzenberg v. Lehman*, 80 Ala. 512, 2 So. 272. See, also, *Jernigan v. State*, 81 Ala. 58, 1 So. 72.

Note Upon Which Judgment Was Rendered.—Where, in an action against the indorser of a promissory note, the plaintiff swears that he delivered the note to an attorney for collection, and has not seen it since, though he has made diligent search for it, and proves by the clerk of the court in which suit was instituted against the makers that judgment was rendered at a particular term, and that all the papers in the cause had been abstracted from his office, a sufficient predicate is laid for the introduction of secondary evidence. *Herndon v. Givens*, 16 Ala. 261.

Possession in Another Person.—Parol evidence of the contents of a note can not be given, on the affidavit of the party's attorney that he had filed the note in another case, and on search could not now find it, and that, when he last saw it, it was in possession of one T.; it not appearing T. was without the jurisdiction of the court. *Judson v. Eslava, Minor* 71.

Destruction of Records of Action.—A note not produced in evidence is not sufficiently accounted for by proof of the destruction of the record of an action thereon, since the note itself is not a necessary part of the papers in the cause. *Borland v. Phillips*, 3 Ala. 718.

Presumption as to Cancellation or Destruction of Notes.—Where the maker of notes had received them several years previously, and delivered the notes of third persons in payment of them, it may be presumed that they were destroyed or otherwise canceled, so as to let in secondary evidence of their contents, without a notice to produce them, in a controversy in respect to the substituted paper. *Pond v. Lockwood*, 8 Ala. 669.

Admission of Loss by Opposite Party.—Proof of the admission by the defendant that a note sued on is lost is sufficient to allow plaintiff to offer parol evidence of its contents. *Cooper v. Mad-dan*, 6 Ala. 431.

Note Filed with Clerk.—The fact that a note has been filed in the clerk's office, that it is not there now, and that the clerk does not know where it is, is not sufficient proof of its loss to let in secondary evidence of its contents. *Preslar v. Stallworth*, 37 Ala. 402.

"The general statement by an officer into whose custody a particular paper is traced, that the document is not now in his office with the other papers of the case, and that he does not know what has become of it, is too indefinite to satisfy the rule in relation to the admission of secondary evidence. There should have been some more direct evidence of a search of the file for the note. *Millard v. Hall*, 24 Ala. 209; *Johnson v. Powell*, 30 Ala. 113." *Preslar v. Stallworth*, 37 Ala. 402, 406.

§ 142 (6) Judicial Papers.

Papers Off File.—Where certain papers constituting a part of the file of the case

were lost, and the trial judge, who was the proper custodian of the papers, caused a search to be made by one familiar with the office, such search and failure to find the missing papers constituted a sufficient predicate for the introduction of secondary evidence of their contents. *Randall v. Wadsworth*, 130 Ala. 633, 31 So. 555.

Writ of Attachment.—In an action for wrongful attachment, it was shown that no writ of venditioni exponas, issued in compliance with the judgment for the plaintiff in the original suit, was on file. The clerk of the circuit court, his deputy, and the clerk of the sheriff each testified that they had made diligent search for the writ in the place where such papers were usually kept, but had been unable to find it. Held, that the evidence authorized the introduction of secondary evidence of the contents of the writ. *Hamilton v. Maxwell*, 133 Ala. 233, 32 So. 13.

Affidavits and Warrants of Arrest.—While the degree of diligence in searching for the original document, essential to make secondary evidence thereof admissible, depends largely upon the circumstances and the character of the document, every reasonable effort must be made to produce the original, and, in an action for malicious prosecution, a sufficient showing of the loss of the affidavits and warrants therein was not made to admit secondary evidence of their contents where no effort was made to ascertain what had become of them from any member of the grand jury in whose custody they were last known to be, and the deputy sheriff stated that the grand jury returned some papers, but he did not know whether they included the affidavits, etc., or whether the papers returned were given to himself or the clerk who was in the office at the time. *Abingdon Mills v. Grogan*, 167 Ala. 148, 52 So. 596.

The testimony showed that an affidavit and warrant of arrest were in the possession of the magistrate who issued them, and, according to his recollection, left with the grand jury. He made the necessary search for them, without success. The only other effort to find them was a search, by the clerk of the court, among the papers which the foreman of the

grand jury delivered to him, upon its adjournment. No member of the grand jury was examined to ascertain whether all the papers in the hands of the jury were delivered to the clerk or not, and no effort was made to find them among those not delivered. Held, that the proof of loss was not sufficient to let in secondary evidence of the contents of the affidavit and warrant. *O'Neal v. McKiuna*, 116 Ala. 606, 22 So. 905.

Writ of Habeas Corpus.—A search of half an hour for a writ of habeas corpus in a lawyer's office, where it was last known to be, without finding it, is sufficient to raise the presumption of its loss, and authorize the admission of secondary evidence of its contents. *Sturdevant v. Gains*, 5 Ala. 435.

Writs of Execution.—Testimony of the clerk of the court that he had made diligent search for certain writs of execution belonging to the files of his office and was unable to find them is sufficient to let in secondary evidence of their contents. *Stewart v. Conner*, 9 Ala. 803.

To authorize secondary evidence of the contents of an execution issued by a justice of the peace, it is sufficient to show, by the justice, that he can not, after diligent search, find it in his office, and has not seen it since the last term of the circuit court, when it went before the jury as evidence in another cause, accompanied by the testimony of the circuit clerk that he has made diligent, but unsuccessful, search for it among the files of his office containing the trial papers of the last term. *Johnson v. Powell*, 30 Ala. 113.

Secondary evidence of the contents of an execution is admissible, upon proof that it has been returned to the clerk's office, and that diligent search has there been made for it, both by the clerk and the party's attorney. The presumption of its loss, being once established, will continue until there is some evidence that it had been found since the search. *Poe v. Dorrah*, 20 Ala. 288.

To let in parol evidence of the contents of an execution, it is not necessary that the clerk's office should be searched for it by the clerk himself. A search by another who has access is sufficient. *Hill v. Fitzpatrick*, 6 Ala. 314.

Order of Sale.—To authorize the admission of secondary evidence of the contents of an order of sale made by the court, its existence should be first proved, and its absence accounted for, or its loss established, after the requisite searches had been made for it in the proper office. *Millard's Adm'rs v. Hall*, 24 Ala. 209.

Papers in Justice's Court.—The fact that the original papers in an action tried before a justice of the peace can not be found either by the party in whose favor the judgment was rendered, or by the justice, will not warrant the introduction of parol evidence regarding the judgment, in the absence of a showing that the justice had been in office continuously since its rendition, or that he had succeeded, after being out one or more terms, to the same justiceship that he held at the time of the rendition of the judgment; the presumption being that his docket and papers have been turned over to his successor in office, as required by law. *Roach v. Privett*, 90 Ala. 391, 7 So. 808, cited in note in 21 L. R. A. 473.

Plaintiff's attorney testified that copies of a complaint and summons against plaintiffs in justice's court, offered in evidence in the absence of the originals, were pencil copies, made by him from the papers received in the suit before the justice; that, as he recollected, the copies were correct; that, after he had made the copies, the originals were used in the suit before the justice; and that after the suit he never saw them. Held competent, so far as it went, as foundation for introduction of the copies. *Thorn v. Kemp*, 98 Ala. 417, 13 So. 749.

§ 142 (7) Books of Account.

When a book containing original entries, which are competent evidence, is shown to be beyond the jurisdiction of the court, copies of them, shown to be correct, are admissible. *Elliott v. Dyche*, 80 Ala. 376, cited in note in 52 L. R. A. 565, 605.

Lists of Damaged Goods.—In an action for damages to a stock of merchandise, a copy of the lists of damaged and undamaged goods was properly excluded as evidence, where no foundation for introducing it was made by showing a loss and inability to find and produce the original

lists. *Brent v. Baldwin*, 160 Ala. 635, 49 So. 343.

§ 142 (8) Bills of Sale.

Trial of Right of Property.—On a trial to determine the right of property levied on under execution, claimant claimed under a chattel mortgage and bill of sale. His attorney testified that a few days previous to the trial he had the papers in his desk, and took them out, with a view to having them at the trial, and laid them on his desk, and had not seen them since; that they were not on the desk, where he put them; and that he had searched for them, and could not find them, and did not know where they were. Held a sufficient foundation for secondary evidence of the contents of the papers. *Stuart v. Mitchum*, 135 Ala. 546, 33 So. 670.

§ 142 (9) Leases and Grants.

Failure to Search in Probable Place.—Secondary evidence, offered by defendant as to the contents of a written lease, will not be allowed where he testifies that the writing has been misplaced, and that he has made diligent search for it, and thinks it is lost or destroyed, but admits that it is probably among certain private papers carefully packed away for safe keeping, which he has neglected to examine. *Burks v. Bragg*, 89 Ala. 204, 7 So. 156, cited in note in 23 L. R. A., N. S., 369.

Title Bond.—After the execution of a deed by the vendor, his title bond is presumed to have been given up and destroyed. Consequently secondary evidence of its contents is then admissible for the purchaser, although none of the witnesses recollect what became of it. *Williams v. Mitchell's Adm'r*, 30 Ala. 299.

§ 142 (10) Mortgages and Trust Deeds.

Mortgage Known to Be in Burned Building.—There was a sufficient predicate for the introduction of certified copies of mortgages in evidence, where a witness testified that he had the mortgages and turned them over to a certain other person, and he testified that they were in his office when it burned, and that he made search for them after the fire and could not find them. *Ryan v. Shaneyfelt*, 146 Ala. 683, 40 So. 223.

Failure to Prove Destruction of Particular Paper.—A party, to lay a predicate for the introduction of secondary evidence of a mortgage, showed the execution of the mortgage to a trustee, who stated that he did not know where the mortgage was and that his last recollection of it was that it was in a safe in a store. Another witness testified that all the papers in the store were turned over to him, that a great many papers thought to be worthless were destroyed, that he did not know that the mortgage was destroyed, and that he did not have the mortgage. Held insufficient to authorize the admission of secondary evidence. *McEntyre v. Hairston*, 152 Ala. 251, 44 So. 417.

Failure to Find Document after Diligent Search.—Proof that the mortgagee, after search among his papers, could not find the mortgage; that it had been left with a lawyer for collection, since which he has never seen it; that the lawyer, who was then in partnership with another, diligently searched for it among his papers and could not find it; that during the partnership he was often absent, and the mortgage might have been taken out in his absence by some one, but, if so, he did not know it; that upon the dissolution of the firm all the papers of the firm were turned over to him, and the mortgage was not among them, is sufficient to authorize the introduction of a duly certified copy from the records of the probate judge. *Denning v. Davis*, 57 Ala. 590.

Where an officer of plaintiff company testified that the mortgage, under which plaintiff claimed, had been in the courthouse and shown to the attorneys in the case, but that he could not afterwards find it at the courthouse or among his papers, this proof, in the absence of anything to suggest improper motive for withholding it, warranted a finding that the mortgage was lost, and could not be produced, so as to allow secondary evidence as to its contents. *Pilcher v. Dothan Mule Co.*, 6 Ala. App. 552, 60 So. 547.

"The objection to the introduction of secondary evidence of the contents of the mortgage under which the plaintiff claimed the right to the property alleged to have been converted was properly over-

ruled. The custodian of the paper, who was an officer of the plaintiff company, testified to the paper having been in the courthouse and shown to the lawyers in the case; that he thought it was with the other papers in the case; but that, after he found that it was in the courthouse, he looked through all his papers, and in all places where he usually kept such papers, and could not find it. This evidence, especially in view of the circumstances mentioned, and the absence of anything to suggest the existence of an improper motive for withholding the original, can not be said to have been insufficient to warrant a finding by the court that the original paper was lost and could not be produced, though a diligent search had been made for it. *Saunders v. Tuscumbia Roofing, etc., Co.*, 148 Ala. 519, 41 So. 982; *Jones on Evidence*, §§ 212, 213. So far as the objection to the secondary evidence was based on the ground that the execution of the instrument had not been proved, it was without foundation in fact. The execution of the paper had been testified to without objection." *Pilcher v. Dothan Mule Co.*, 6 Ala. App. 552, 60 So. 547, 548.

On the trial of an indictment for selling mortgaged personal property, secondary evidence may be received to prove the execution and contents of the note and the mortgage securing it, where the papers were diligently searched for at the place where they were last seen, by three persons acting together, and on two distinct occasions, and where there is no proof of fact or circumstance tending to show a motive for withholding the papers. *Jernigan v. State*, 81 Ala. 58, 1 So. 72.

Failure of Custodian to Produce Document.—Where the plaintiffs in a cause, to whom a deed of mortgage had been executed, and which remained unsatisfied, in answer to interrogatories propounded to them under the statute, state that the deed is in the hands of A., their attorney, and A., being examined as a witness, deposed that it has not been in his possession for the last five or six months, and a notice to produce it on the trial is shown to have been duly served on B., another attorney, who had succeeded A. in the management of the cause, these

facts constitute a sufficient predicate for the admission of secondary evidence at the instance of the defendant; the deed not having been produced. *Bright v. Young*, 15 Ala. 112.

§ 142 (11) Bonds.

Contractor's Bond.—In an action by a town on a contractor's bond, a witness testified that it had been introduced in evidence in another case, after which the witness and the clerk of the court searched the courthouse for it, failed to find it, and that witness' recollection was that W., representing the contractor in that case, introduced it in evidence, but was not certain, though he was positive that the bond was there; that he had looked through his own desk and other places where such papers were kept, and could not find it. He also testified that the treasurer of the city was the custodian of such papers; that the chairman of the building committee had turned the bond over to witness, but he did not know whether such chairman got the bond after the trial referred to, or whether he had it then. W. testified that he was attorney for the principal in the case referred to, remembered seeing the bond; that it was signed by the contractor, but did not recall that he had the bond in his custody; that he had not searched for it, but did not have it, and never had it. The chairman of the building committee testified that he never had the bond in his possession, and the treasurer, the legal custodian of the bond, was not examined. It was also shown that the contractor signed the bond, but no witness testified that it was signed by defendant's surety. Held insufficient to show loss of the bond, so as to authorize secondary evidence of its contents. *United States Fidelity, etc., Co. v. Dothan*, 174 Ala. 480, 56 So. 953.

Title Bond.—Proof that a title bond and receipts of payment were last seen in the possession of the assignee in bankruptcy of their original holder, and that the successor of said assignee had been unable to procure them after diligent inquiry both of his predecessor and others, is sufficient to let in secondary evidence of their contents. *Robe's Heirs v. Stickney*, 36 Ala. 482.

§ 142 (12) Contracts and Assignments.

Insurance Policy.—The proof showed that an insurance policy was in the possession of the agent who wrote it, but no notice was served on him to produce it; and although he testified that he did not know where it was, and could not find it, he did not show that he had made a bona fide, diligent search for it in the place where it was most likely to be. Held, that secondary evidence as to the contents of the policy was inadmissible. *Phoenix Assur. Co. v. McAuthor*, 116 Ala. 659, 22 So. 903.

Diligent Search Must Be Made for Contract—Insufficient Evidence of Destruction.—Where it is alleged that a written contract was lost, it must be shown that careful search was made at the place where it was last known to be, and where it would most likely be found, before secondary evidence of its contents is admissible. *Foster v. State*, 88 Ala. 182, 7 So. 185.

Evidence of the agent of a party that he had kept his books and papers, had assorted his papers at the close of the year and destroyed such as he regarded as of no value, had frequently looked over his papers and had not lately seen the contract in question, had never looked for this paper and had no recollection that it was destroyed, though he was satisfied that it was destroyed, as he had not seen it for some time in looking over the papers for other objects, is not sufficient to authorize the introduction of secondary evidence of the contract. *Green v. State*, 41 Ala. 419.

§ 142 (13) Letters and Telegrams.

Search Must Be Shown.—Generally a party offering secondary evidence after letter must show that he has to a reasonable degree exhausted all means of locating the paper, and that he has searched the place where the paper was kept. *Whitsett v. Belue*, 172 Ala. 256, 54 So. 677.

Receipt and Destruction of Letters.—It is proper for a party to prove by her own testimony the reception of letters and their destruction. This is necessary and preliminary to the proof of their contents. *Scarborough v. Blackman*, 108 Ala. 656, 18 So. 735, 736.

Statement of Inability to Find Letters.

—The mere statement of defendant, "I can't find them," does not show that a search had been made, so as to authorize secondary evidence of the contents of letters. *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71.

Statement That Letter Was Lost or Destroyed.

—A witness' statement that he did not keep a letter, and that it had been either lost or destroyed, was sufficient proof of loss to admit secondary evidence of its contents. *Whitsett v. Belue*, 172 Ala. 256, 54 So. 677.

Failure to Prove Diligent Search.—Evidence that plaintiff had left a letter with certain attorneys, that he had made diligent search for the letter on two different occasions, and that the attorneys had searched in the place where they kept their correspondence, etc., but without any proof by the attorneys with reference to the search made by them among their documents, or that the attorney's evidence could not be produced, was insufficient to justify the introduction of secondary evidence as to its contents. *Alabama Const. Co. v. Meador*, 143 Ala. 336, 39 So. 216.

Where the party, wishing to prove the contents of a lost letter, stated that he had looked among his papers for it, but that he might have mislaid it, though he thought it might have been lost or destroyed, no such diligent search was shown as is required in order to permit secondary evidence. *Bogan v. McCutchen*, 48 Ala. 493.

Failure to Show Person by Whom Search Was Made.

—A mere statement that a particular letter, the contents of which are sought to be introduced in evidence, was used before a justice of the peace and can not be found, without showing by whom, or when, where, or of whom, inquiry and search were made, is not sufficient to authorize the admission of secondary evidence of its contents. *Calhoun v. Thompson*, 56 Ala. 166.

Destruction of Telegram.—"As in cases of other writings, proof of the loss of a telegram is a prerequisite to the admission of secondary evidence of its contents. *Whilden & Sons v. Merchants', etc., Nat. Bank*, 64 Ala. 1." *American Union Tel.*

Co. v. Daughtry, 89 Ala. 191, 7 So. 660, 662.

The testimony of the operator in charge of defendant's office, from which a telegram was sent, that he sent away all the papers found there shortly after the telegram was sent, and that he has been informed that they were destroyed, is not competent to show the destruction of the telegram for the purpose of admitting parol evidence of its contents. *American Union Tel. Co. v. Daughtry*, 89 Ala. 191, 7 So. 660.

§ 142 (14) Conveyances.

Inferential Proof of Loss.—The affidavit of the complainant of the loss of a deed is not evidence of the fact of loss; but such loss must be proved, and is usually arrived at inferentially. *Owen v. Paul*, 16 Ala. 130.

Search in County Clerk's Office.

—Where a bill alleges that a deed, charged to be lost, was deposited in the office of the clerk of the county court, proof should be made of a search in that office, as otherwise the presumption would arise that it was still there. *Owen v. Paul*, 16 Ala. 130.

Failure to Prove Inquiry of Last Custodian.

—Where plaintiff's deed had but a short time previous to the trial been placed in the hands of an attorney, who had since removed into another state, and no inquiry had been made of such attorney concerning the deed, nor any search made for it in his former office, it was error to admit in evidence a certified copy of the deed taken from the probate records. *King v. Scheuer*, 105 Ala. 558, 16 So. 923.

Failure to Institute Efficient Search.

—Where proof was made to the court that the executor of the grantee had searched for an original deed, and had not been able to find it, and that after the grantee's death his son had carried off to a place in the country a trunk containing his father's papers, which the executor had not searched, but he had made verbal application to him for the trunk and the deed, it was held that a copy was not admissible. *Tannis v. St. Cyre*, 21 Ala. 449.

In ejectment, in which an original deed is competent evidence, the record of such deed is admissible, where the party of-

fering it testifies that at one time he had the original in his possession, but did not have it at the time of trial, and that he had made diligent search, and could not find it, and did not know where it was. Nashville, etc., L. R. Co. v. Hammond, 104 Ala. 191, 15 So. 935.

In an action of ejectment, the fragment of a deed under which one of the parties to the suit claims, which is identified by parol evidence, where the attesting witnesses thereto are dead or can not be produced, and it appears therefrom that the lands involved in suit were conveyed to the grantor of the party seeking to introduce it, is admissible in evidence, in connection with parol proof that the missing portion of the paper could not be found with the other papers of the grantee of said deed, or among those belonging to the party to the suit seeking to introduce it. Anniston City Land Co. v. Edmondson, 127 Ala. 445, 30 So. 61.

Custodian Can Not Be Compelled to Produce Document.—The general rule is that a party relying upon proof of a lost deed must account for failure to produce it, and establish the fact that it was lost, by proof of diligent search where it is most likely to be found, together with evidence of the particular nature of the search made; but where it appears that its custodian was a third person, who can not be compelled to produce it, the rule is relaxed, though enough must be shown to reasonably satisfy the court that it is not voluntarily withheld by the party offering to prove it. Laster v. Blackwell, 128 Ala. 143, 30 So. 663.

Burning of Deed.—Where defendants claimed under a deed alleged to have been destroyed, their testimony was competent to prove the burning and identity of the deed as being among the papers destroyed. Powers v. Hatter, 152 Ala. 636, 44 So. 859.

Where defendant testified to the burning of certain deeds, and had to describe them in order to lay a predicate by showing what papers were destroyed, evidence as to whose signature was attached thereto was admissible. Powers v. Hatter, 152 Ala. 636, 44 So. 859.

Search of Papers of Dead Custodian.—The proper custodian of a deed having died, and the deed being alleged to be

lost, held that, in order to make a copy competent, the proponent must show that the original could not be found after a proper search had been made for it among the papers of the deceased. McGuire v. Bank of Mobile, 42 Ala. 589.

Search in Every Probable Place.—If defendant, when applied to for a deed, denies having it in his possession, and expresses his belief that it is in the register's office, and ineffectual search is made for it there, and also in the office of a lawyer who once had it in his possession, a sufficient predicate is laid for proof of the deed by a certain copy. Shields v. Byrd, 15 Ala. 818.

Deed Left in Law Office.—Where a deed was left in a pocketbook in a law office, which, on search, could not be found, it is not necessary to produce the lawyer to testify to its loss; it not being shown to have been in his personal custody. When an instrument alleged to be lost has been recorded, much less stringent proof will be required of its loss than in other cases. Adams v. Shelby, 10 Ala. 478.

Deeds More than Thirty Years Old.—Where plaintiff in ejectment claims under deeds more than thirty years old, which are not shown to have ever been in his possession, and the circumstances are free from suspicion, record copies of such deeds are admissible, on proof of diligent search by his attorney and agent, assisted by himself, though he is not personally examined as to his custody of the papers. Beard v. Ryan, 78 Ala. 37.

Diligent Search Must Be Shown.—Testimony merely that a deed alleged to have been lost was searched for and not found is insufficient to admit secondary evidence of its contents; there must be diligent search made, and the execution of the instrument, as well as its loss, must be proved. Singer Mfg. Co. v. Riley, 80 Ala. 314.

Statement of Place Deed Was Last Seen.—A deed is not shown to have been lost, so as to admit secondary evidence of its contents, by merely showing by one witness that it once existed, and that he last saw it in his desk at home. Echols v. Hubbard, 90 Ala. 309, 7 So. 817.

"Her evidence amounts to no more than a supposition that a deed was exe-

cuted, and a supposition that the supposed deed was destroyed when the courthouse at Athens was burned by federal soldiers, based on the assumption that the deed had been filed there along with papers connected with the administration of the estate. The other witness, George H. Moore, a son of Alfred Moore, and coexecutor of the will, proves the existence of the deed, but utterly fails to establish its loss. He testifies that it came to his custody as executor of his father's estate, and that he left it, or the last he knew of it, it was in a certain desk or secretary at the family home in Huntsville. There is no evidence that any search was ever made for it, and non constat but that it was there at the time of the hearing in the court below, and was not lost at all. This was far from being a sufficient predicate for the introduction of secondary evidence of the execution and contents of the alleged deed. 1 Greenl. Ev. § 558; U. S. v. Sutter, 21 How. 170; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 3 So. 475." Echols v. Hubbard, 90 Ala. 309, 7 So. 817, 818.

Deposition of Nonresident.—Where a deed was of ancient date, and is such as would not probably be preserved a great length of time (as a bill of sale of slaves), an attempt to take the deposition of a nonresident, in whose possession the deed was last known to be, was sufficient proof of diligence to let in secondary evidence of the contents thereof. Beall v. Dearing, 7 Ala. 124.

Deposit in Postoffice.—Proof by the grantee in a deed that he deposited it in the postoffice directed to another, who testifies that he never received it, and that inquiry has been made at the office of deposit and delivery, and to the general postoffice by letter, without finding the deed, is sufficient to let in secondary evidence of its contents. McRae v. Pegues, 4 Ala. 158.

Failure to Find Deed in Court.—A party seeking to show the loss of a deed, for the purpose of admitting secondary evidence thereof, stated that he thought he handed it to his counsel in a suit to enable him to prepare his answer therein and make defense; that he had never seen it since the answer in the cause referred to was filed, though he had made most

anxious and diligent search for it, and caused search to be made among the papers of his counsel, and, applying at the proper office, was informed that not a paper pertaining to the cause in which it was used remained in court; that he thereupon employed the register in chancery and the former deputy clerk, as well as others, to examine all the files and books of reference in the court of chancery and in the circuit court, on the equity side of which the suit was instituted and determined, but his efforts proved unavailing. Held sufficient. Juzan v. Toulmin, 9 Ala. 662.

Where witnesses, who testified that a deed was filed in the probate office, disclaimed its subsequent possession, and there was evidence that one of such witnesses, the clerk in the probate office, who receipted for it, and the probate judge search for it among the papers left for record, secondary proof of its contents was not inadmissible merely because another clerk in the probate office, not shown to have had its custody or control, was not examined as to his knowledge of its whereabouts. Carter v. Tennessee Coal, etc., R. Co. (Ala.), 61 So. 65.

"We think a sufficient predicate was laid as to the loss of the deed to admit secondary proof of same. Lamar and Wall last traced it into the probate office and disclaimed the subsequent possession of same, and searches were made where papers left for record were kept made by one of them and Mrs. Palmer, the clerk who receipted for same, and again by one of them and probate judge. There may have been another clerk in office, but the deed had never been traced into his custody or control; and we can not say that the predicate was insufficient, because he, too, was not examined, and disclaimed any knowledge of its whereabouts. This holding is not in conflict with the cases of Huggins v. Southern R. Co., 159 Ala. 189, 49 So. 299; Abandon Mills v. Grogan, 167 Ala. 148, 52 So. 596. In those cases the proof did not show a search by the party with whom it was left or of the last place to which it was taken. We did not hold that the search had to be made by every person connected with the last place to which the lost paper had been taken or was left."

Carter v. Tennessee Coal, etc., R. Co. (Ala.), 61 So. 65, 67.

Original Deed in Another State.—Evidence that a deed under which a party claimed a chattel once existed, and was in the possession of the husband of the grantee of the deed residing in another state; that the deed had been demanded, but not produced; and that inquiry had been made of other persons, who it was supposed might have possession of the deed, and an offer to prove its contents by an office copy, are sufficient to admit inferior evidence of its contents. *Mordcai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 584.

Deed Sent to Another State.—Proof that a deed was placed in the hands of counsel for the purpose of instituting the action, and that it was sent in a commission to another state to take depositions, and that the person to whom it was sent informed the witness by letter that he had forwarded the deed to the clerk of the court from which it issued, but it appeared that it never reached its destination, and an attempt had been made to secure the deposition of the person in whose hands it had last been, which attempt failed, the evidence was sufficient to establish the loss, and the secondary evidence was admissible to prove its contents. *Swift v. Fitzhugh*, 9 Port. 39.

Testimony of One of Three Grantees.—The testimony of one of the three grantees in a deed that he had once had possession of the original, and had searched for it, but could not find it, unaccompanied by proof that it was not in the custody of one of the other two grantees, is sufficient as a predicate for the introduction of a copy of the deed. *Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272, 50 So. 906.

Custodian a Fugitive from Justice.—The grantee being presumed to have the custody of a deed, the fact that he fled from the state, eight or nine years ago as a fugitive from justice, and has not since been heard of, is a sufficient excuse for the nonproduction of the deed by one claiming under a purchase at execution sale against him. *Shorter v. Sheppard*, 33 Ala. 648.

Must Exhaust All Reasonable Sources of Information.—To entitle a party to in-

troduce secondary evidence to establish a deed, he must show that he has, in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. *McGuire v. Bank*, 42 Ala. 589.

§ 143. — Proof as to Possession or Control of Primary Evidence.

Lack of Possession and Control Must Be Proved.—Under Code 1896, § 992, providing that, if it appears to the court that the party offering in evidence a transcript of the record of a conveyance has not the custody or control of the original instrument, the transcript must be received, it is not enough to show that such party has not the possession of the original, but he must also prove that he has not control thereof. *Hammond v. Blue*, 132 Ala. 337, 31 So. 357.

"It is not enough to show that a party is not in possession of the original document or paper, to render secondary evidence of the same competent and admissible. The statute requires more. He should also prove that he has not the control of such original. Code 1896, § 992; *Jones v. Hagler*, 95 Ala. 529, 10 So. 345; *Farrow v. Nashville, etc., R. Co.*, 109 Ala. 448, 20 So. 303." *Hammond v. Blue*, 132 Ala. 337, 31 So. 357, 358.

Possession of Map.—A question asked a witness as to whether he had a certain map in his possession was competent for the purpose of establishing the predicate for the introduction of secondary evidence. *Theodore Land Co. v. Lyon*, 148 Ala. 668, 41 So. 682.

Neither Possession nor Custody.—Under Code 1907, § 3374, which provides for the admissibility of a transcript of a deed upon a showing that the original was destroyed or without the custody or control of a party, a showing by one of the plaintiffs in ejectment that he did not have possession or custody of a deed was sufficient to permit the introduction of the record thereof. *McBride v. Lowe*, 175 Ala. 408, 57 So. 832.

Proof of Marriage License.—The evidence disclosed that the judge signed a number of license certificates in blank, and delivered them to another, who is-

sued one to the person who was married to plaintiff's daughter. Defendant stated, in answer to a subpoena requiring him to produce the license, that he had not in his possession a license such as that described in the subpoena. Another witness testified that he had examined the record of marriage licenses which was on file in the defendant's office, and that he could not find a record of the issuance of a license for the marriage of plaintiff's daughter. Held to constitute sufficient foundation for the introduction of parol evidence of the issuing and signing by defendant of the license, and its contents. *Crook v. Webb*, 125 Ala. 457, 28 So. 384.

§ 144. — Notice to Produce Primary Evidence.

§ 144 (1) Necessity in General.

Necessity for Notice.—A party will not be allowed to give parol evidence of the contents of an instrument in the possession of his adversary unless he has given the latter or his counsel reasonable notice to produce it on the trial. *Olive v. Adams*, 50 Ala. 373.

To Show Contents of Deeds.—Where a party desires to show the contents of deeds which are possession of the adverse party, he must give notice to such adverse party to produce the deed before he can show their contents by parol. *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

Necessity for Notice to Produce Letters.—Where notice to produce certain letters is not given, and no evidence is offered to show that they are lost or destroyed, copies are not admissible. *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

Refusal after Notice.—It is error to permit secondary evidence of the contents of defendant's books of account upon a mere showing of notice by plaintiff of a motion to produce the original books, since, in order to lay a predicate for secondary evidence, there must not only be a demand, but a refusal or failure to produce. *Alabama Iron Co. v. Smith*, 155 Ala. 287, 46 So. 475, cited in note in 36 L. R. A., N. S., 902.

Acts Equivalent to Notice.—An unsuccessful attempt to take the deposition of a nonresident, in whose possession a deed was last known to be, to establish its ex-

istence, contents, and loss, is equivalent to a demand of the deed. *Beall v. Dearing*, 7 Ala. 124.

Where the deposition of a witness is taken to prove the contents of a deed, it is not necessary to give notice to produce the deed when the deposition is taken, but such notice must be given before the deposition can be used on the trial. *Hemphill v. Townsend*, 7 Ala. 853.

Before Evidence as to Accuracy of Account.—No notice need be given by plaintiff to the defendant to produce a statement of account sent him, before receiving oral testimony as to the accuracy of the statement or memorandum allowed to go to the jury. *Hirschfelder v. Levy*, 69 Ala. 351.

When Notice Need Not Be Proven.—If a party when applied to for a deed denies having it in his possession, no notice need be given him to produce it, in order to admit secondary evidence thereof. *Shields v. Byrd*, 15 Ala. 818.

Where plaintiff testified to addressing and mailing letters to defendant, a sufficient predicate was laid for testimony of their contents, without proving notice to defendant to produce them, where he denied having received them. *Jordan v. Austin*, 161 Ala. 585, 50 So. 70.

"It was competent for the plaintiff to show that he had written defendant demanding payment of the note, and that he received no reply. Defendant testified that he had written the plaintiff complaining of the mare and offering to restore her, and claimed a rescission. The fact that plaintiff had written defendant to pay the note and he failed to reply was contradictory of defendant's theory of an offer to return the mare and of a rescission of the sale, as well as the contention that she did not come up to the plaintiff's warranty, if any there was. A proper predicate was shown for the proof of the contents of the letters written by plaintiff to the defendant, as the plaintiff testified to addressing and mailing them to defendant, and, as the defendant denied getting them, a notice to produce was unnecessary. 2 Wigmore on Evidence, § 1203, subd. 'b.'" *Jordan v. Austin*, 161 Ala. 585, 50 So. 70, 72.

Where, in an action for divorce for adultery the accused wife denied in her an-

swer and on the stand ever having written or received certain letters tending to prove her infidelity, and claimed them to have been forgeries, and her alleged paramour testified that letters received by him from her had been burned, copies of such letters were admissible, though no notice had been given to her to produce the originals. *Bickley v. Bickley*, 136 Ala. 548, 34 So. 946.

§ 144 (2) Description or Identification of Primary Evidence.

Notice Does Not Exclude Other Documents.—Notice to E., the plaintiff, to produce, on the trial, letters received in answer to letters written on E.'s behalf "by" P., held not to render admissible proof of contents of letters written "to" P. *Mobile Life Ins. Co. v. Egger*, 67 Ala. 134.

§ 144 (3) Time of Service.

Notice at Trial.—Where it is shown or can be intended that a paper is in the possession of a party, and in court, so that it can be produced without delaying the trial, a notice at the trial will perhaps be sufficient to let in secondary evidence of its contents if it is not produced. *Brown v. Isbell*, 11 Ala. 1009.

In an action of unlawful detainer, notice to produce a written demand given to defendant at the trial is not sufficient as to time, without proof that the paper is in court, or so near that it can be obtained without delaying the trial. *Bates v. Ridgeway*, 48 Ala. 611.

§ 144 (4) Notice Embodied in Pleadings.

Where, in an action for failure to deliver a telegram, a notice was indorsed on the complainant requiring defendant to produce at the trial the original of the telegram dated January 6, 1906, referred to in the complaint, and on January 3, 1907, the complaint was amended, changing the date "sixth day of January," wherever it occurred, to "fourth day of January," and trial was had on June 9, 1909, the amendment to the complaint operated to make the notice one to produce the telegram of January 4, 1906, so as to make admissible secondary evidence of the contents of the telegram, upon failure of defendant to produce the original. *Western Union Telegraph Co. v. Stokes*, 171 Ala. 168, 54 So. 181.

§ 144 (5) Notice to Absent Parties or Where Document Is Out of Jurisdiction.

Several Days before Term.—Notice to a party, several days before the trial term, to produce a writing, is sufficient to let in parol evidence of its contents, although the plaintiff reside out of the state. *Jefford's Adm'r v. Ringgold*, 6 Ala. 544.

It is difficult to lay down a precise rule, as to what notice to produce a writing is necessary, to let in secondary evidence of its contents; but a notice to the plaintiff's attorney several days before the term of the court when the cause was tried, is prima facie sufficient, although the plaintiff resided without the state; if the plaintiff was ready to produce it, and was unwilling that parol evidence should be given, he could have applied for a continuance. *Jefford v. Ringgold & Co.*, 6 Ala. 544.

§ 144 (6) Filing of Suit as Notice.

Action on Notice.—In an action for money had and received, to recover of an agent the amount of a promissory note collected by him, a witness, who had seen the note, and heard the parties to the action speak of its amount, may testify thereto, though no evidence was given of the loss or destruction of the note, or notice to produce it shown. *Sally's Adm'r's v. Capps*, 1 Ala. 121.

§ 144 (7) Service on Counsel or Representative.

Service on Attorney Sufficient.—Proof that a deed for land was made in 1824 by the defendant to the plaintiff, and given to the mother of the plaintiff, an infant, for safekeeping, who, ten years after was married to the defendant, and that notice had been given to the defendant's attorney to produce the deed, was held sufficient to authorize the admission of secondary evidence to prove the contents of the deed. *Bethea v. McCall*, 3 Ala. 449.

Where a suit is brought in the name of one person for the use of another, a notice to the attorney of record to the plaintiff to produce a writing which merely describes the suit as between the nominal plaintiff and the defendant is sufficiently certain, and the attorney can not excuse the nonproduction by proof that he was

retained by the plaintiff really interested. *Simington v. Kent's Ex'r*, 8 Ala. 691.

A written notice to the attorney at law of a party to produce a paper to be used in evidence is declared by statute to be valid and legal, to all intents and purposes, as if served on the party in person. *Simington v. Kent's Ex'r*, 8 Ala. 691.

Attorney of Nonresident.—Notice to plaintiff's attorney, several days before the term when the cause is to be tried, to produce a writing or submit to secondary evidence, is prima facie sufficient, though plaintiff resides without the state. *Jefford's Adm'r v. Ringgold*, 6 Ala. 544.

Counsel and One Defendant.—Where notice was served on defendant's counsel, and one defendant was present to produce an original letter written defendants, and, though its possession was not denied, it was not produced, the court acted within its discretion in allowing parol evidence of the writer as to its contents. *Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, 159 Ala. 491, 49 So. 92.

Notice to Executor.—Where a bill presented to a drawee for acceptance was at his request left with him, a notice to his executors after his death to produce it on the trial of an action against them for the refusal of their testator to accept will authorize the admission of parol evidence of its contents, although they deny it ever came to their possession. *Kennedy's Ex'rs v. Geddes*, 3 Ala. 581.

§ 144 (8) Notice to Person Not in Possession of Document.

Beneficiary of Trust Estate.—On the death of a trustee, the title deed of the trust estate devolves on his personal representative, and a notice to produce it, given to one of the cestuis que trustent, is not of itself sufficient to authorize the admission of secondary evidence. *Powell v. Knox*, 16 Ala. 364, cited in note in 5 L. R. A. 976.

§ 145. Character and Degrees of Secondary Evidence.

§ 145 (1) In General.

Highest Character of Secondary Evidence.—Though the facts may warrant the admission of secondary evidence, the best of that character of evidence which

appears to be in the power of the party offering it must be produced. *Powers v. Hatter*, 152 Ala. 636, 44 So. 859.

§ 145 (2) Oral Evidence.

Parol Evidence of Contents of Telegram.—In an action by a brakeman for injuries from the derailment of a car he testified that he received instructions from the conductor by a telegram signed by M., and that he had lost the telegram, and could not produce it. Held, that any ground for an objection that it was not shown that the telegram had been signed by M., or who M. was, was removed by plaintiff's further testimony that it was signed by M., the train dispatcher, and that plaintiff saw the operator hand it to the conductor. *Southern Ry. Co. v. Howell*, 135 Ala. 639, 34 So. 6.

Testimony of Person Who Had Not Seen Instrument.—One who never saw a certain lost license to make sales of fertilizer, claimed to have been issued to a corporation of which he was an officer, can not prove its existence and contents. *Edisto Phosphate Co. v. Sandford*, 112 Ala. 493, 20 So. 613.

Person Who Has Read Document May Testify.—Where there is no subscribing witness to a lost deed, a sufficient predicate being laid to let in secondary evidence, its contents may be proved by any one who has read it and knows what it contains. *Nolen v. Gwyn's Heirs*, 16 Ala. 725, cited in note in 16 Ala. 725.

To Show Mistake in Record.—Parol evidence was admissible to show a mistake in a record of a deed; for, although the best of secondary evidence is required, it is permissible to show that what appears to be is not in fact a higher degree of evidence. *Harvey v. Thorpe*, 28 Ala. 250.

Person Ignorant of Handwriting.—Where an attorney stated that a letter was written to him by the plaintiff, which was lost, and the contents not remembered by him, another person, to whom the attorney showed the letter, is competent to prove its contents, although he has no knowledge of the handwriting. The identity of the letter and the proof of its contents are questions for the jury. *Curry v. Robinson*, 11 Ala. 266.

The contents of articles of partnership

can not be proved by the testimony of a witness who states that he saw such a paper subscribed with the defendants' names, and apparently attested by two other persons as subscribing witnesses, but with the handwriting of all of whom he was unacquainted. *Anderson v. Snow*, 8 Ala. 504.

The contents of letters which are lost may be shown by any one, without accounting for the nonproduction of the person to whom they were written. *Drish v. Davenport*, 2 Stew. 266, cited in note in 14 L. R. A., N. S., 750, 751.

The admission of the maker of a note that he executed it was inadmissible, where the attesting witness was not called, and such admission was elicited on cross-examination without allowing the opposite party to see the instrument. *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 So. 276, cited in note in 35 L. R. A. 346.

§ 145 (3) Exclusion of Parol Evidence as Inferior to Copies or Other Documents.

Parol evidence of the contents of a deed is improper, when it is shown that the party offering it is in possession of a true copy. *McRae v. Pegues*, 4 Ala. 158.

§ 145 (4) Subscribing Witnesses.

Must Account for Absence of Subscribing Witnesses.—Where the absence of the subscribing witness is not accounted for, secondary evidence of an absolute deed and a parol defeasance to the same is not admissible in a bill to redeem the property conveyed. *Hatfield v. Montgomery*, 2 Port. 58.

The execution of a chattel mortgage, to which there is a subscribing witness, can not be proven by the mortgagor or mortgagee without reason for the failure to produce the witness being shown, as against an execution creditor of the mortgagor. *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

"No rule is better than that when one claims personal property under a mortgage, which is attested by a subscribing witness, its execution must be proved by him, or a proper predicate must be laid for the introduction of secondary evidence; and the admissions or declarations of the parties themselves to the instru-

ment (not made in open court, or in writing for the purpose of a trial when they are parties litigant), are not admissible for this purpose. *Askew Bros. v. Steiner*, 76 Ala. 218; *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 So. 276. And its execution can not be proved by the mortgagor or mortgagee, when the subscribing witnesses are not called, and no reason for failing to produce them is shown. *Russell v. Walker*, 73 Ala. 315." *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

The attestation of a written instrument did not have to be proved as against an obligor who did not deny its execution, under Ala. Code 1867, § 3036, which provided that in actions on written instruments the same was admissible in evidence unless the execution was denied by affidavit. *Meyer Bros. v. Mitchell*, 75 Ala. 475, cited in note in 35 L. R. A. 325.

In a suit in equity for the specific performance of an executory contract for the sale of land, against the vendor and another claiming under him by subsequent conveyance, the execution of the contract, if denied by the latter, must be proved, although the denial is not under oath; and if the contract is attested by subscribing witnesses, its execution must be proved by one or more of such witnesses, unless sufficient excuse is shown for not producing them. *Meyer Bros. v. Mitchell*, 75 Ala. 475, cited in note in 35 L. R. A. 321, 322, 325.

Where the subscribing witness is a nonresident, dead, or unknown, secondary evidence may be used to show the contents of a written instrument. *Barringer v. Sneed*, 3 Stew. 201; *Elliott v. Dycke*, 78 Ala. 150, cited in note in 35 L. R. A. 339.

"The deed being executed in Georgia, the presumption, in the absence of all testimony on the subject, is, that the subscribing witnesses had their domicile in that state. The defendants were not called upon to account for their absence, but was rightly permitted to prove the execution of the deed by other testimony. If the deed had been destroyed, the handwriting of the witnesses could not be proved, and defendants were forced to other sources for proof of execution. The court did not err in permitting the proof to be made by the witness Cadow, nor by other wit-

nesses who testified to Elliott's admissions, and to his acts indicating that he set up no claim to the lands. *Ellerson v. State*, 69 Ala. 1." *Elliott v. Dycke*, 78 Ala. 150, 156, cited in note in 35 L. R. A. 339.

Paper Not Required by Law to Be Made.—"The affidavit, the proof of the execution of which, in the form it was allowed, made the basis of an exception, was a private paper, one which the law does not require to be made. It was a mere notice to the sheriff of the claim of the El Cosmopolitano Club to a part of the property he had levied on, forbidding him to sell it. We are not informed it was made as the basis of a replevy; and on the presentation of this claim, as the bill of exceptions states, a release of the levy of the property described in the affidavit was demanded of the sheriff in behalf of said club. To make the claim appear to be bona fide, no doubt, it was sworn to. The notary public before whom it was sworn is not, properly speaking, a subscribing witness to it, and it is not necessary now so to decide. But, if the notary were the attesting witness the paper is not the foundation of the right and title of the club to the property, the sale of which, by the paper, it forbade; but it is 'merely collateral, or inter alios, under or from whom neither party seeks to claim any right or interest.' *Askew Bros. v. Steiner*, 76 Ala. 218, 221. And so the witness Gould was properly allowed to prove his own signature, and that of John Marquez, the other maker of the written claim. This view of the case disposes of the remaining assignments of error. We find no error in the record, and the judgment of the city court is affirmed." *Lavretta v. Holcombe*, 98 Ala. 503, 12 So. 789, 791.

§ 145 (5) Memoranda and Other Documents.

Memoranda made by a sheriff in the discharge of his official duty, describing an execution, its levy, and the sale of lands under it, are competent secondary evidence of the facts therein stated, when a proper predicate has been laid for the introduction of secondary evidence. *Baucum v. George*, 65 Ala. 259.

Memoranda of an execution, its levy,

and the sale thereunder, made by the sheriff in the discharge of his official duty, is competent secondary evidence of the facts therein recited, where the execution was issued twenty years before, and could not be found. *Baucum v. George*, 65 Ala. 259.

The existence of a record or office paper, and its subsequent loss, having been shown, its contents may be proved by secondary evidence, as in the case of other documents; and if the record or paper was ancient, less strictness of proof is required than if it were recent. *Baucum v. George*, 65 Ala. 259.

Mortgage of Premises.—In trespass for injury to land which plaintiff purchased from defendant, a mortgage of the premises executed by plaintiff to defendant simultaneously with the execution of the deed is admissible as secondary evidence of the contents of the deed, on proof of its loss. *Gresham v. Taylor*, 51 Ala. 505.

§ 145 (6) Copies and Counterparts.

Sworn Copy as Best Evidence.—The best evidence of the contents of a lost instrument is a sworn copy of the original. It is proof of the same grade of the original. *Evans v. Bolling*, 8 Port. 546.

Duplicate Copies of Contract.—Where four typewritten copies of a contract had been made, and two of them executed, both parties retaining one of the duplicates and one of the parties showed loss of its copy, the two unsigned copies were the next best evidence of the original, if there were no changes made before it was executed. *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263, 264.

Though the general rule is that, where contracts are executed in duplicate and one of the copies lost, the other is to be introduced as the original copy, it would not apply where it was shown that the other had been changed by interlineations, which were alleged to have been made after the contract was executed, and under such circumstances the two unsigned copies would be the next best evidence. *R. D. Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 So. 263.

Book of Account.—Where the original book of account made in the course of business or duty is lost, a copy, supported

by the oath of the person making it, is admissible. *Batre v. Simpson*, 4 Ala. 305, cited in note in 52 L. R. A. 565, 602, 607.

Summary Not Exact Copy.—In an action for damages to a stock of merchandise, a copy of the lists of damaged and undamaged goods was offered as evidence, and no foundation for introducing it was made by showing a loss and inability to find and produce the original lists. Held that, it appearing by undisputed testimony that the "copy" offered was only a summary of the original, and not an exact copy, it would not have been competent if the foundation had been laid. *Brent v. Baldwin*, 160 Ala. 635, 49 So. 343.

§ 145 (7) Sufficiency.

Substance of Language of Document.—In the proof of the contents of a lost deed it is not necessary for the witness to recall the language, its substance being sufficient; nor does the fact that his knowledge is derived from hearing it read, rather than from his own inspection, render his testimony incompetent, though it may affect its credibility. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

In an action of ejectment, brought by the plaintiffs, as remaindermen under a deed executed by S. and wife to L. for her life, remainder to her children, it appearing that said deed had been lost, plaintiffs offered the testimony of the widow of the grantors to the effect that she and her husband made a deed to L.; that her husband wrote the deed, and she signed it with him, and that it was made to L. during her life, and was to go to her children after her death. Also the testimony of another witness that she heard the deed read; that it was made by S. and wife to L. for life, remainder to her children, in 1858 or 1859, conveying title to certain described land, signed by S., and witnessed by H. and P.; and the testimony of another that he saw the paper writing of S. to L., that he could not remember all the contents, but it contained the "stuff" that is in all deeds, and then went on to say "that it was to Eliza Laster for her life, and at her death to her children." Held, that this proof made out a prima facie case of the contents of the deed under the statute (Code, § 983; Code 1852, § 2198), dispensing with the formal

parts of a deed, and giving effect to the intention of the grantor. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

Satisfactory Proof of Substantial Parts.

—Secondary evidence of the contents of a lost deed must be such as furnishes satisfactory proof of its substantial parts. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

Amount of Account.—A defendant, who proves the issuance of a subpoena duces tecum, and service thereof on plaintiff, to compel him to produce an itemized statement of a receipted account, or a copy thereof, and that defendant has no copy or memorandum of the contents of the account, has the right to prove the amount of such account, without specifying the items therein. *Comer v. Thompson*, 54 Ala. 265.

Satisfactory Evidence.—In civil cases it is sufficient that the evidence of the contents of a lost instrument is satisfactory. Proof beyond reasonable doubt is not necessary. *Potts v. Coleman*, 86 Ala. 94, 5 So. 780.

Testimony of Witnesses.—In an action for personal injuries due to the negligence of a railroad company's employee, where the fact that the company had certain rules for the conduct of employees, which were not brought out in the pleading, but developed incidentally in the examination of a witness, when there was no opportunity for demanding a printed copy, which was in the hands of defendant, the plaintiff may show the contents of the rules by the testimony of the witness. *Northern, etc., R. Co. v. Key*, 150 Ala. 641, 43 So. 794.

§ 145 (8) Acts and Declarations.

Parol Admissions of Maker.—Where a proper predicate has been laid, the contents of a lost deed may be proved by the parol admissions of the maker. *Fralick v. Presley*, 29 Ala. 457.

§ 145 (9) Records and Abstracts.

Transcript of Record.—Under Code 1907, § 3374, which makes admissible a duly certified transcript of the record of a deed when it appears that the original conveyance has been lost or destroyed or that the party has not the custody or control thereof, the original record of a deed

is admissible on such showing. *McBride v. Lowe*, 175 Ala. 408, 57 So. 832.

Where it appears that the original deed is in the possession of the party offering a transcript of it, such transcript is inadmissible under Code, § 1798, providing for a certified copy where the original deed is lost or not in the control or possession of the party. *Farrow v. Nashville, C. & St. L. Ry. Co.*, 109 Ala. 448, 20 So. 303.

Execution Docket of Court.—Where title was sought to be deraigned through an execution sale, and the original execution could not be found in the files, the execution docket of the court showing an execution on the judgment against the lands in question, with advertisement, sale, and deed is admissible as the next best evidence. *Williams v. Lyon* (Ala.), 61 So. 299. But see *Ayers v. Roper*, 111 Ala. 651, 20 So. 460, where it was held that an execution should be proven by the original or a certified copy, not by entries from the execution docket.

§ 146. Determination of Question of Admissibility.

Preliminary Proof Addressed to Court.—The preliminary proof of the destruction or loss of a written contract, to introduce parol evidence of its contents, is always addressed to the court. *Glassell v. Mason*, 32 Ala. 719.

Discretion of Court as to Admissibility of Secondary Evidence.—The sufficiency of proof that the best evidence is not voluntarily withheld in order to introduce secondary evidence is for the discretion of the court, governed by the circumstances of the case. *Mordecai v. Beal*, 8 Port. 529, cited in note in 34 L. R. A. 384.

Proof of acts necessarily precedent to right to introduce secondary evidence of contents of documents and papers rests largely in the court's discretion. *Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, 159 Ala. 491, 49 So. 92.

Contract Not Shown to Be in Writing.—Where, in an action on a contract, the complaint did not allege and the proof did not show that it was in writing, a question asked plaintiff with reference to the person with whom he made the contract was not open to the objection that the contract was the best evidence. *Union Foundry & Machine Co. v. Lankford*, 145 Ala. 667, 39 So. 765.

VI. DEMONSTRATIVE EVIDENCE.

§ 147. Exhibition of Person or Object in General.

Permitting Plaintiff to Walk Before Jury.—In an action for injuries to a passenger, it was not error to permit plaintiff to walk as best he could before the jury. *Birmingham R., etc., Power Co. v. Rutledge*, 142 Ala. 195, 39 So. 338.

Exhibition of Slave to Jury.—In an action on a warranty of a slave, to recover damages for his unsoundness, it is improper to suffer the slave to be produced by the plaintiff on the trial, and exhibited to the jury, without the consent of defendant; and even then, it seems, the court may interpose and refuse its assent. *Marshall v. Gantt*, 15 Ala. 682.

§ 148. Articles Subject of or Connected with Controversy.

Pieces of Cross-Ties.—In an action for injuries to an employee by the derailment of a dinkey engine on a defective track, it was not error to permit plaintiff to introduce pieces of cross-ties of the track in evidence, though whole ties might have been better evidence of the condition of the track. *Adams v. Crim* (Ala.), 58 So. 442.

Garments Worn by Deceased.—In an action against an employer to recover for the wrongful death of an employee, where it appeared that deceased was killed while occupying the bottom step at the front of a coach, leaning out beyond the side of the coach to watch a hot box thereunder, when he was struck by the wing of a stock gap, on which a wire was fastened, and the evidence was in conflict as to whether the deceased was first caught by the plank of the fence or by the wire, the torn pants worn by deceased when injured were properly allowed to be exhibited as evidence. *Northern Alabama Ry. Co. v. Mansell*, 138 Ala. 548, 36 So. 459.

§ 149. Writings Submitted for Comparison.

To Prove Signature.—Signatures proved or admitted to be in the party's handwriting can not be given in evidence to the jury to enable them to determine, by a comparison with the disputed signature, whether it be genuine or not. *Little v. Beazley*, 2 Ala. 703, cited in note in 62

L. R. A. 835; *Bestor v. Roberts*, 58 Ala. 331; *Moon's Adm'r v. Crowder*, 72 Ala. 79.

And where, in an action on a promise sent by telegraph, its execution was not denied by the pleadings, so that proof of the genuineness of the telegram was outside the issues, and the genuine signature of the person who sent the telegram was admitted to enable the jury, by comparison, to determine by whom it was written, the proof was immaterial, related to no issue in the cause, and could not possibly have done any injury. *Bestor v. Roberts*, 58 Ala. 331, cited in note in 62 L. R. A. 836.

So, in *Moon v. Crowder*, 72 Ala. 79, cited in note in 62 L. R. A. 836, it is said: "To legalize such testimony [proof of handwriting by witness comparison] the witness must be first shown to be an expert, that is, accustomed to, and skilled in the matter of, handwriting, genuine and spurious. These may institute comparisons between writings of unquestionable genuineness and the writing in dispute, and may give their opinions where both were written by one and the same person.' In *Griffin v. State*, 90 Ala. 596, 8 So. 670, the court says: 'Only experts, persons accustomed to, and skilled in the matter of handwriting may institute comparison between writings of unquestioned genuineness and the writing in dispute, and give an opinion.'"

Other signatures made by the grantor in a deed can not be introduced in evidence for the purpose of comparing them with the signature of the deed in order to disprove the genuineness of such signature. *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, cited in note in 18 L. R. A., N. S., 521.

And in *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, cited in note in 18 L. R. A., N. S., 521, it was held that there was no error in excluding the signature of a grantor in a deed offered for the purpose of comparison with the signature of another deed which was in issue.

In a prosecution for forgery it was error to allow a witness who confessed having written the forged instrument at the request and under the direction of the defendant to write in the presence of the court and jury so that the jury might institute a comparison between the instru-

ments. It would open too wide a door for fraud if a witness were allowed to corroborate his own testimony by a preparation of specimens of his writings for the purpose of comparison. *Williams v. State*, 61 Ala. 33, cited in note in 62 L. R. A. 865.

In *Washington v. State*, 143 Ala. 62, 39 So. 388, cited in note in 18 L. R. A., N. S., 520, it was held that the court erred in admitting, over the objection of the defendant, an inventory which was supposed to have been written by the defendant, for the purpose of comparison, and in permitting the witness to compare such paper with a forged instrument for the purpose of testifying as to the similarity of the writing on that paper with the written signature of the forged instrument. It was said that it was not allowable for either witnesses or jurors to compare the handwriting of papers, not in evidence for any other purpose, with a disputed writing or signature.

In Alabama the case of simple jury comparison with irrelevant writings was disposed of in *Little v. Beazley*, 2 Ala. 703, the court declaring broadly that comparison of handwriting by submitting different writings having no connection with the matter in issue is not permitted by law. The present case presents the naked question whether signatures proved to be in defendant's writing can be given in evidence to the jury to enable them to determine by a comparison with the disputed signature whether the latter is genuine or otherwise. In our opinion this was not competent evidence. In accord are *Bishop v. State*, 30 Ala. 34; *Williams v. State*, 61 Ala. 33; and *Griffin v. State*, 90 Ala. 596, 8 So. 670, cited in note in 62 L. R. A. 835.

Letters Not Shown to Be Genuine.—In *Bolton v. State*, 146 Ala. 691, 40 So. 409, cited in note in 18 L. R. A., N. S., 521, letters not in evidence for other purposes, and not shown to be genuine, were held not admissible for the purpose of comparison.

Handwriting of Telegram.—Where the issue is, whether a telegram is in the handwriting of a particular person, his genuine signature to another instrument can not be admitted, to enable the jury, by a comparison of the two, to determine by whom, the telegram was written; but

where suit is on a promise or request sent by telegraph, and its execution is not denied by sworn plea, proof of the genuineness of the telegram is without the issue, and allowing comparison of handwriting could not work injury, and is not ground for reversal. *Bestor v. Roberts*, 58 Ala. 331, cited in note in 62 L. R. A. 836.

Writing Admitted to Be Genuine.—In *Griffin v. Working Women's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521, the paper offered for comparison was treated as having been introduced in evidence; but the court, in stating the rule as to comparison, said: "A comparison of handwriting may not be instituted between the writing that is in question and extraneous papers, although such extraneous papers may be shown to be genuine. A writing, although admitted to be genuine, when not otherwise relevant and admissible in evidence, is not admissible for the sole purpose of instituting a comparison of handwriting, whether by the jury trying the case, or for the expression of an opinion by the one examined as an expert witness."

To Prove Alteration of Check.—On an issue whether a check had been raised in amount, it was error to admit in evidence a check which bore evident signs of having been altered as a result of experiments with acids which had been made thereon, for the purpose of showing that an alteration could not be made without detection. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304, 310.

Upon the introduction by one party of chemical experts, who testified that by the use of acids and gas writings could be so thoroughly eradicated as to leave no trace under the microscope, it was improper to admit in evidence another writing, foreign to the controversy, with which the other party had experimented, in order to show that an alteration could not be made without detection; an unsuccessful effort by one person to forge a name is plainly not competent evidence that another person did not succeed. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304.

§ 150. Experiments in Courts.

A single experiment, when offered to be made in the presence of the jury with inanimate objects, is properly excluded as evidence. *United States Cast Iron Pipe & Foundry Co. v. Granger*, 172 Ala. 546, 55 So. 244.

"But a single experiment, even when offered to be made in the presence of the court and jury, with inanimate objects, has been pronounced by this court, in both civil and criminal cases, not acceptable as evidence. *Tesney v. State*, 77 Ala. 33; *Alabama, etc., R. Co. v. Collier (Ala.)*, 14 So. 327. See *Miller v. State*, 107 Ala. 40, 19 So. 37." *United States Cast Iron, etc., Co. v. Granger*, 172 Ala. 546, 55 So. 244, 248.

Method of Stopping Electric Car.—In an action for the death of a person struck by a car, the motorman was properly permitted to illustrate with his hands the time it would take him to go through the various motions necessary to stop or check up the car, as it would give the jury a better idea of what was to be done than could be explained by mere words. *Birmingham, R., etc., Power Co. v. Saxon (Ala.)*, 59 So. 584.

"There was no error in permitting the motorman to illustrate, with his hands, the time it would take him to go through the various motions necessary to reverse the lever, etc., in order to stop or check up the car. Being an expert, and familiar with the amount of resistance usually met with in performing these services, it seems that he would automatically make the motions in about the time usually employed. But, however that may apply, the illustration would present to the jury a better idea of what was to be done than could be explained by mere words; and if counsel was of opinion that it would take more time, by reason of the resistance of the levers, that could be brought out on cross-examination, and the jury could judge of it and give such weight to the illustration as they thought proper. This bears no analogy to the case of *Birmingham, R., etc., Power Co. v. Hayes*, 153 Ala. 178, 44 So. 1032, in which the answer was the mere solving of a mathematical proposition, which the court said the jury could work out as the witness; nor to the case

of *Tesney v. State*, 77 Ala. 33, 38, in which 'a separate and distinct experiment' was made by firing at a coat; nor to Alabama, etc., *R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169, where, also, a separate and distinct experiment was made by placing children in the supposed position of the injured, in order to determine whether they could be seen at a certain distance; nor to Alabama, etc., *R. Co. v. Collier* (Ala.), 14 So. 327, where an experiment was also sought to be made by pouring a liquid fire extinguisher on cloth, so as to determine what injury could be done to clothing by the explosion of a bottle containing the extinguisher." *Birmingham R., etc., Power Co. v. Saxon* (Ala.), 59 So. 584, 591.

Identification of Checks.—In an action against a bank to recover a deposit paid out by defendant on checks to which plaintiff's name was forged, plaintiff may be asked to point out in a package of checks, part of which are genuine and part forged, the genuine from the forged. *First Nat. Bank v. Allen*, 101 Ala. 476, 14 So. 335.

VII. ADMISSIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 151. Nature and Grounds for Admission in General.

Admissions against Interest.—The admissions of a party against his interest are admissible as evidence against him. *Dennis v. Chapman*, 19 Ala. 29.

Showing Delivery of Deed.—The declarations of a grantor made after the alleged delivery of a deed, tending to show a delivery, are admissible as admissions against interest, but his statements and declarations tending to negative delivery are incompetent, unless they form part of the *res gestæ*. *Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812.

Limitation of Parol Admissions.—"Parol admissions are competent only of those facts which it is permissible to prove by parol. *Ware v. Robertson*, 18 Ala. 105." *Fralick v. Presley*, 29 Ala. 457, 462.

To Show Outstanding Title.—In an action by a vendee for breach of warranty of title, the parol declarations and admissions of defendant tending to show that there was an outstanding equitable title

at the time of the sale to plaintiff are admissible, though involving matters of law, where the law was so mingled with matters of fact that they could not be separated. *Lewis v. Harris*, 31 Ala. 689.

To Establish Deeds, Records or Statutes.—The admission of a party are not evidence either of the conveyance of land, in another state, or that by the law of that state, judgments are a lien on lands. The rule is, that admissions, out of court, will not establish deeds, records or statutes. *Morgan v. Patrick*, 7 Ala. 185.

§ 152. Subject-Matter.

Manner of Doing Work.—Where defendant refused to permit plaintiff to complete a contract to paint a number of houses because he thought the work was not being done in a workmanlike manner, the exclusion of testimony that plaintiff had admitted putting the paint on with a broom was error. *J. B. Anderson & Co. v. Brammer*, 4 Ala. App. 596, 58 So. 941.

Receipt of Goods for Transportation.—In an action against a carrier for failure to deliver three bales of a shipment of cotton, testimony was admissible that bills of lading which evidenced the shipment of the three bales also covered other bales, some of which were delivered, that the bales not delivered and not in controversy were paid for by defendant, who refused to pay for the three bales claiming that they had been delivered, as tending to show an admission that the three bales had been received and transported, and that the man issuing the bills of lading was the carrier's agent. *Southern Ry. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

Ownership of Property.—"By the third section of the act creating the branch of the state bank of Mobile, it is provided, that the president of that institution shall always be one of the board for the transaction of the business, 'except in cases of sickness or necessary absence, in which event the board may appoint a president pro tempore.' In *Bancroft v. Bank*, 1 Ala. 230, we held, that the certificate of the president pro tem., was competent to show that a note sought to be recovered by notice and motion under the charter was bona fide the property of the bank." *Crawford v. Branch Bank*, 7 Ala. 205, 215.

Value of Set of Tools.—A statement made by the defendant as to the value of a set of tools is admissible as an admission in an action against him for the conversion of an undivided one-half interest in them, since the value of the whole is evidence as to the value of the interest. *Stamps v. Thomas* (Ala.), 62 So. 314.

"A statement as to the value of the property alleged to have been converted, made by the defendant when testifying in a former trial of the case, was provable against him as an admission of a fact pertinent to an issue to be passed on. *Massey v. Fain*, 1 Ala. App. 424, 55 So. 936. It is argued that evidence of the statement then made by the defendant should have been excluded because that statement was as to the value of the lot of tools as the subject of a sole ownership, while the only inquiry as to the value which is pertinent in this case is as to the value of the undivided half interest in that lot of tools which was alleged by the plaintiff to have been converted. This argument assumes that proof of the value of a thing can shed no light in an inquiry as to what a half interest in it is worth. The assumption is unwarranted. It is not doubted that the ascertained value of a thing is one of the data properly to be considered in reaching a conclusion as to the value of a half interest in it. *Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533; *The Albert Demois*, 177 U. S. 240, 255, 20 Sup. Ct. 595, 44 L. Ed. 751; 38 Cyc. 2038." *Stamps v. Thomas* (Ala.), 62 So. 314, 315.

§ 153. Interest of Party and Relation of Admission Thereto.

"The general principle on which the competency of admissions as evidence rests, is, the interest which the party making them has in the suit, or its subject matter. From this it would seem that the admissions of one who has no interest in a suit, ought not to be allowed to control it." *Chisholm v. Newton*, 1 Ala. 371.

Admission of Administrator.—Where a trustee in a deed for the benefit of creditors permits the grantor until his death, and his administrator afterwards, to retain possession of, and to make a crop

with, the slaves of the trust estate, the admission of the administrator, who sold the crop and received its proceeds, as to the amount of such sale, is not evidence against the trustee. *Harrison v. Mock*, 16 Ala. 616.

Admissions of Party.—"Admissions which are relevant and material to the issue made by a party to a suit, whether made as a witness on the stand or elsewhere, are always admissible against him. He is not concluded by them unless they induce action, so as to estop him afterwards, but he may explain or show that in making the statement he was mistaken. Where a party testifies on a subsequent trial different from that given on a former trial, it is competent for the adverse party to give in evidence his statement on the first trial, and it is the duty of the jury to consider both statements, in connecting with the explanation, if any is made, in the light of all the evidence, and determine which is true. A charge which singles out any particular part of the evidence, and bases a conclusion of law upon it, gives the fact thus emphasized undue prominence, and is calculated to mislead the jury. Such charges generally are argumentative, and should be refused. The charges asked by defendant in regard to the former admissions of the plaintiff are faulty in this respect, and the court did not err in refusing them." *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130, 134.

Action against Sheriff.—In an action for an escape against a sheriff, the admission of the person escaping are inadmissible in evidence to show the extent of the liability of the party so escaping to the plaintiff, whether he can be admitted as a witness or not. *Pugh v. McRae*, 2 Ala. 393.

§ 154. Capacity of Person Making Admission, and Voluntary Character Thereof.

Admission of Married Woman.—A bill in chancery sworn to by the complainant is admissible against him in another suit; and, where the complainant is a married woman, her coverture does not exempt her from the operation of this rule. *McLemore v. Nuckolls*, 37 Ala. 662, cited in note in 28 L. R. A., N. S., 328.

§ 155. Mode of Making and Form in General.

§ 155 (1) In General.

Conversation between Plaintiff and Defendant.—In slander, an answer to a question whether it had been reported to plaintiff that defendant had been denouncing him as a liar, being *prima facie* hearsay, was not rendered admissible as an admission of defendant where plaintiff, to show that he had stated to defendant what he had heard defendant had said about him, and that defendant had repeated it to him, thus making it an admission, did not testify that he had told defendant even substantially what he testified had been reported to him. *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696.

"While the plaintiff testified he did have an interview with the defendant, the majority of the court are of the opinion that his testimony as to what he 'told' defendant in that interview is not even substantially what he testified had been reported to him, and, therefore, that defendant's response can not be taken as an admission, nor operate to bring the evidence admitted, within any exception to the rule that hearsay evidence is inadmissible. Consequently they hold that the trial court committed reversible error in admitting the testimony. The writer entertains the opinion that, in the interview between plaintiff and defendant, plaintiff's statement to defendant conformed substantially to his (plaintiff's) testimony, and that the jury might infer from the defendant's reply an admission that he had uttered the statements which plaintiff testified had been reported to him. Upon first impression we were of the opinion that the testimony objected to was admissible on the ground held good by the trial court; but after more mature reflection we have reached the conclusion that that theory is unsound, and that the case cited by appellee's counsel in support of it (*Patterson v. Frazer* [Tex. Civ. App.] 93 S. W. 146) is not in point, when the facts of that case are closely scrutinized." *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696, 697.

§ 155 (2) Admissions as to Indebtedness and Amount Thereof.

Admission of Amount Due.—In an ac-

tion on an account, evidence that defendant had admitted that he owed plaintiff the amount claimed and offered to pay a less sum was admissible. *Baker v. Haynes, Henson & Co.*, 146 Ala. 520, 40 So. 968.

"If a 'debtor admit a particular item of an account, or any other fact meaning to make the admission as being true, this is good evidence; although the object of the conversation was to compromise an existing controversy.' *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325." *Baker v. Haynes, etc., Co.*, 146 Ala. 520, 40 So. 968.

Implied Admission.—In an action against an administrator *de bonis non* on a note alleged to have been executed by his intestate, an implied admission arising from judgments recovered against the administrator in chief on notes signed in a similar manner is inadmissible as against defendant. *Rogers v. Grannis*, 20 Ala. 247.

A refusal to pay a bill because another person should pay part is admissible as an admission of liability. *May v. Hewitt*, 33 Ala. 161.

A conversation between the plaintiff's agent and the defendant, relative to the bill of exchange on which the latter was sought to be charged as acceptor, under an acceptance by another as his agent; in which conversation, the defendant did not deny his liability on the acceptance, but asserted that a third person, to whom he had sold the steamboat, ought to pay a part of the amount, because the bill was drawn on account of the insurance of the boat, and the policy was unexpired at the time the boat was sold, is competent evidence against the defendant, as an implied admission of his liability on the acceptance. *May v. Hewitt, etc., Co.*, 33 Ala. 161.

§ 156. Judicial Admissions.

§ 157. — In General.

§ 157 (1) In General.

Suit Brought for Use of Another.—A suit brought in the name of the payee of a note for the use of a third person, to whom it appears to have been regularly indorsed, is an admission that the indorser is the proprietor of the paper, and

suit can not be supported by the payee. *Hunt v. Stewart*, 7 Ala. 525.

Institution of Suit in Name of Husband and Wife.—The institution of a suit by a husband, in the name of himself and wife, for the recovery of slaves, is evidence against him, in a subsequent controversy, between him and the distributees of his wife, as an admission against his interest. *Gwynn v. Hamilton's Adm'r*, 29 Ala. 233.

To Prove Property of Slave.—The record of a suit by a purchaser of a slave to recover money from the vendor belonging to the slave and his mother (the suit being brought in the name of the mother's owner without his consent, and being afterwards dismissed by him), is not admissible in an action of detinue for the slave by the vendor against the purchaser to explain a receipt given for the money by the vendor, and to show that the defendant regarded the money as the property of the slave's mother. *Webb v. Kelly*, 37 Ala. 333.

Indictment of Principal in Action against Surety.—In debt against a surety for his principal's embezzlement, the indictment drawn up by the plaintiff's attorney at their instance is admissible to show what was claimed to have been embezzled. *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147.

As Binding Another Person.—One person can not make a judicial admission which will effect the interest of another and fix the proof of it without the other ever having an opportunity to be heard in regard to the matter which is sought to be proved by the admission. *Snodgrass v. Branch Bank*, 25 Ala. 161.

§ 157 (2) By Counsel.

Binding on Client.—The admission by the attorney of record of a fact for the purpose of trial binds his client, and is conclusive of the fact admitted. *Starke v. Kenan*, 11 Ala. 818.

§ 157 (3) Confession or Plea of Guilty in Criminal Prosecution.

Action for Assault.—In a civil action for assault, evidence that defendant pleaded guilty, or paid a fine under such plea in a criminal prosecution for the same assault, may be received as an admission or declaration against interest.

Ritter v. Griswold, 2 Ala. App. 618, 56 So. 860.

"While, as contended by appellee in his application for a rehearing, a plea of guilty, or the fact that a defendant paid a fine under such a plea, entered in a criminal prosecution, may be received in a civil action for the same offense as an admission or declaration against interest; and while the cases cited in the original opinion (*Irby v. Wilde*, 155 Ala. 388, 46 So. 454, and *Phillips v. Kelly*, 29 Ala. 628), are not applicable because of that distinction, yet the questions asked the defendant do not bring this case under the rule insisted upon." *Ritter v. Griswold*, 2 Ala. App. 618, 56 So. 860, 861.

§ 158. — Pleadings.

See the title PLEADINGS.

§ 158 (1) Admissibility in Subsequent Proceedings in General.

A bill in equity signed by the complainant may be put in evidence against him, in another suit, as an admission of the facts therein stated. *McLemore v. Nuckolls*, 37 Ala. 662; *Callan v. McDaniel*, 72 Ala. 96, cited in note in 28 L. R. A., N. S., 328.

A bill in chancery is not evidence against the complainant in the bill in a trial at law. *Adams v. McMillan*, 7 Port. 73.

The answer of a party in chancery is proper evidence against him, and so much of the bill as is necessary to explain the answer. *McGowen v. Young*, 2 Stew. 276.

"The general rule is, that admissions of the contents of a writing, or record, are not admissible to prove its existence or contents, unless made for the purpose of the trial, but the sworn answer of a party to a bill in chancery is an exception to this rule. *Greenl. Ev.*, § 97. We are unable to perceive the least error in the rulings of the court below, and its judgment is therefore affirmed." *Ricketts v. Garrett*, 11 Ala. 806, 811.

Answer in Trover.—In general, in trover, a defendant can not give in evidence his answer to a demand of the chattel in suit. *St. John v. O'Connel*, 7 Port. 466.

Plea in Ejectment.—In ejectment, on an issue as to adverse possession by defendant, the pleas in a former action be-

tween the same parties for the same land are admissible to show that defendant, who had formerly held the land as plaintiff's tenant, had repudiated plaintiff's title. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 145.

Exhibit.—When a record of a suit is stated as an exhibit to an answer to a bill in chancery, and the exemplification of the suit is given in evidence by the party making the answer, though offered only to show the fact of the suit, and an eviction by means of an injunction allowed therein, the opposite party may read the answer to prove the existence of the record. *Ricketts v. Garrett*, 11 Ala. 806.

§ 158 (2) Same or Different Parties.

Bill and Answer in Chancery.—The answer of a party in chancery is proper evidence against him, and so much of the bill as is necessary to explain the answer. *McGowen v. Young*, 2 Stew. 276.

Respondent in Subsequent Suit.—An answer in chancery is admissible evidence against the respondent in a subsequent suit, whether the parties are the same or not. *Royall v. McKenzie*, 25 Ala. 363.

To Prove Title against Mortgagor.—Where, in a suit by an assignee of a mortgage to foreclose, his assignor was joined as defendant, and answered, admitting all the allegations in the bill and disclaiming any interest in the lands covered by the mortgage, complainant was entitled to introduce such answer in evidence to prove his title as against the mortgagor. *Langley v. Andrews*, 142 Ala. 665, 38 So. 238.

Action for Work and Labor.—Where, in an action for work and labor, defendants file a plea of set-off for a balance due from plaintiff, evidence of the amount claimed as such balance in a previous suit by defendants against plaintiff was admissible together with the account then furnished at plaintiff's request. *Hartsell v. Masterson*, 132 Ala. 275, 31 So. 616.

§ 158 (3) Pleadings Not Verified or Signed.

Unsworn Pleadings.—An unsworn pleading, filed by an attorney in a cause, is not admissible in evidence against the party in whose behalf it was filed. Ten-

nessee Coal, Iron & Railroad Co. *v. Linn*, 123 Ala. 112, 26 So. 245.

A party's unverified pleadings are not, in another action, evidence against him of the declarations in the language of his counsel therein contained. *Cooley v. State*, 55 Ala. 162.

§ 158 (4) Pleadings Superseded, Withdrawn, or Abandoned.

Complaint Struck Out by Plaintiff.—An admission contained in the original complaint which has been struck out by plaintiff on obtaining leave to amend, is admissible against him, and may be proven by production of the original or of the copy served on the defendant. *Davidson v. Rothchild's Adm'r*, 49 Ala. 104.

§ 159. — Stipulations and Agreed Statements.

Existence of Fact.—An agreement by counsel, in one suit, of the existence of a fact, is not proof of the fact in another suit with which the former has no connection. *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, cited in note in 35 L. R. A. 340.

Testimony of Absent Witness.—An admission of what an absent witness would testify to, in order to prevent a continuance, is not an admission of the competency or relevancy of the evidence, and can not be used at a subsequent trial, though the witness has died, as its efficacy expires with the time at which it is given. *Ryan v. Beard's Heirs*, 74 Ala. 306, cited in note in 25 L. R. A., N. S., 169.

§ 160. — Petitions, Affidavits, and Depositions.

Affidavits.—A man's voluntary affidavit is evidence against him, as an admission of the facts contained therein. *Hallett v. O'Brien*, 1 Ala. 585.

The affidavit of the plaintiff, made on a motion to set aside an entry of satisfaction of a judgment, that another person had an interest in the judgment jointly with him, is admissible evidence for the defendant under the plea of payment, in a subsequent action on the judgment, in support of partial payments made to that person. *Penn v. Edwards*, 50 Ala. 63.

Answers to interrogatories in an action are admissible in evidence in another ac-

tion as admissions of the party making them. *Gay v. Rogers*, 109 Ala. 624, 20 So. 37.

Deposition in Chancery Suit.—In an action for unlawful detainer, the defendant's deposition taken in a chancery suit involving the same lands, in which deposition defendant admits having possession of the land in controversy, is admissible in evidence. *Spann v. Torbert*, 130 Ala. 541, 30 So. 389.

§ 161. — Testimony.

Testimony of Party.—Statements made by a party while testifying in another state as to his knowledge of the insolvency of a certain person may be proved against him without calling him as a witness, to show his knowledge of such insolvency. *Loeb v. Peters*, 63 Ala. 243.

Hearsay Evidence of Testimony.—In an action against a principal for false imprisonment imposed by its alleged agent, evidence of a witness that he had heard one of the defendants testify in another action that the person was defendants' agent was admissible as an admission. *C. N. Robinson & Co. v. Green*, 148 Ala. 434, 43 So. 797.

§ 162. Offers of Compromise or Settlement.

§ 163. — In General.

§ 163 (1) In General.

Statement of Rule.—Admissions made with a view to a compromise can not be used against the party making them. *Wilson v. Hines*, Minor 255; *Wood v. Wood*, 3 Ala. 756; *Globe Tailoring Co. v. Seibold* (Ala.), 62 So. 384; *Collier v. Coggin*, 103 Ala. 281, 15 So. 578, 579; *Sandlin v. Kennedy Stave, etc., Co.*, 165 Ala. 577, 51 So. 622; *Courtland v. Tarlton*, 8 Ala. 532, 535.

"It is an established rule, that an admission made during, or in consequence of, a proposition to compromise, is inadmissible against the party making it. An offer to pay a sum of money, in order to purchase one's peace and adjust a pending or threatened litigation, if not acceded to, can not with propriety be called an admission, which can only be predicated of existing facts—it is an unaccepted proposition—a matter in feasant, which rather negatives the present existence of

what is proposed to be done." *Gibbs v. Wright*, 14 Ala. 465, 467.

"If such an offer carry on its face the character of a peace offering, it is privileged, and can not be used against the party making it. But where distinct facts are admitted by the proposition, or pending the negotiation, they stand upon a different ground, and for these the privilege can not be invoked." *Gibbs v. Wright*, 14 Ala. 465, 467.

"It is not error to sustain the defendant's objection to the question propounded to him, 'You agreed to settle if they would allow you that reduction, didn't you?' It appears from the bill of exceptions that if the defendant made the offer inquired about he did so in an effort to adjust or compromise a claim against him, the correctness of which he was disputing. Under a familiar rule the evidence called for by the question was not admissible. *Sandlin v. Kennedy Stave, etc., Co.*, 165 Ala. 577, 51 So. 622." *Globe Tailoring Co. v. Seibold* (Ala.), 62 So. 384, 385.

Evidence of a proposition of compromise, and its refusal, is not admissible evidence against the party refusing. *Kelly v. Brooks*, 25 Ala. 523.

Offers made in negotiations for compromising suits involving titles can not be used as admissions of facts. *East Tennessee, V. & G. Ry. Co. v. Davis*, 91 Ala. 615, 8 So. 349, cited in note in 23 L. R. A., N. S., 368, 370.

Evidence of an offer of settlement made by the defendant, which, if made, was in an effort to compromise a dispute, is inadmissible. *Globe Tailoring Co. v. Seibold* (Ala.), 62 So. 384.

Attempt to Compromise for Larger Sum—Statement in Will.—That defendant in an action for services stated, in a will executed after the services rendered, that he gave plaintiff certain property on condition that he would set up no claim against his estate after his death, is irrelevant evidence. It contains neither an admission, nor any circumstance tending to show an admission, of any indebtedness, but is, at most, an offer to purchase peace. *Ex parte Grantland*, 29 Ala. 69.

To Show Admissions as to Title.—Where, in an action for negligent death, defendant pleaded a settlement with the

administratrix of the decedent, and the replication alleged that the settlement was fraudulent and that the administratrix was incompetent, the testimony of a witness, that defendant had, before the settlement, offered to settle with the witness as attorney for a much larger sum, which fact was communicated to the administratrix before the settlement, was not admissible on the issue of the liability of defendant. *Loveman v. Birmingham Ry., L. & P. Co.*, 149 Ala. 515, 43 So. 411.

Testimony in ejectment that, after suit brought, plaintiff and defendant agreed that the witness might survey the disputed boundary line, and that each would abide by the result and pay half the costs, is inadmissible, as showing a mere proposition of compromise. *Alexander v. Wheeler*, 69 Ala. 332.

To Procure Settlement by Guarantor.—In a suit on a guaranty, a letter, written by the guarantor to secure a settlement without suit, was admissible to disprove his plea of non est factum, though not to show liability. *Shows v. Steiner*, 175 Ala. 363, 57 So. 700.

In an action on a policy of insurance, evidence of an offer of compromise made by defendant is inadmissible. *Feibelman v. Manchester Fire, etc., Co.*, 108 Ala. 180, 19 So. 540, cited in note in 14 L. R. A., N. S., 694, 704.

In an action for personal injuries, it is error to admit evidence that defendant stated to plaintiff that he thought the latter could get \$75 in compromise of his claim, and asked plaintiff how much he wanted. *Collier v. Coggins*, 103 Ala. 281, 15 So. 578.

Presentation of Claim.—That a shipper, suing for injury to goods received for carriage, had presented a claim direct to the carrier in settlement of the controversy, with a view of reaching an amicable adjustment of the dispute, could not be shown as an admission of the extent of the loss. *St. Louis & S. F. R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81.

A statement, made and delivered by a party to the adverse party in an attempted compromise of the matter in dispute between them, is inadmissible. *C. W. Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272, 50 So. 906.

Statement of Account.—In an action

for the conversion of lumber, it was improper to admit a statement of account, which according to a plaintiff was handed to him as part of negotiations for a compromise; it not being shown to be an admission of distinct facts. *C. W. Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533.

"The court erred in admitting the statement of account, which, according to the testimony of the witness Dunn, was handed to him as a part of the negotiations for a compromise. This was not shown to be an admission of distinct facts, within the rule laid down in *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325, and cases cited. In addition it may be said no authority is shown in the attorney to bind his client." *Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533, 534.

Injuries to Vessel.—In an action for injuries to a vessel by collision with a drawbridge because of the bridge tender's negligence in failing to open the bridge in time, evidence that the morning after the injury the bridge tender visited the vessel and inquired whether plaintiff would take a named sum and drop the matter was inadmissible, as a mere offer of compromise. *Southern Ry. Co. v. Reeder*, 152 Ala. 227, 44 So. 699, cited in note in 42 L. R. A., N. S., 946.

Action for Deceit in Horse Trade.—In an action to recover damages for deceit alleged to have been practiced by the defendant in the exchange of a horse to the plaintiff, where there is a disputed question of fact as to whether the contract of exchange was made with the plaintiff, or with her husband individually, whom the plaintiff's evidence tended to show was acting as her agent, the fact that the defendant had made a proposition of settlement is admissible in evidence as bearing upon such disputed question, and is not open to the objection that it was a proposition of compromise which was not effected or consummated. *Watson v. Reed*, 29 So. 837, 129 Ala. 388.

Proposal of Compromise Coupled with Condition.—A proposal to compromise a matter in controversy, coupled with a condition which is rejected, is not an admission that anything is due, and has no effect on the legal rights of the parties. *Jackson v. Clopton*, 66 Ala. 29.

Offer to Pay for Services in Stock.—In an action for services performed for defendant company in constructing a railroad, it was error to admit a proposition to plaintiff by a certain person to pay him therefor in stock, where it did not appear on its face to be a proposition of settlement, though spoken of as such by plaintiff, and it was not shown that the person making it had any authority to do so. *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55.

§ 163 (2) What Constitutes Offer.

Letter Showing Willingness to Pay Part.—One of the defendants wrote a letter to the plaintiff, from which it appeared that the letter had demanded the payment of three notes which the defendants had given for his compensation in selling certain lots in Mobile. The writer of the letter endeavored to convince the plaintiff of the injustice of the requisition, by stating that but a small part of the purchase money had been collected, and proposed to pay him in proportion to the amount received of the purchasers. Held, that this letter was a refusal to comply with the plaintiff's demand, and an offer to pay what was believed to be right, evidently made with a view to compromise, and consequently was inadmissible as evidence against the defendants. *Courtland v. Tarlton*, 8 Ala. 532.

§ 163 (3) Persons by or to Whom Made.

Statement to Third Person.—In an action by a broker for compensation in procuring a purchaser, evidence that defendant stated to another that, regardless of the suit, he intended to give plaintiff something was not an offer of compromise, and was properly received as an admission. *Alexander v. Smith (Ala.)*, 61 So. 68.

"The court allowed the witness McBurnett to testify that defendant in a conversation with him expressed a willingness to treat plaintiff right, and that he was willing to give plaintiff something regardless of any suit or anything. As an admission of indebtedness this may have been very weak, but doubtless it was appraised by the jury at its true value. It was not an offer of compromise. It was the expression of an intention in some

sort to pay, when, if defendant's contention were true, a denial of liability might have been expected. The testimony was competent. 16 Cyc. 948-9." *Alexander v. Smith (Ala.)*, 61 So. 68, 72.

§ 163 (4) Admission of Distinct or Independent Facts.

Where distinct facts are admitted by a proposition to compromise, or pending the negotiations, the privilege which makes an offer of compromise inadmissible can not be invoked as to such distinct admissions. *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325.

An admission made during or in consequence of a proposition to compromise is inadmissible against the party making it. But distinct facts, admitted by the proposition, or pending the negotiation, though connected with an offer to compromise, may be given in evidence against the party making them. *Gibbs v. Wright*, 14 Ala. 465.

§ 163 (5) Offer or Consent to Arbitrate.

Evidence of a proposition of arbitration and its refusal is not admissible evidence against the party refusing. *Kelly v. Brooks*, 25 Ala. 523.

§ 164. Statements in Writing.

§ 164 (1) In General.

A party's verified claim of exemptions, filed after the alleged execution of notes payable to him and set up as a foundation of his bill to sell lands of the maker, such claim tending to show that the notes did not then exist, is admissible to establish the plea of non est factum. *Jackson v. Grisham*, 171 Ala. 553, 55 So. 165.

Statement of Account.—In detinue to recover an electric motor, there was an issue as to whether plaintiff purchased the motor at the price of \$150 on his individual account, or for himself, and defendants, with whom he was associated in a business way, on their joint account. It appeared that a payment of \$75 was made by plaintiff; the money being gotten from defendant M., who later paid the balance. On the trial in justice court, an itemized statement of the account between the parties kept by M. was produced, in which \$75 was charged to plaintiff at the date of the first payment; the

statement also showing a balance as of its date slightly in excess of \$75 in favor of plaintiff, who accounted for this method of payment by testimony that defendants were indebted to him and agreed to furnish the money in discharge of their indebtedness. Held that, on appeal to the circuit court, the statement was properly received in evidence, as in the nature of an admission by defendant tending to corroborate plaintiff's testimony and theory of the case. *Minchener v. Robinson*, 169 Ala. 472, 53 So. 749.

Bill of Sale.—In an action of assumpsit, a bill of sale executed by defendant to a third person, containing an express admission of the existence of a debt due from him to the plaintiff, was admissible. *Myrick v. Wallace*, 5 Ala. App. 398, 59 So. 704.

An affidavit is admissible as an admission against a party making it, though it did not differ materially from his testimony at the trial. *Orr v. Travelers' Ins. Co.*, 120 Ala. 647, 24 So. 997.

An indorsement on the note of the sum for which it was discounted, and the date of the discount, is an admission, on the part of the bank discounting, of the sum lent upon the note, of which the defendant may avail himself, as otherwise the inference would be that the bank was entitled to recover the entire amount. *Colgin v. State Bank*, 11 Ala. 222.

§ 164 (2) Writings Not Executed or Not Delivered.

Renewal of Note.—In a suit on a note, it appeared that defendant had written a new note for a certain sum to be given plaintiff in renewal, which he afterwards refused to sign. Held, that the note was prima facie an admission that defendant was indebted to plaintiff for that amount. *Turrentine v. Grigsby*, 118 Ala. 380, 23 So. 666.

Statement of Accident.—In an action for injuries to a servant, there was no error in admitting in evidence a statement in regard to the accident, though it was not signed by plaintiff, where one who had signed it testified that, while plaintiff declined to sign it, it was read over to him and he admitted that it was correct. *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856.

§ 164 (3) Valuation of Property for Taxation.

Returns of property made to a tax assessor as to the ownership of property are admissions against the party making them, though as to any other person they are mere hearsay. *Wright v. Merriwether's Adm'r*, 51 Ala. 183.

The sworn assessment list furnished by a landowner to the assessor, giving the market value in money of his land, as required by Code, §§ 470-486, is admissible in a proceeding to condemn a right of way across the same land, instituted at about the time the list was made, not merely to discredit the landowner's testimony in the condemnation proceeding, but as independent evidence of the value of the land. *Birmingham Mineral R. Co. v. Smith*, 89 Ala. 305, 7 So. 634.

§ 165. Oral Statements.

§ 166. — In General.

By Party in Interest.—Verbal admissions or declarations made by a party in interest are competent evidence against him. *Lehman v. McQueen*, 65 Ala. 570.

Price of Horse.—In trover for conversion of a horse, evidence of a conversation with plaintiff in which defendant stated that he had paid \$225 for the horse, and that the horse was worth that to him, was admissible to show damages. *Massey v. Fain*, 1 Ala. App. 424, 55 So. 936.

To Prove Age of Defendant.—Under defendant's plea of infancy in a contract action, it was competent to prove statements by defendant to plaintiffs, before making the contract sued on, that defendant was over twenty-one years of age. *Taylor v. White & Awbrey*, 1 Ala. App. 593, 56 So. 2.

Oral Acceptance of Order of Payment.—Where, in an action on an orally accepted order, for the rent of certain mules, plaintiff also declared on defendant's original promise to pay the rent of the mules, evidence of defendant's oral acceptance of an order for the amount due, while inadmissible to fix a liability on the order, was competent to show defendant's original promise to pay. *Faircloth-Byrd Mercantile Co. v. Adkinson*, 167 Ala. 344, 52 So. 419.

§ 167. — Relating to Matters of Record or in Writing.

Statement as to Title.—In an action of ejectment, where plaintiff's title deeds had been lost or destroyed, his oral admission that he had no title to the lands was admissible for defendant. *Allred v. Kennedy*, 74 Ala. 326.

So, although the mere return of a deed by the grantee to the grantor would not effect a divestiture of the title, the plaintiff may be asked "if he did not return the land papers to said C.," his vendor; the fact of such return being relevant to the question, whether they were not worthless as a conveyance. *Allred v. Kennedy*, 74 Ala. 326.

Admissions of a defendant regarding an unpaid note, and a vendor's lien thereunder, may be proven when not used to contradict the terms of the note. *Chapman v. Peebles*, 84 Ala. 283, 4 So. 273.

§ 168. Acts or Conduct.

Contract between Party and Third Person.—On the question whether defendant or one N. is the real debtor for lumber sold to N., and used to build a tramway to a quarry, a contract between defendant and a third person, reciting that defendant owns the quarry, is admissible, where there is evidence that defendant paid several bills contracted by N. to build the tramway, paid N.'s board bill while it was being built, and knew the use to which the lumber was being put, and that the account for the lumber was made out against defendant, and presented to him for payment. *Lewis v. Robertson*, 100 Ala. 246, 14 So. 166.

Giving Land for Taxes.—It appeared that, in the years 1876 and 1877, A. had the land assessed as belonging to S. and M., and that, in 1878, G., the vendee of plaintiff and subvendee of M., and A. each gave in for assessment a one-half interest in the land. Held, that evidence of such facts was admissible as an admission that M. owned an interest in the lands during the years 1876 and 1877, and that G. owned a half interest in the land in 1878. *Steed v. Knowles*, 97 Ala. 573, 12 So. 75, cited in note in 14 L. R. A., N. S., 290.

To Prove Genuineness of Signature.—In an action by plaintiff for wages accru-

ing after his discharge by defendant company, he may introduce, without proof of the signature, a letter purporting to be signed by defendant's president, and received by plaintiff, accepting terms previously offered by plaintiff, where plaintiff thereupon went to defendant, and his services were accepted; this being an implied admission by the writer of the genuineness of the signature. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46.

Bond as Admission.—Where a defendant, arrested on a ca. sa., gives a prison limits bond, it does not amount to an admission on the part of an obligor that the obligee was living at the time of its execution. *Tait v. Frow*, 8 Ala. 543.

Prosecution of Garnishment Proceedings.—Plaintiff obtained judgment in garnishment against persons who had become indebted to defendant by reason of the fact that their accounts due C. had been transferred to defendant in consideration of a note, which defendant assigned to C. Held, that, if plaintiff prosecuted his garnishment with a knowledge of these circumstances, or if, after having acquired such knowledge, he attempted to force a collection of his debt against the garnishees, he impliedly admitted the validity of the transaction between defendant and C., and could not proceed against the maker of the note to condemn the sum due to himself from defendant. *Sheppard v. Buford*, 7 Ala. 90.

Delivery of Property to Sheriff.—Where property is delivered to the sheriff, or its assessed money value paid, under a process issued on a judgment afterwards reversed, such delivery or payment will not constitute an admission of plaintiff's title on a second trial of the action, as against the defendant in execution. *Tr-aun v. Keiffer*, 31 Ala. 136.

§ 169. Acquiescence or Silence.

§ 169 (1) In General.

Silence Gives Consent.—"The silence of a party against whom a claim or right is asserted, is a fact which may be shown in an action for the enforcement of such claim or right; and from it the jury may infer an admission of the truth of the assertion. *Watson v. Byers*, 6 Ala. 393; *Wheat v. Croom*, 7 Ala. 349; *Hicks v. Lawson*, 39 Ala. 90. The rule is said to

rest 'on that instinct of our nature, which leads us to resist an unfounded demand.' The common sense of mankind is expressed in the popular phrase, 'Silence gives consent,' which is but another form of expressing the maxim of the law. 'Qui tacet consentire videtur.' The rule involves as facts on which it rests, that it is the interest or duty, of the party to whom the declaration or assertion is made, to, reply to it. If it proceeds from one having, or asserting, or authorized to assert, adverse interests or claims, it is in the ordinary course of human conduct, if the truth of the assertion is not admitted, that dissent from it should be expressed. Or, there may be circumstances under which, it would be a duty to dissent, if silence would mislead, and produce injury to others, who may rely on the truth of the assertion." *Perry v. Johnston*, 59 Ala. 648, 651.

"The rule for the admission of such evidence is thus stated in *Peck v. Ryan*, 110 Ala. 336, 17 So. 733: 'That the statement must be heard and understood by the party to be affected by it, that the truth of the facts embraced in it must be within his knowledge, and that the statements must be made under such circumstances, and by such persons as naturally call for a reply.' The authorities to support the announcement are there cited. See *Wigmore on Evidence*, §§ 1071, 1072. Judge Austill testified that, upon the occasion referred to 'all of the family came out to the fence' near which the transaction and statements limited by the court took place. It appears from the record that the defendants, other than Louisa and William, resided with them on the premises. In view of these circumstances, we think the court erred to the prejudice of plaintiff in limiting testimony as it did." *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233, 234.

Received with Caution.—"Admissions implied from silence are received with great caution at best, and are never received unless the statement was of such character, and made under such circumstances, as naturally to call for a reply. *Abercrombie v. Allen*, 29 Ala. 281." *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808, 810.

The silence of a party against whom a

claim or right is asserted is a fact which may be shown in an action for enforcement of such claim or right, and from which the jury may infer an admission of the truth of the assertion. *Perry v. Johnston*, 59 Ala. 648.

To Show Character and Extent of Possession.—Plaintiff, after having acquired a deed to the premises in controversy, visited the same and conferred with two of the defendants in the presence of the others, in which conversation it was agreed that one of them should take the land as plaintiff's tenant and that the rest should continue to reside there. Held, that such evidence was admissible against all the defendants as indicating the character and extent of their possession, provided the statements were understood by those present who did not take part therein, and were made under such circumstances as to naturally call for a reply. *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233.

Failure to Claim Warranty.—In an action for the price of a horse defended on the ground of breach of warranty, the testimony of the agent of the seller making the sale, that the buyer after the death of the horse, did not claim that the agent on behalf of the seller had warranted the horse to be sound, was properly excluded; it not being offered to contradict any testimony of the buyer. *Millsap v. Wolfe*, 1 Ala. App. 599, 56 So. 22.

§ 169 (2) Failure to Deny or Object to Oral Statements in General.

The mere declarations of strangers with whom a party has no connection, though made in his presence, may be best answered by silence, and from such silence no inference arises against the party. *Perry v. Johnston*, 59 Ala. 648.

"The mere declarations of strangers, with whom the party has no connection, though made in his presence, may be best answered by silence, and from silence no inference against the party should be drawn. 'The mere silence of one,' says Mr. Greenleaf, 'when facts are asserted in his presence, is no ground of presuming his acquiescence, unless the conversation were addressed to him, under such circumstances as to call for a reply.' 1 Green. Ev., § 1975. In *Jelks v. McRae*, 25

Ala. 440, a slave's confession of larceny, made in the presence of the master, and in reference to which he was silent, was held inadmissible as evidence against him. In *Fuller v. Dean*, 31 Ala. 654, 657, which was an action of slander, the defendant offered evidence showing that prior to the speaking of the slanderous words, another person had made the same criminal charge against the plaintiff, and it was not denied. This court said: 'We can see no principle on which this evidence was admissible, unless it be under the influence of the maxim, "Qui tacet consentire videtur;" an admission inferred from acquiescence in the verbal statements of another. * * * Now, we do not think the charge made in this case was of a nature to call for a reply; but in the language of Mr. Greenleaf, we think it was impertinent, and best rebuked by silence.'" *Perry v. Johnston*, 59 Ala. 648, 651.

Declarations of Colaborer.—Defendant, in an action for injury to an employee, may prove, not only declarations of plaintiff tending to show he was in fault, but declarations of plaintiff's colaborer, in plaintiff's presence or hearing, tending to fix such fault on plaintiff. *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 284, 47 So. 279.

"Plaintiff and Jim Spencer were working together as 'buddies' in the mine on the day of the explosion, which caused plaintiff's injuries. They together had prepared the fuse by which the shot was made. It would be competent for the defendant to prove any declaration made by the plaintiff, tending to show fault on his part in the preparation of the place or hold for the fuse and in the placing of the fuse in position; and it would also be competent to prove any declaration or statement made by Spencer, in plaintiff's presence or hearing, tending to fix such fault on the plaintiff; but in order to put the lower court in error, in its ruling in respect to the admissibility of such evidence, it is incumbent upon the defendant to show to that court, what answer was expected. *Dent v. Chiles*, 5 Stew. & P. 383, 392. This is sufficient to guide the court in respect to this matter, should another trial be had." *Sloss-Sheffield Steel, etc., Co. v. Sharp*, 156 Ala. 284, 47 So. 279, 280.

Admissions of Bookkeeper.—In an action on a store account, defendant claimed that he had made two \$50 payments direct to plaintiff, and two like payments to his bookkeeper. Plaintiff claimed that only one payment had been made to his bookkeeper. Held, that an admission by the bookkeeper, in plaintiff's presence, that defendant had paid him \$50, but whether he had given him credit for it he could not say, to which plaintiff replied that he only wanted what was right, is not admissible in evidence against plaintiff, as the statement did not call for any reply from plaintiff. *Peck v. Ryan*, 110 Ala. 336, 17 So. 733.

Failure to Assert Title.—Where defendant in ejectment relies on an assignment, dated 1851, to his grantor, purporting to be executed by R., through whom plaintiff claims by inheritance, plaintiff may show that when R., in 1859, proposed, in the presence of defendant's grantor, to sell the property to witness, said grantor did not object, but told witness that he would get a good title. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

Statement Not Calling for Denial.—That defendant, who was president of a corporation failed to make any response in a conversation with a subordinate as to the affairs of the corporation, the latter expressed his opinion that defendant was personally responsible on certain notes of the corporation of earlier date, evidencing the then indebtedness of the corporation to plaintiff bank, which had been indorsed by defendant, was inadmissible as an admission, there being no occasion for a denial. *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808.

Where a slave confesses in the presence of defendant, his master, and plaintiff, that he had received from another slave stolen property belonging to plaintiff, the master's silence can not be construed into an admission of the facts stated in such confession, as it involves no charge against him, and calls for no reply. *Jelks v. McRae*, 25 Ala. 440.

Identity of Goods Attached.—Where the vendee's stock of goods was seized under attachment, after the goods sued for had been sold to defendant, declarations by the sheriff, made in defendant's presence, that he had not attached the

goods sued for, to which defendant made no reply, are admissible as tending to prove an admission by defendant that the goods were still in his possession. *Harmon v. Goetter*, 87 Ala. 325, 6 So. 93.

Accusation of Crime.—Evidence offered against a party, showing that a statement was made in his presence accusing him of a crime, to which he did not reply, is admissible as constituting an implied admission on his part of the truth of the charge. *Hicks v. Lawson*, 39 Ala. 90.

Statement Regarding Performance of Services.—In an action to recover damages for the breach of contract for services as overseer at a stipulated price, evidence is inadmissible to show that, during an altercation which occurred on the trial of another suit before a justice of the peace, plaintiff said, in the presence and hearing of the defendant, "that he took good care of everything as defendant's overseer, and that defendant did not deny the same." *Abercrombie v. Allen*, 29 Ala. 281.

Statement of Damages.—A lessee can not show his damages by a failure of the lessor to repair according to his covenant, by proving his own declarations in the presence of the lessor, made, in stating his estimate of the repairs necessary, before the contract was made; it not appearing that the lessor assented to it. *Hill v. Bishop*, 2 Ala. 320.

Charge of Trespass.—Where one is charged with the commission of a trespass in such manner as requires a denial or refutation, which he refuses to make, but requires proof of the fact, it is presumptive evidence of the truth of the charge. *Wheat v. Croom*, 7 Ala. 349.

Declarations of Slave.—A declaration of a character proper for a slave to make, made by him in the presence and hearing of a white person, from whom it naturally called for a response, is admissible evidence against such white person, if uncontradicted by him, as showing acquiescence in the truth of the statement. *Spencer v. State*, 20 Ala. 24.

§ 169 (3) Oral Statements by Husband and Wife.

Declarations of Wife.—Where chattels are in the possession of husband and wife, the wife's assertions of title, when

made in the presence of the husband and acquiesced in by him, are competent evidence for her vendee, in an action against him by the husband's administrator. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

When a declaration of the wife is offered in evidence against the husband, and his presence at the time it was made is sufficiently proved to authorize the evidence to go before the jury, it is for them to determine whether he heard the remark—its pertinence and effect as an implied admission on his part depending upon the fact that he heard it. *Glawson v. Wiley*, 35 Ala. 328.

§ 169 (4) Oral Statements Made in Court.

Failure to Contradict Witness.—Declarations of one, while testifying as a witness in a case, that certain property belonged to him, are not admissible, against one subsequently claiming the property, because he was present in court and said nothing. *Collier v. Dick*, 111 Ala. 263, 18 So. 522.

§ 169 (5) Failure to Deny or Object to Written Statements in General.

To Show Relation of Parties.—Where one addresses a communication to an agent of a corporation, describing himself in his representative capacity, if the agent, in replying to such communication, addresses him simply as an individual, without regard to his representative capacity, such correspondence can not be construed into an admission by the agent of the special relation claimed by such person. *Sullivan v. Louisville & N. R. Co.*, 128 Ala. 77, 30 So. 528.

§ 169 (6) Failure to Dispute Book Entries or Accounts.

Objection to Single Item.—A debtor who, when an account is rendered him, objects to only a single item, impliedly admits the correctness of the balance of the account. *Burns v. Campbell*, 71 Ala. 271, cited in note in 23 L. R. A., N. S., 369.

In Action on Account.—Where an itemized statement of the account in suit is handed defendant a reasonable time before trial in the justice court thereon, his failure, in his testimony before the justice, to deny the correctness of the account, impliedly admits its correctness, and therefore, on appeal to the circuit court.

is evidence of its correctness. *Peck v. Ryan*, 110 Ala. 336, 17 So. 733.

Failure to Deny Any Accounts.—Where an account is placed, together with a number of others, in the hands of an attorney for collection, proof that the debtor came several times to his office, and examined the bundle of accounts in which it was filed, and made no objection to either the correctness or justice of any of them, is sufficient to charge him with an acknowledgment of the justness of the demand. *McCullough v. Judd*, 20 Ala. 703.

"It is undoubtedly the law, that if a debtor, to whom an account is rendered, retains it without objection for an unreasonable time, this is enough to raise the presumption that he admits its correctness. *Langdon v. Roane*, 6 Ala. 518; *Burns v. Campbell*, 71 Ala. 271, 286. It is, however, only evidence of an admission, and can not be more conclusive than an express admission that the account is correct. Either is subject to disproof; and when it is satisfactorily shown that the account is not correct, this destroys the force of the admission, and shows it to have been made in mistake. This is the rule, when a right of recovery is claimed on the strength of such admission, express or implied. When, however, a settlement has been made, and it is sought to re-examine, and overcharge or falsify the account, to authorize relief, there must, as a general rule, appear to have been fraud, or gross mistake in the reckoning. 6 *Watt's Ac. & Def.* 427." *Sloan & Son v. Guice*, 77 Ala. 394, 397.

§ 169 (7) Failure to Answer Letter or Statements Therein.

Plaintiffs having written to defendant in reference to their account, on which the action is founded, addressing him as a partner with the person, since deceased, by whom the business was carried on; his failure to answer the letter would if unexplained, operate as an implied admission on his part of the fact of partnership. *Humes v. O'Byran*, 74 Ala. 64.

(B) BY PARTIES OR OTHERS INTERESTED IN EVENT.

§ 170. Parties of Record.

§ 171. — In General.

§ 171 (1) In General.

Testimony of Plaintiff.—Where, in

ejection, defendant relied on a deed executed to another pending the action, it being shown that the deed was executed and unrecorded and that the grantee was a nonresident, and the legal presumption being that the deed was in the grantee's possession, plaintiff's testimony that he had executed the deed was admissible against himself. *Sellers v. Farmer*, 151 Ala. 487, 43 So. 967.

In an action against a postmaster for the value of lost letters, the testimony of a witness that defendant stated to him (witness) "that it might have been through his [defendant's] negligence that the letters were lost" is admissible. *Raisler v. Oliver*, 97 Ala. 710, 12 So. 238.

Declarations of Debtor.—A mortgagee agreed to accept \$300 to be paid by F., and his debtor's \$200 note, in full settlement of all notes, "mortgages," and demands against him. On the strength of such agreement, F. paid the \$300, and took a mortgage from the debtor. The \$200 note given by the debtor recited that it was secured by the mortgage formerly held by said mortgagee. Held, that a declaration of the debtor that he executed the \$200 note, and that it was secured by mortgage, made in F.'s absence, was not admissible against him to postpone the lien of his mortgage. *Cade v. Floyd*, 120 Ala. 484, 24 So. 944.

Declarations of Trustee.—In an action of detinue for slaves, where the defendant claims under a deed of trust as trustee of plaintiff's wife, it is competent for the plaintiff to show, by the declarations of the trustee himself, that he is the real party in interest by transfer from the beneficiary. *Thompson v. Drake*, 32 Ala. 99.

Declarations of Defendant.—In an action for the price of a horse sold, defendant denying the sale, his declarations that he had purchased the horse were admissible as declarations against interest. *Moore v. Crosthwait*, 135 Ala. 272, 33 So. 28.

§ 171 (2) Statements as to Particular Facts in General.

Employment of Plaintiff by Defendant.

—In an action for services performed under a contract which defendant denies, plaintiff may prove defendant's declarations, made while giving the bond to re-

lease plaintiff from jail, that he wanted plaintiff to work for him. *Wood v. Brewer*, 57 Ala. 515.

Inability of Vendor to Make Title.—The declarations of a vendor of land in his lifetime, and of his administrator, showing a refusal and inability on their part to make a title, are admissible for the plaintiff in an action on the title bond given by the vendor. *Bedell's Adm'r v. Smith*, 37 Ala. 619.

§ 171 (3) Disparagement of Title or Interest.

Recognition by Plaintiff of Defendant's Title.—In trover for the conversion of a mule, where there was evidence that it belonged to plaintiff's father, and defendant claimed it under a mortgage executed by the latter, evidence of statements made by plaintiff as to a right or wish to redeem therefrom was admissible, as showing his recognition of defendant's title thereunder. *King v. Franklin*, 132 Ala. 559, 31 So. 467.

§ 171 (4) Statements as to Intent, Motive, or Nature of Act.

Fraudulent Intent.—Declarations of the defendant in execution, showing a fraudulent intent on his part, are not admissible evidence against the claimant, unless he, or some one through whom he claims, was connected with the fraud. *Newcombe v. Leavitt*, 22 Ala. 631.

Intent to Remove from State.—In an action for wrongful attachment, evidence that defendant in attachment tried to sell property before the attachment was sued out, and stated that he expected to go to another state, and engage in business there, is admissible to show that he was about to remove from the state. *Troy v. Rogers*, 113 Ala. 131, 20 So. 999.

In an action against a postmaster for the value of the contents of registered letters alleged to have been lost, testimony of a witness that defendant stated to him (witness), "that it might have been through his [defendant's] negligence that the letters were lost" is admissible. *Raisler v. Oliver*, 97 Ala. 710, 12 So. 238.

§ 171 (5) Statements as to Existence, Validity, and Amount of Debt, or Payment Thereof.

Admission of Debt.—In an action on a

note alleged to have been left with the maker as collateral security for a debt due from the payee, which had never been paid, evidence that defendant admitted his liability, and promised to pay, without reference to the other debt as unpaid, is admissible against him. *Wharton v. Thomason*, 78 Ala. 45.

Acknowledgment by Indorsers.—Where, in an action against the indorsers of a note, they denied having induced the holder to delay suit against the maker by promising to pay the note, testimony that they said to witness that they told the holder that either of them was worth the debt, and that they had offered to give him a mortgage on the maker's property, and pay \$300 per month until the debt was paid, was properly received. *Brown v. Fowler*, 133 Ala. 310, 32 So. 584.

§ 171 (6) By Parties to Contest of Will.

Declarations of Proponent.—Where the proponent is sole legatee and sole executor, his declarations are admissible for the contestant. *Seale v. Chambliss*, 35 Ala. 19.

§ 171 (7) Parties Having No Interest in Subject-Matter at Time of Admission.

Declarations of Defendant Previous to Acquiring Interest.—B. obstructed the waters of a brook so that they flowed upon the land of M. P. and W. afterwards purchased B.'s land and maintained the obstruction. Held, in an action against them by M., that P.'s admissions as to the injury to the plaintiff's land from the overflow of water upon it, made a number of years before P. purchased an interest in B.'s land, were admissible against him. *Polly v. McCall*, 37 Ala. 20.

§ 171 (8) Coparties.

Answer of Codefendant.—An answer of one defendant is not evidence against his codefendant. *Cockerham v. Davis*, 5 Port. 220; *Taylor v. Roberts*, 3 Ala. 83.

Admission of One of Two Defendants.—Evidence of an admission by one of two defendants, although it may not bind another, is competent evidence, and the question of its effect arises only when a charge is necessary or requested. *Palmer v. Severance*, 9 Ala. 751.

In a suit against two, the admissions

of one defendant are competent testimony. If the codefendant desires to avoid the effect which such admissions may have upon him, he should ask a charge of the court. *Falkner v. Leith*, 15 Ala. 9.

Declarations of Mortgagee.—The declarations of a mortgage, made, before the sale, as to his intention to buy in the property, through the agency of others, for the benefit of the mortgagor, and to prevent it being seized by other creditors, are not competent evidence against the purchasers at the sale, in a suit against them and the mortgagee jointly, to have the sale set aside on the ground of fraud. *Mahone v. Williams*, 39 Ala. 202.

Limitation by Instruction.—The admissions of one of two defendants, being competent against himself, can not be excluded from the jury on motion. Their operation may be limited by instructions to the jury, at the request of his codefendant. *Polly v. McCall*, 37 Ala. 20.

§ 172. — Nominal and Unnecessary Parties.

Can Not Defeat Claim of Real Party.—The admission of a nominal plaintiff, made after action brought, can not be given in evidence to defeat the claim of the actual party in interest. *Chisholm v. Newton*, 1 Ala. 371; *Vickars v. Mooney*, 6 Ala. 97; *Sykes v. Lewis*, 17 Ala. 261.

A declaration by a nominal plaintiff, not shown to have been made before the action was begun, is inadmissible to defeat the action. *Copeland v. Clark*, 2 Ala. 388.

Before Parting with Cause of Action.—The declarations of a nominal plaintiff, made before he parted with the note sued on, are admissible against him; and, where there is no proof of the time when another person became the beneficial proprietor of the note, declarations made by him at any time before suit brought are admissible. *Sally v. Gooden*, 5 Ala. 78.

After Parting with Interest.—The admission of the nominal plaintiff, after he has parted with his interest, can not be given in evidence to defeat the beneficial plaintiff. *Head v. Shaver*, 9 Ala. 791.

"But in allowing the declarations, or admissions of the nominal plaintiff, after

he had parted with his interest in the note, by transferring it to Youngblood for his indemnity, the court erred, as he could not impair the title, after such transfer, by any declaration or admission. *Copeland v. Clark*, 2 Ala. 388. See, also, *Chisholm v. Newton*, 1 Ala. 371, and *Brown v. Foster*, 4 Ala. 282." *Head v. Shaver*, 9 Ala. 791, 793.

An admission by a guardian ad litem of the consideration or execution of notes upon which is based an action against an infant heir to enforce a vendor's lien on land coming to him by descent is not evidence against or binding upon such heir, and will not relieve the vendor from establishing his whole case by proof. *Matthews v. Dowling*, 54 Ala. 202.

Admission Showing Real Party in Interest.—The admission of record by the plaintiff that the suit is brought for the use of another can have no effect against the defendant, except to exclude the admissions of the nominal plaintiff from the evidence. *Brown v. Foster*, 4 Ala. 282.

Admissions of Nominal Plaintiff.—To a bill by the real owner of a judgment, the admissions in the answer of the nominal plaintiff in the judgment suit are proof of the complainant's title thereto as against the judgment defendant, his codefendant. *Nix v. Winter*, 35 Ala. 309.

§ 173. Real Party in Interest.

Admissions of a feme covert, suing by a trustee, made in a bill in chancery filed separately and sworn to by her, are admissible in evidence against her in an action at law. *McLemore v. Nuckolls*, 37 Ala. 662, cited in note in 28 L. R. A., N. S., 328.

Declarations as to Continuance of Interest.—Where the plea asserts that the interest in the suit is in a stranger to the record, and sets up a set-off against him, his declarations that the interest still continues, and that the debt was put in the hands of the plaintiff of record to get it beyond the reach of creditors, are admissible, though made during the pendency of the suit; it being shown by other evidence that he is the party in interest. *Bowen v. Snell*, 11 Ala. 379.

"The general rule on this subject is thus stated, by a very exact writer on

evidence: "The law in regard to this source of evidence looks chiefly to the real parties in interest, and gives to their admissions the same weight as though they were parties on the record. Thus the admissions of the cestui que trust of a bond; those of the persons interested in a policy of insurance effected in another's name for their benefit; those of all the ship owners in an action by the master for freight; those of the indemnifying creditor in an action against the sheriff, etc., etc., are all receivable against the party making them. And in general, the admissions of any party represented by another, are receivable in evidence against the representative." The only limitation stated by the author is, that the admissions must have been made during the continuance of the interest. *Greenl. Ev.*, § 180." *Bowen v. Snell*, 11 Ala. 379, 381.

§ 174. Joint Interest.

§ 174 (1) In General.

An act or word of one cotenant is not admissible to prejudice the rights of the other tenants. *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233.

Recognition of Superior Title.—Where B. had acquired title before the execution of plaintiff's deed, the admission of any or all of the defendants claiming under B. of a superior right or title in plaintiff could not divest them of the legal title derived from B., unless they held possession in recognition of plaintiff's title for the requisite period to complete the bar of the statute, in which case plaintiff's title would be established, notwithstanding the prior title of B. *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233.

"The character and extent of the possession of all the defendants was a material inquiry in the premises; and it was admissible against all defendants, as indicative of the character and extent of their possession, provided, of course, the conditions set forth in the quoted rule, rendering silence an evidential circumstance, were found by the jury to have existed at the time in question. However, it is appropriate to suggest that such evidence should be cautiously credited. *Campbell v. State*, 55 Ala. 80." *Ste-*

phens v. Barnwell, 154 Ala. 124, 45 So. 233, 234.

Joint-Owners of Boat.—In an action against a railroad company for injuries received by plaintiff while a passenger on a steamboat alleged to have been operated by defendant, it is error to admit in evidence a certificate of enrollment, together with a bond and affidavit of a person not a party, in connection with whom plaintiff alleged defendant operated such boat, in which he stated that he owned one-twelfth and defendant eleven-twelfths of such boat, for the purpose of showing enrollment and registration, and that defendant and such person was held out to the public as owners of the boat, where there is no testimony that defendant had knowledge of or participation in them. *Central R. & Banking Co. v. Smith*, 76 Ala. 572.

§ 174 (2) Co-Obligors.

Prevalence of English Rule.—The former English rule, that a promise or admission by one obligor binds others whom he is bound to indemnify or contribute to, does not prevail here. *Rapier v. Louisiana Equitable Life Ins. Co.*, 57 Ala. 100.

Signers of Note.—In an action against one of the signers of an instrument in the form of a note, testimony of another signer as to whether he had offered to compromise the debt was properly excluded; it being irrelevant on the question whether defendant owned the debt. *Penton v. Williams*, 163 Ala. 603, 51 So. 35.

Suit on Contract.—The rule has long been settled in this state, that in a suit on a contract that is joint, or joint and several, a promise or admission by one obligor, who is bound to indemnify or contribute to the others, will not bind them. *Rapier v. Louisiana, etc., Life Ins. Co.*, 57 Ala. 100.

"There are authorities which hold that in a suit on a contract that is joint, or joint and several, a promise or admission made by one obligor who is bound to indemnify or contribute to the others, will bind the others. Such was at one time the English rule, and which seems to be rule in some of the states. See authorities on the briefs of counsel. In Ala-

bama the rule has long been settled the other way. *Lowther v. Chappell*, 8 Ala. 353; *Myatts v. Moore*, 41 Ala. 222; *Moore v. Leseur*, 18 Ala. 606; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Evans v. State Bank*, 13 Ala. 787. This last case is directly in point. See, also, 1 Greenl. Ev., § 187, directly in point." *Rapier v. Louisiana, etc., Ins. Co.*, 57 Ala. 100, 104.

Letter Stating Liability.—On an issue to whether defendants had promised to pay a note on which they were indorsers, a letter subsequently written by one of them containing an individual promise to pay, and stating that they wanted the plaintiff to hold the paper, was admissible. *Brown v. Fowler*, 133 Ala. 310, 32 So. 584.

Rebuttable Inference.—In *assumpsit* against three joint makers of a promissory note, the admissions of one of the defendants are competent evidence against the codefendants, at least until the inferences arising from the face of the note are rebutted, and it is shown that the party making the admissions is not jointly interested with the others. *Camp v. Dill*, 27 Ala. 553.

§ 175. Persons Suing or Defending in Different Character or Capacity.

The declarations of a principal defendant can not be given in evidence, for the purpose of showing a transaction between him and the garnishee fraudulent, unless made in the presence of the garnishee. *Jones v. Norris*, 2 Ala. 526.

(C) BY GRANTORS, FORMER OWNERS, OR PRIVIES.

§ 176. Privies and Former Owners in General.

Admissions against Interest.—A man's admissions against his own interest are admissible in evidence against him and those claiming under him by a title arising since such admissions. *Fralick v. Presley*, 29 Ala. 457.

Declarations or admissions, against the interest of the party making them, that he holds as tenant or trustee for another, are admissible against him and those who succeed to his rights or estate. *Brewer v. Brewer*, 19 Ala. 481.

"Nor can it be objected that these admissions are not evidence against George

W. and those who claim under him, for the rule of evidence is, that the declarations of one against his interest, that he holds as tenant or trustee of another, are admissible against him and those who subsequently succeed to his rights or estate. 1 Greenl. Ev., § 189; *Varick v. Briggs*, 6 Paige, 323." *Brewer v. Brewer*, 19 Ala. 481, 488.

Letter Acknowledging Plaintiff's Claim.

—Where, in an action of ejectment, defendant relied on adverse possession by himself and his father, through whom he claimed, a letter written by the father to plaintiff during the time covered by the claim of adverse possession which recognized in plaintiff an interest in the lands in controversy, is admissible as tending to show that the possession relied on was not adverse, though the admission on the part of the father was not clearly remembered by witness, whose evidence was that the family name of the person in whom defendant's father had recognized possession was the same as that of plaintiff, but that the surname was different. *Savery v. Moore*, 71 Ala. 236.

Declaration of Former Owner to Son.

—In an action of ejectment, a declaration by one who was formerly owner of the property sued for, made to his son, while not in possession, that he had sold and given possession of the land, is purely hearsay, and inadmissible. *Anniston City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61.

Declaration of Husband.—The declarations of a husband in disparagement of his own title, admitting that his wife had an equitable interest in lands which he had partly paid for with her moneys, made while negotiating an exchange of the lands, are admissible for the wife against a subsequent purchaser at execution sale against the husband. *Walker v. Elledge*, 65 Ala. 51.

Act of President of Railroad Company.

—On an issue as to whether defendant railroad company had a right of way over plaintiff's land, evidence, that one under whom plaintiff claims, while president of the company, directed the location of the right of way, is inadmissible, unless he was at that time the owner of the land.

Farrow v. Nashville, S. & St. L. Ry. Co., 109 Ala. 448, 20 So. 303.

Declarations When Listing Property.—

On a trial of right of property between a wife and a judgment creditor of her husband, where evidence of listing of the property as his own for taxation by the husband has been improperly admitted, declarations made by him at the time or listing to the assessor that it was not his, but his wife's, are admissible in rebuttal. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666.

Declarations of Debtor.—In a dispute between execution creditors by confession and an attaching creditor on the question of fraud by the debtor in the confession of the judgments, declaration by the debtor in reference to the property, the debt due the attaching creditor, and the debtor's plans for its payment, made before the confessions of the judgments, are admissible for the attaching creditor, in the absence of evidence showing when the execution creditors' claims accrued. *Moses v. Dunham*, 71 Ala. 173.

Showing Loan of Slave.—The admission by the husband, while he held a slave, that it was a loan to his wife from her father, is admissible evidence against a purchaser at execution sale under a judgment subsequently rendered against the husband. *Cole v. Varner*, 31 Ala. 244.

Holding Slave for Father.—If one who has possession of a slave disclaims property in himself, and holds it for the estate of his father, his declarations in disparagement of his own title are admissible evidence against him, or one claiming under him, to show the character of his possession. *Miller v. Jones' Adm'r*, 26 Ala. 247.

Explanatory of Possession.—The declarations of the defendant in execution, while in possession of the personal chattels in controversy, and explanatory of his possession, are admissible evidence against the claimant, on the principle of *res gestæ*; but his declarations respecting the source of his title, as that he claimed them as a distributee of his father's estate, are not admissible. *Brice v. Lide*, 30 Ala. 647.

To Show Consideration of Purchase.—

In a contest between an existing execution creditor and a purchaser from the

debtor, the statements of the latter are not admissible to prove the consideration of the purchase. *Hooper v. Edwards*, 18 Ala. 280.

"It is well settled that in a controversy between a creditor and one who claims to be a purchaser from his debtor, to subject the property of the latter to the payment of his debt, the purchaser must show a valuable consideration for his purchase, and that this can not be done by the admissions of the debtor, either in the form of recitals in the conveyance, or by parol declarations or admissions, if the debt of the attaching creditor existed at that time of the purchase. *Berry v. Hardman*, 12 Ala. 604; *Falkner v. Leith*, 15 Ala. 9." *Hooper v. Edwards*, 18 Ala. 280, 282.

§ 177. Grantors, Vendors, or Mortgagors of Real Property.

§ 177 (1) In General.

Reasons for Making Deed.—In ejectment by one brother against another and his wife and children, involving land deeded to such wife and children by the brothers' father, prosecuted on the ground that the deeds were obtained by undue influence, evidence was not admissible on plaintiff's part to show that after making the deed the father declared he desired the land divided equally between the brothers, and that he had made the conveyance to "get rid of" defendant. *Bain v. Bain*, 150 Ala. 453, 43 So. 562.

"The plaintiff offered to show that, subsequent to the day on which the two deeds were executed, the grantor expressed his dissatisfaction at the way he had disposed of the lands in the deeds, and said he 'wanted the lands divided equally between J. R. Bain and W. L. Bain, and that he had to make the deeds as they were to get rid of J. R. Bain.' It has been expressly ruled by this court that declarations made by the grantor, subsequent to the full execution of the deed, are not evidence which can be looked to for the purpose of impeaching the deed. Especially is this true where it is not insisted that the grantees stood in any relation of confidence or possessed any peculiar influence over the grantor. *Adair v. Craig*, 135 Ala. 332, 33 So. 902, and cases there cited. Consequently the

court committed no error in not allowing proof of the declarations of the grantor made to witnesses C. P. Bain and W. C. Scarbrough." *Bain v. Bain*, 150 Ala. 453, 43 So. 562, 563.

In **ejectment**, evidence as to what one of two parties claiming the land in controversy said to the other in respect to the nature of his possession was competent, where such two parties were those under whom the plaintiff and the defendants respectively claimed. *Watters v. Brown* (Ala.), 58 So. 291.

§ 177 (2) Before Conveyance of Possession.

"The acts or declarations of a vendor prior to a sale, not in disparagement of his title, are not competent evidence against the vendee." *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538, 541.

"The rule is established beyond controversy, that the declarations of a grantor, made whilst he was in possession, and before he has conveyed his title to another, are admissible, not only against himself, but also against all who claim under him. See [*Norton v. Pettibone*], 7 Conn. 319 [18 Am. Dec. 116]; [*Bridge v. Eggleston*], 14 Mass. 245 [7 Am. Dec. 209]; [*Beers v. Hawley*], 2 Conn. 472; 2 Cerm R. 55; [*Jackson v. Myers*], 11 Wend. 536; [*Jackson v. Bard*], 4 Johns. 230 [4 Am. Dec. 267]; also, 2 C. & H. Notes to Phil. Ev. 652. And we know it is the daily practice, to give in evidence the declaration of former owners, made before they parted with their title, showing the extent of their possession, as well as the character of their title. It is true, that those declarations would not defeat an absolute title, if it be shown that the declarant had such title. But like other evidence, they are to be weighed by the jury, and such effect is to be given to such declarations as the jury believe they are entitled to. By this rule, we see that the admissions of Watts, before his sale to Smith, are admissible to prove fraud in the deed from Scarbrough to him. It is also equally well settled, that the declarations of a grantor made after he has parted with his title, can not be received as evidence to impeach his deed. See *McBride v. Thompson*, 8 Ala. 650; [*Hurn's Lessee v.*

Soper], 6 Har. & J. 276; [*Jackson v. Cary*], 16 Johns. 302; [*Jackson v. Cole*], 4 Cow. 587." *Reed v. Smith*, 14 Ala. 380, 386.

Declarations made by a vendor before the sale, tending to show his fraudulent intent, are admissible as against his vendee in a contest with a judgment creditor of the vendor, where there is evidence tending to show that the integrity of the transfer between the vendor and vendee was at least questionable, and there was no ostensible change of possession, this tending to show that the vendee was connected with the vendor in the consummation of the fraud. *Borland v. Mayo*, 8 Ala. 104, cited in note in 41 L. R. A., N. S., 19.

The declarations of the vendor, made to the purchaser while the negotiations for the sale were in progress, are admissible in favor of the purchaser on the issue of the bona fides of the transaction as to creditors. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770, cited in note in 41 L. R. A., N. S., 3.

In Absence of Vendee.—The admissions of a vendor, made before the sale, and in the absence of the vendee, not explanatory of his possession or title, are not competent evidence against the vendee. *Garner v. Bridges*, 38 Ala. 276.

The declarations of the vendor in disparagement of his own title are competent evidence against a subsequent purchaser; and the declaration of a purchaser at a sale for taxes that he is buying as the agent of another are also admissible against his subsequent vendee. *Baucum v. George*, 65 Ala. 259.

Possession Permissive.—In ejectment, where defendant claims that his grantor, N., had adverse possession, plaintiff may prove statements of N. tending to show that his possession was permissive, and in subordination to the title of R., through whom plaintiff claims by inheritance, provided the statements were made while N. was in possession. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

Payment of Purchase Price.—The admission of the grantor as to the payment of the purchase price is admissible, as against subsequent grantees of such grantor, to prove payment of the purchase price. *Pearce v. Nix*, 34 Ala. 183.

Do Not Affect Prior Grantee.—The declarations or admissions of the grantor in disparagement of his own title are competent evidence against a subsequent grantee, but not against a prior grantee. *Alexander v. Caldwell*, 55 Ala. 517.

Statement of Remote Grantor.—In ejectment, a witness can not testify that one of the defendant's grantor, while in possession, told him (witness) that he (grantor) had been told by his grantee, when the grantee was in possession, that he (grantee) came into possession because he bought plaintiff's stock, and in the trade was to care for plaintiff's land. *Beasley v. Clark*, 102 Ala. 254, 14 So. 744. 744.

Offer to Transfer Property.—An offer on the part of the defendant in execution to transfer his property to another for the purpose of delaying creditors can not be given in evidence to affect the claimant, who subsequently purchased the same property from the defendant. *Oden v. Rippetoe*, 4 Ala. 68.

Showing Ownership in Plaintiff.—A witness in ejectment may testify that he heard defendant's grantor, while in possession, say that the land was plaintiff's. *Beasley v. Clark*, 102 Ala. 254, 14 So. 744. 744.

Transactions with Deceased.—In ejectment, defendant, who relies on a transfer to N., his grantor, purporting to have been executed by R., deceased, through whom plaintiff claims by heritance, indorsed on the deed of the property to R. can not testify, in his own behalf, that N. told him how the transfer came to be put on the deed, as it involves proof of a transaction with deceased, R., besides being hearsay. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

Ownership of Machinery.—The owner of the lands being in possession, her declaration that she did not own the machinery was admissible on the question of ownership of the machinery, as against one claiming it under a conveyance of the lands from her. *Nelson v. Howison*, 122 Ala. 573, 25 So. 211.

§ 177 (3) After Conveyance or Transfer of Title in General.

Do Not Affect Title of Grantee.—Statements by one after making a deed

will not affect the title of his grantee. *Anniston City Land Co. v. Edmondson*, 145 Ala. 557, 40 So. 505; *Price v. Branch Bank*, 17 Ala. 374, 376; *Bilberry v. Mobley*, 21 Ala. 277, cited in note in 41 L. R. A., N. S., 21.

"The acts or declarations of a vendor subsequent to a sale, of which the vendee has no knowledge, and in which he does not acquiesce, are, as to the vendee, *res inter alios acta*, and can not be permitted to affect him." *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538, 541.

To Show Undue Influence.—Declarations of the grantor, made after the execution of a deed, that the grantee requested her to execute the same to him, are not admissible in evidence to impeach the validity of the deed for undue influence. *Adair v. Craig*, 135 Ala. 332, 33 So. 902.

Declarations Years after Making Deed.—Declarations by grantor several years after the making of the deed are not competent to show his intention at that time as to a delivery. *Napier v. Elliott*, 162 Ala. 129, 50 So. 148.

"Evidence as to statements and declarations made by the grantor several years after the making of the deed to the plaintiff was not competent to show the intention of the grantor at the time the deed was made. The cases of *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687, and *Law v. Law*, 83 Ala. 432, 3 So. 752, cited and relied on by counsel for appellant, were contested will cases. Wills never take effect until after the death of the testator, and any act of the testator in connection with his will accompanied with a declaration would be competent in evidence as to the question of intention. Here the proposed evidence related to a past and completed transaction. If the grantor were living, it would not be competent for him to testify as to what were his intentions at the time. He could only testify as to what was done or said by him at the time of the making of the deed illustrative of his intention as to a delivery. We do not regard the cited cases as being applicable here." *Napier v. Elliott*, 162 Ala. 129, 50 So. 148.

Declarations of Administratrix.—The declarations of an administratrix in chief, not in possession of the intestate estate

at the time they were made, were offered by the administrator *de bonis non* to defeat the title executed by the administratrix, and to show continuing property in the estate. Held not admissible against the purchaser. *McArthur v. Carrie's Adm'r*, 32 Ala. 75.

Admission of Indebtedness.—On the question whether a conveyance was fraudulent, admissions by the vendor that he was indebted to the vendee, if made at a time previous to contracting the debt with the attaching creditor, are admissible, it being shown that the consideration for the conveyance was notes due from the vendor to the vendee; but such admissions, made at the time of the sale, and after the existence of the attaching creditor's debt, although admissible as part of the transaction, are entitled to no weight as proof of a consideration, and an adequate consideration must be proved aliunde, where the evidence creates suspicion. *Goodgame v. Cole*, 12 Ala. 77.

Where the creditor of a firm attaches its stock of goods after it has been transferred to the wife of one of the members in payment of a pre-existing indebtedness to her, on the trial of her claim to the goods, a letter from the firm to her attorney, admitting their indebtedness to her, is admissible in evidence, if it is not shown that the attaching creditor's debt was contracted prior to the date of the letter. *Bell v. Kendall*, 93 Ala. 489, 8 So. 492.

§ 177 (4) Showing Nature of Conveyance.

Grantor in Trust Deed.—The declarations of a grantor in a trust deed attacked for fraud, made prior to the execution of the deed, can not be given in evidence against the grantee to show the object and purpose of the deed. *Hodge v. Thompson*, 9 Ala. 131.

§ 177 (5) Showing Fraud.

See, generally, the title **FRAUDULENT CONVEYANCES**.

Prior to Alleged Sale.—In a controversy between a purchaser at execution sale of land sold as the property of A. and a purchaser from B., to whom A. had sold and conveyed the land, the declarations of B. while he held the title are

admissible to prove fraud in the conveyance from A. to him. *Reed v. Smith*, 14 Ala. 380, cited in note in 41 L. R. A., N. S., 15.

It is not permissible, with a view to show fraud on the part of the grantee, to prove that the grantor proposed to others fraudulently to convey the property to them, unless the grantee had knowledge of such proposals and the object and motive of the grantor in making them. *Reed v. Smith*, 14 Ala. 380, cited in note in 41 L. R. A., N. S., 15.

"As to declarations and actions made by the grantor prior to the alleged fraudulent sale, as against the grantee, which tend to show a fraudulent intention, the part of the grantor, a more liberal rule perhaps prevails. *Lehman, etc., Co. v. Kelly & Bro.*, 68 Ala. 192; *Bridge v. Eggleston*, 14 Mass. 245, 7 Amer. Dec. 209; *Foster v. Hall*, 12 Pick. 89, 22 Amer. Dec. 400. If, under this rule, which we need not stop to discuss, it was permissible for the plaintiff to prove that Dreyfus had purchased other goods on credit from another person, about two weeks prior to his sale to the defendant, as was attempted to be done, the proposition to make such proof should have been coupled with an offer to prove also that the debtor had not paid for such goods; for, if he had bought and paid for them, this fact would tend to prove neither fraud on his part, nor his insolvency." *New York, etc., Cigar Co. v. Bernheim*, 81 Ala. 138, 1 So. 470, 471.

Contemporaneous Declarations of Fraudulent Purpose.—Where the proffered declarations show a fraudulent intent, the decisions are in accord. Here, the practice is to admit in evidence the vendor's contemporaneous declarations of his fraudulent purpose, when the transfer is attacked as in fraud of his creditors. *Jones v. Norris*, 2 Ala. 526; *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 So. 284, cited in note in 41 L. R. A., N. S., 5.

Contrary to the doctrine which obtains in the jurisdictions just considered, a number of courts have held that declarations of the character now under consideration are inadmissible unless the vendee is connected with the fraud. *Abney v. Kingsland & Co.*, 10 Ala. 355; *Newcombe*

v. Leavitt, 22 Ala. 631, cited in note in 41 L. R. A., N. S., 12.

Where the vendor was allowed to remain in possession of the premises for many years, and asserted his ownership by collection and presumptively the appropriation of the rents, such a prima facie case of fraudulent combination between vendor and vendee is raised as to authorize declarations of the vendor that the transfer was made to defraud certain of his creditors to be admitted in evidence against the vendee, as if the declarations were his own. *Byrd v. Jones*, 84 Ala. 336, 4 So. 375, cited in note in 41 L. R. A., N. S., 28.

In *Hodge v. Thompson*, 9 Ala. 131, cited in note in 41 L. R. A., N. S., 8, the declarations of the grantor in a trust deed for the benefit of certain creditors named therein, which were made a day or two before such deed was executed, to the attorney of one of the creditors named in it, with respect to the object and purpose of the deed, were admitted in evidence by the trial court in a suit between the trustee and a judgment creditor of the grantor, over the trustee's objection. The supreme court said: "We can not see how this evidence was proper, as the object and purpose of the deed was to be ascertained from its face or by proof showing its falsity. It may be, however, that the bill of exceptions is not so full on this point as was intended, and therefore we shall decline any determinate opinion beyond what has already been said."

After Sale of Property.—The declarations of a vendor indicating an intent to defraud creditors, made after the sale, and not in the presence or hearing of the vendees, are not admissible against them, although they may have united in the fraudulent purpose, since the declarations of one co-conspirator, made after the conspiracy is terminated and the object consummated, are regarded as the mere narrative of a past transaction, and inadmissible as against the others. *Harris v. Russell*, 93 Ala. 59, 9 So. 548, cited in note in 41 L. R. A., N. S., 25.

Declarations of the grantor after conveyance, that he wanted to save his property for his family, are admissible to impeach him, where he has sworn to inno-

cent and different motives in executing the conveyance. *Borland v. Mayo*, 8 Ala. 104, cited in note in 41 L. R. A., N. S., 23.

It has been held that the error in admitting subsequent declarations of the vendor that the sale was fraudulent, without connecting the vendee with the fraud, is not cured by instructing the jury to disregard the evidence unless he was by other proof so connected with the fraud. *Bilberry v. Mobley*, 21 Ala. 277, cited in note in 41 L. R. A., N. S., 25.

And some cases expressly qualify the rule by adding, "unless there is other evidence tending to connect the vendee with the fraud," or some equivalent phrase. *Bilberry v. Mobley*, 21 Ala. 277, cited in note in 41 L. R. A., N. S., 24.

Thus, some of the cases lay stress upon the fact that the vendee was not present when the declarations were made. *Bilberry v. Mobley*, 21 Ala. 277, cited in note in 41 L. R. A., N. S., 23.

Evidence of an offer on the part of a judgment debtor to transfer his property to another for the purpose of delaying creditors can not be given in evidence to affect subsequent purchasers of the same property from the judgment debtor, even with the limitation that such evidence can only affect the purchasers if subsequent evidence will authorize an inference that the purchasers received the property under the same circumstances, since such evidence would have no tendency to show that the debtor participated in the fraud. *Oden v. Rippetoe*, 4 Ala. 68, cited in note in 41 L. R. A., N. S., 15.

§ 177 (6) After Conveyance, but before Transfer of Possession.

Declarations of intent made by a vendor after a sale and conveyance of his real and personal property, and during his continuance as the agent and manager of the purchaser, were held inadmissible in *Robinson v. Pitzer*, 3 W. Va. 335, either to disprove the purchaser's title or to establish fraud in the sale, because the other evidence in the case failed to involve the transaction between the parties in such doubt or uncertainty, or to raise such a reasonable apprehension of collusion, as would in the court's judgment warrant a resort to the statements of the vendor after he had parted

with the property, though holding a possession consistent with the charge of ownership. *Weaver v. Yeatmans*, 15 Ala. 539, cited in note in 41 L. R. A., N. S., 29.

Explanatory of Character of Possession.—The declarations of a grantor, made while in possession of the property, but subsequently to the conveyance, are admissible against his grantee so far only as they are explanatory of the character of his possession. They can not be received to impeach the bona fides of the deed. *Price v. Branch Bank*, 17 Ala. 374.

It was not error to admit the declarations of the grantor in a deed, while in possession of land sued for, and after he had conveyed the same; explanatory of his possession, and to the effect that he held for another. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137.

To Show Duress.—Declarations of the grantor, after the execution of a deed with express trusts, are not admissible to show duress of the grantor as the inducement of the execution. *Anonymous*, 34 Ala. 430.

§ 178. Sellers or Mortgagors of Chattels.

§ 178 (1) In General.

Showing Character of Possession of Slave.—In trover for the conversion of a slave, the declaration of a defendant's vendor "that he had promised to give the slave to the plaintiffs" is not admissible evidence against defendant, being neither explanatory of possession, nor in disparagement of title. *Moby v. Barnes*, 26 Ala. 718.

"The court erred in excluding the evidence of the declarations of Thomas P. Terrill, in relation to his title, whilst in possession of the slave. This point has been frequently decided by this court. *Oden v. Stubblefield*, 4 Ala. 40; *Garey v. Frost*, 5 Ala. 636; *McBride v. Thompson*, 8 Ala. 650." *Garey v. Terrill*, 9 Ala. 206, 207.

The purchaser of negroes at a sale under a trust deed attacked as in fraud of creditors is not so connected with the alleged fraud as to make the maker's subsequent declarations of fraudulent intent evidence against him, because, after an actual change of possession by delivery of

the slaves to the purchaser, the latter made a contract with the maker by which the latter was to take charge of the slaves for a year and make the former a crop as overseer, nor because of the relationship of father-in-law and son-in-law between the parties, nor because there was no change in the planting operations, nor because the compensation of the maker was not explicitly stipulated, it being enough that the purchaser promised to pay him well if he made a good crop, and less if he failed. *Weaver v. Yeatmans*, 15 Ala. 539, cited in note in 41 L. R. A., N. S., 25. The court distinguished *Borland v. Mayo*, 8 Ala. 104, on the ground that there the evidence disclosed facts which prima facie indicated a combination to hinder creditors in the collection of their demands, and that a ground was thus laid for the introduction of independent declarations of the vendor.

"The declarations of the defendant in execution, in possession of the personal chattels in controversy, explanatory of his possession—that is, showing that he holds in his own right, or in subordination to the title of another,—are admissible as evidence against the claimant. But they are so admissible only upon the ground that they constitute part of the *res gestæ*—that is, they show the manner in which he held possession. His declarations, which go to establish something beyond that, and to prove facts disconnected with the possession, are not admissible against the claimant. *McBride v. Thompson*, 8 Ala. 650, 652; *Abney v. Kingsland & Co.*, 10 Ala. 355; *Darling v. Bryant*, 17 Ala. 10. According to these rules, there was no error in excluding those declarations of the defendant in execution, which were excluded." *Brice & Co. v. Lide*, 30 Ala. 647, 649.

Curing Improper Admissions by Instructions.—Where there is no evidence to implicate the claimant of property in the purpose of the defendant in execution to defraud his creditors, the declarations of the defendant, indicating a fraudulent design on his own part, are not admissible against his vendee, the claimant; and the error of admitting such testimony can not be cured by the court's directing the jury to disregard it, unless they be-

lieve, from all the facts and circumstances, that the claimant participated in the defendant's intention to delay, hinder, or defraud his creditors. *Abney v. Kingsland*, 10 Ala. 355, cited in note in 41 L. R. A., N. S., 14.

To Show Existence of Unrecorded Mortgage.—Where the issue was whether a buyer of personalty had at the time of his purchase actual notice of a third person's unrecorded mortgage thereon, evidence of statements made by the seller to the buyer at the time of sale showing that the third person had a mortgage on the property was admissible, while evidence by statements by the seller to others not in the presence of the buyer was inadmissible. *Ard v. Crittenden* (Ala.), 39 So. 675.

"There was no objection to the question that elicited the testimony, that Deens told Payne that 'he had slept over his rights; that the mortgage was not recorded until after Johnson sold the teams to Barrow.' Therefore it was not a matter of right on defendant's part to have the testimony excluded, even conceding that it was irrelevant or illegal. *Liverpool, etc., Ins. Co. v. Tillis*, 110 Ala. 201, 17 So. 672; *Billingsley v. State*, 96 Ala. 126, 11 So. 409; *McCalman v. State*, 96 Ala. 98, 11 So. 408. Moreover, there was nothing prejudicial to appellant in this testimony. Where evidence is so immaterial that it clearly appears that the court and jury had not been influenced by it, the refusal by the court to exclude it will not constitute reversible error." *Ard v. Crittenden* (Ala.), 39 So. 675, 676.

Showing Fraud.—Declaration of the vendor as to his fraudulent intent, made a day or two before the property was removed from the state, are too remote to be admissible as part of the *res gestæ*, where such sale is attacked as in fraud of judgment creditors. *Newcombe v. Leavitt*, 22 Ala. 631, cited in note in 41 L. R. A., N. S., 8.

§ 178 (2) Before Transfer or Delivery of Possession.

The declarations against his title, of one in possession of personal property, are admissible against a party holding under him by purchase subsequent to the

making of such declarations. *Barnes v. Mobley*, 21 Ala. 232; *Jennings v. Blocker's Adm'r*, 25 Ala. 415.

The admissions or declarations of a vendor or assignor of personal property, made before the sale or assignment, are evidence against his vendee or assignee, or against any one who, after such admissions or declarations, comes into the place of the vendee or assignee, or represents his rights and liabilities. *Horton v. Smith*, 8 Ala. 73, cited in note in 26 L. R. A., N. S., 814.

Declarations in disparagement of one's own title, while in possession, are admissible in evidence against the person making such admissions and against a purchaser holding under him. *Arthur v. Gayle*, 38 Ala. 259.

Declarations of an owner of personal property in disparagement of her own title, made while she was in possession and before her sale to another are admissible in evidence against a person deriving title from her vendee. *Jennings v. Blocker*, 25 Ala. 415; *Fralick v. Presley*, 29 Ala. 457, 462; *Gillespie v. Burleson*, 28 Ala. 551; *Cole v. Varner*, 31 Ala. 244; *Arthur v. Gayle*, 38 Ala. 259, 267.

One Month Prior to Sale.—Statements by a seller of personalty months prior to the sale, and not shown to be connected therewith, are not admissible to show fraud or defect in the title. *Murphy v. Butler*, 75 Ala. 381.

Statement of Husband as against Wife's Title.—L. sued F. for breach of warranty of title of a mare sold by F. to L., and attached a mule which G. claimed to own at the time it was levied on. The evidence showed that F. had stolen the mule from G., and that her husband had obtained it from two persons who had taken F. in custody, and from whom he had escaped. Held, that the declarations of the husband, made while the mule was in his possession, claiming ownership thereof, and before any attempted transfer to his wife, were admissible in evidence against her, but not for the purpose of showing how title was acquired, either as to source or manner. *Guy v. Lee*, 81 Ala. 163, 2 So. 273.

Notice of Lien on Property.—The admission of notice of a lien on property

sold at an administrator's sale, made by the purchaser, is not binding on purchasers of the property from him. *Singleton v. Gayle*, 8 Port. 270.

§ 178 (3) After Transfer or Delivery of Possession.

Do Not Bind Vendee.—The statements of a vendor, made after a sale, are not competent evidence against his vendee. *Martin v. Kelly*, 1 Stew. 198.

Statements of the vendor of goods, made after the sale, and out of the presence of the purchaser, are not admissible in evidence to defeat the latter's title. *McKenzie v. Hunt*, 1 Port. 37.

In *detinue* by a trustee of a married woman to recover certain chattels, declarations of the husband, relating to the ownership of the property, not shown to have been made prior to the deed under which plaintiff claims, are inadmissible in evidence against the trustee. *Holly v. Flournoy*, 54 Ala. 99, cited in note in 3 L. R. A., N. S., 959.

Manner of Obtaining Possession.—The declarations of a person in possession of personalty as to the terms of the contract under which he obtained such possession, to the effect that the title was to remain in his vendor until the purchase money was paid, are admissible against one claiming under him by a subsequent contract, but not as against one claiming by paramount title. *Elmore v. Fitzpatrick*, 56 Ala. 400.

Declarations of Sheriff at Time of Levy.—On a statutory trial of the right of property in a stock of goods on which an attachment had been levied, the declarations and conduct of the defendants in attachment, proved by the sheriff, transpiring after the transfer to the claimant and after the levy, and not accompanying, qualifying, or explaining any material fact in the case, are not admissible against claimant. *Pulliam v. Newberry's Adm'r*, 41 Ala. 168.

Showing Character of Possession of Slaves.—When a husband has possession of slaves after his marriage, which previously belonged to his wife's father, and subsequently accepts from him a deed conveying them to the issue of the wife after her death, his acts and declarations showing that his only title was under this

deed will conclude his assignee from asserting a title independent of it. *Inge v. Murphy*, 10 Ala. 885, cited in note in 25 L. R. A. 449, 451, 452, 456.

Answer in Chancery.—In an action by a vendor to recover goods from one to whom they were resold by an insolvent vendee, the sworn answer of the vendee in a chancery suit, made subsequent to his parting with the title and property, admitting his insolvency at the time of purchasing the goods, was inadmissible. *McCormick v. Joseph*, 77 Ala. 236, cited in note in 23 L. R. A., N. S., 368, 370.

§ 178 (4) After Parting with Title, but before Change of Possession.

Vendor Retaining Possession.—Where the vendor of property remains in possession, his declarations in respect to the same are evidence against the vendee. *Borland v. Mayo*, 8 Ala. 104.

To Impugn Validity of Deed of Trust.—The declarations of one in possession of personal property, tending to impugn the validity of a deed of trust which he had previously executed, and under which the claimant, against whom the testimony is offered, deduces his title, are inadmissible. *Weaver v. Yeatmans*, 15 Ala. 539.

"This, we have seen, instead of being part of the *res gestæ*, would be something beyond, and independent of it—the *res gestæ* being the continuous possession of the declarant." *Weaver v. Yeatmans*, 15 Ala. 539, 542.

As to Possession of Slaves.—Declarations made by a vendor, remaining in possession of slaves, after the period when, by the ordinary course of trade, they should have passed to the possession of the vendee, are admissible as evidence against the vendee on the question of fraud. *Goodgame v. Cole*, 12 Ala. 77.

The declarations of a person in possession of slaves in controversy that "they had been loaned to him by the widow of S., and were held under the will of S., to be returned at her death, to be divided as directed by said will," and "that there was a dispute about the title, and he would only sell such title as he got from the sheriff, as he was informed that the heirs of S. would claim them at the death of his widow," are admissible in evidence against a subpurchaser from him by subsequent contract. *Jemison v.*

Smith, 37 Ala. 185, cited in note in 5 L. R. A., N. S., 971.

§ 179. Bankrupts and Assignors for Benefit of Creditors.

Declarations of Assignor in Absence of Assignee.—In an attempt by creditors to avoid an assignment by the debtor as fraudulent as to them, the declarations of the assignor, made in the absence of the assignee, are not evidence against him. *Smith v. Rogers*, 1 Stew. & P. 317.

§ 180. Donors.

Declarations after Gift.—Declarations of the donor after the gift are inadmissible in evidence against his donee. *Julian v. Reynolds*, 8 Ala. 680.

To Impeach Validity of Gift.—The declarations of a donor tending to impeach the validity of his gift are not admissible in evidence unless shown to have been made before the execution of the deed of gift. *Gregory v. Walker*, 38 Ala. 26.

To Prove Gift Fraudulent.—The declarations of a donor made subsequently to the execution of the deed of gift are not admissible to prove it fraudulent. *Strong's Ex'rs v. Brewer*, 17 Ala. 706, cited in note in 64 L. R. A. 314.

Declarations in Reference to Other Gifts.—Where the defense to an action by a father against a son-in-law to recover a slave alleged to have been lent to the wife was that it was a gift, evidence of what the plaintiff said when he portioned his other daughters, and his declarations in reference to his future conduct relative to the marriage portions of his other children, were held to be inadmissible. *Olds v. Powell*, 7 Ala. 652.

Explanatory of Gift.—The declarations of a donor after the consummation of the gift are inadmissible either to affect the gift, or to explain his words or conduct at the time the gift was made. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

To Show Donee Character as Bailee.—Although the donor's subsequent declarations can not be received to invalidate his previous gift when once it is established, yet, where the issue is whether he had parted with his dominion in favor of the donee, with whom he had left a slave, a letter subsequently written by him to the donee is admissible evidence for the pur-

pose of showing that the latter was holding as his bailee merely. *Stallings v. Finch*, 25 Ala. 518.

Party in Possession.—The declarations of a party in possession are not admissible evidence to disprove a title claimed under him, as that he had not given, and did not intend to give the property to the person against whom the declarations are offered. *Walker v. Blassingame*, 17 Ala. 810.

§ 181. Assignors of Rights in Action in General.

The declaration of an assignor whose assignment is sought to be set aside in chancery as in fraud of his judgment creditors, that he would place his property beyond the reach of such creditors, must be rejected as inadmissible in evidence against the assignee, where the declaration is made in his absence, because, if an answer on oath of one defendant can not be read to charge his codefendant or to affect his rights, much less can declarations and admissions made not in the presence of each other be received in evidence for the same purpose. *Smith v. Rogers*, 1 Stew. & P. 317, cited in note in 41 L. R. A., N. S., 14.

After Commencement of Action.—The assignor of a chose in action suing as the nominal plaintiff can not prejudice the rights of the assignee, the real party in interest, by declarations made after the commencement of the action. *Vickers v. Mooney*, 6 Ala. 97.

To Defeat Beneficial Plaintiff.—The declarations of the nominal plaintiff after he had parted with his interest can not be given in evidence to defeat the beneficial plaintiff. *Head v. Shaver*, 9 Ala. 791.

Sale in Fraud of Creditors.—The fact that a vendor, without the knowledge of the vendee, after the sale of his stock and accounts, demanded payment from the debtor of one of the accounts sold, is not admissible as against the vendee to show that the sale is in fraud of creditors. *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538, cited in note in 53 L. R. A. 540.

§ 182. Former Holders of Bills or Notes.

Declaration to Indorsee.—An acknowledgment made by the maker of a note to

one who had once held the note as indorsee will inure to the benefit of the holder. *McRae v. Kennon*, 1 Ala. 295.

Admission of Payment.—Admissions of the owners of a note that it had been paid may be given in evidence in a suit brought for the use of another, it not appearing that he had any interest in the note when the admissions were made. *Remy v. Duffee*, 4 Ala. 365.

Before Action on Note.—In an action upon a note, the declarations of a nominal plaintiff, made before he parted with his interest in the note, are admissible in evidence; and, without proof of the time when he parted with his interest, his declarations, made at any time before suit brought, are admissible. *Sally v. Gooden*, 5 Ala. 78.

Declarations of Payee as Binding Maker.—The declarations of the payee of a note, through whom the plaintiff derives title as indorsee, are not evidence to charge the maker, although his admissions made on a previous day, in discharge of the maker, had been given in evidence by the latter; the later admissions not being made in the same conversation. *Perry v. Graves*, 12 Ala. 246.

Discharging Liability of Drawer.—In an action by an indorsee against the drawer of a bill, a written admission of the payee discharging the liability of the drawer is inadmissible in evidence. *Carmichael v. Brooks*, 9 Port. 330.

Memorandum on Note.—In an action brought by the assignee against the maker of a note, defendant seeking to establish as a set-off a note executed by the assignee to a third person and transferred by the latter to defendant, a memorandum written on the latter note by plaintiff's assignor, stating that such note, if "taken up" by defendant, should be credited on the note of the latter to him, is competent evidence for defendant, if shown to have been made before the transfer of the note sued on. *Grayson v. Glover*, 33 Ala. 182.

§ 183. Testators and Intestates.

§ 183 (1) In General.

As to Soundness of Slave.—Where the question involved was whether a slave was sound when sold by an administrator, the declarations of the intestate,

the owner of the slave, that he was unsound, are admissible evidence to show when the soundness commenced. *Stewart v. Hood*, 10 Ala. 600.

Declarations of Deceased Trustee and Beneficiary.—In a chancery suit between two purchasers of land, one claiming under a purchase from the trustee in a deed of trust, and the other under a prior purchase from the grantor in the deed, the trustee and the sole beneficiary under the deed both being dead, their declarations to the purchase from the grantor, on the faith of which he claims to have made his purchase, are competent evidence for him, and may be proved by himself and the grantor. *Hendricks v. Kelly*, 64 Ala. 388.

Declarations of Testator.—In a suit between an executor and the widow of his testator, the declarations of the testator, founded in ignorance or mistake as to his rights, to the effect that certain slaves, which he held under the will of his wife's father, were her separate property, should not be received to divest the property out of his executor. *Machem v. Machem*, 28 Ala. 374, cited in note in 16 L. R. A. 321.

§ 183 (2) Admissions of Indebtedness.

Receipt for Note Given Attorney.—Where a claim was filed against the estate of an attorney, deceased insolvent, upon a receipt given by him for a note left with him for collection, and the affidavit of verification averred the loss of the debt by the gross negligence of the attorney, evidence was held not admissible, in support of the claim, that he had collected the money and that he promised to pay it. *Stubbs v. Beene's Adm'r*, 37 Ala. 627.

§ 183 (3) Disparagement of Title in General.

Showing Property in Wife.—The declarations of the husband, while in possession of slaves, to the effect that they are the separate property of the wife, are competent evidence against his administrator, in a suit brought by him against a purchaser from the wife after the death of the husband. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

On Executor's Right to Recover Slaves.—After slaves which had been be-

queathed to a married woman had been delivered to her by the executor, and had thereby become the property of her husband, subsequent declarations by the husband that the slaves belonged to the wife will not preclude his executor, on his death, from recovering them. *Machen v. Machen*, 15 Ala. 373.

Declarations as to Sale of Note.—Declarations of a husband that he sold a note belonging to the separate estate of his wife are not admissible in evidence after his death, against a wife, in an action brought by her against the holder of the note for its conversion. *Murphree v. Singleton*, 37 Ala. 412.

§ 183 (4) Statements by Persons in Possession.

Declarations of Ancestor.—Where defendant claims title by adverse possession under an agreement with plaintiff's ancestor as to a dividing line between their adjoining lands, a declaration by such ancestor that he owned up to such line on one side and defendant on the other, is competent as an admission against interest, tending to establish the agreement, and possession under it. *Pittman v. Pittman*, 124 Ala. 306, 27 So. 242.

Holding as Trustee.—The declarations of an intestate that certain slaves were held by him as trustee for his wife, and not as her husband, are admissible in evidence against his administrator, in a suit brought by him against the wife for the slaves. *Lide v. Lide's Adm'r*, 32 Ala. 449.

(D) BY AGENTS OR OTHER REPRESENTATIVES.

§ 184. Authority in General.

Authority Must Be Shown.—One is not bound by the declarations of another until it is shown that the latter was his agent. *Postal Tel., etc., Co. v. Brantley*, 107 Ala. 683, 18 So. 321.

"There being no testimony whatever going to show the agency of the parties of whom plaintiff inquired what line it was, the reply of one of them, that it was the 'Postal Telegraph Company,' was not binding on the defendant, even if the declaration had been otherwise competent. The court erred in allowing such declaration to be proven. *Postal Tel.,*

etc., Co. v. Le Noir, 107 Ala. 640, 18 So. 266." *Postal Tel., etc., Co. v. Brantley*, 107 Ala. 683, 18 So. 321, 322.

Acts or admissions of one professing to act as the agent of another are not admissible without independent proof of his authority. *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

To Prove Agency.—It is a settled principle in the law of agency that, while the declarations of an agent who is admitted or proved to be such, may be admitted, if made in conducting a transaction within the scope of his agency, for the purpose of throwing light upon the transaction itself, it is equally true that the fact of agency can not be proved by the declarations of the agent. *First Nat. Bank v. Leland*, 122 Ala. 289, 25 So. 195; *Owensboro Wagon Co. v. Bliss*, 132 Ala. 253, 31 So. 81; *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15, 30; *Cohn, etc., Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853, 856.

"Acts done and declarations made by one assuming to be agent do not, and can not, prove the agency, or the extent of the agent's power, unless they are made known to the principal, and in some way ratified by him after being informed of what had been done, and the character in which it was done. Knowledge of what was done, and how done, is an indispensable prerequisite to a binding ratification. 1 Amer. & Eng. Enc. Law, 429, 432, 441; 1 Brick. Dig. p. 59, §§ 88, 98; *Burns v. Campbell*, 71 Ala. 271; *Herring v. Skaggs*, 73 Ala. 446." *Huntsville Belt Line, etc., R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295, 298.

While agency may not be proved by the declaration of an agent, it may be established by his testimony, and such testimony may involve only a statement of the fact of agency without going into details as to how the relation was brought about, or as to particular facts on which it rests. *Parker v. Bond*, 121 Ala. 529, 25 So. 898, cited in note in 18 L. R. A., N. S., 289.

In Action against Vendee.—If a vendee relies upon the acts or declarations of a third person in defense to an action for the purchase money, he must show that that person occupied such a situation in respect to the vendor as made them evi-

dence against him. *Bradford v. Bush*, 10 Ala. 386.

Transaction between Debtor and Creditor.—When the evidence does not show the authority of one professing to be agent of a creditor for the collection of a claim, transactions between the debtor and such person, or statements by him not known to the creditor or afterwards ratified by him, are inadmissible against the creditor. *Galbreath v. Cole*, 61 Ala. 139.

Declarations and Admissions of Slave.—The declarations and admissions of a slave, made at the time of his arrest as a runaway, are not competent evidence for the party making the arrest, in an action against the owner to recover the statutory penalty. *Thorpe v. Burroughs*, 31 Ala. 159.

The declarations of an agent made after the transaction is fully completed are hearsay, and not admissible as part of the *res gestæ*. *Gale Sulky Harrow Co. v. Laughlin*, 31 Neb. 103; *Tennessee, etc., Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395, cited in note in 19 L. R. A. 746.

"If the jury was convicted by evidence other than his admissions that he was the company's agent, then any act done by him within the line of his agency, and within the scope of the company's chartered powers, was binding on it; and any declaration made by him accompanying an act of agency, and explanatory thereof, was equally admissible on the doctrine of *res gestæ*." *Tennessee, etc., Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395, 397, cited in note in 19 L. R. A. 746.

Other Evidence of Agency.—"Acts and declarations of one whose agency is the subject of inquiry, though incompetent when there is no other evidence of agency or of ratification, become competent for consideration in determining both the fact of agency and the scope of authority originally given, when shown in connection with evidence of agency. *McClung v. Spotswood*, 19 Ala. 165." *Birmingham, etc., R. Co. v. Tennessee Coal, etc., R. Co.*, 127 Ala. 137, 28 So. 679, 681.

The admission and declarations of an agent are not binding on his principal, nor competent evidence against his prin-

cipal, unless made within the scope of his authority, and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gestæ*; and this principle applies equally to the agent of a corporation and of a natural person. *Danner, etc., Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184.

There being evidence before the jury that the son was defendant's agent, it was competent to prove all his acts in the transaction, including his declaration that he was defendant's general agent. *Gibson v. Snow Hardware Co.*, 94 Ala. 346, 10 So. 304.

§ 185. Agents or Employees.

§ 186. — In General.

Statement of Rule.—The declarations or admissions of an agent are admissible in evidence only when shown within the scope of his employment, and while he was engaged in the business of his principal. *Bohannon v. Chapman*, 13 Ala. 641; *Memphis & C. R. Co. v. Maples*, 63 Ala. 601; *Henderson v. Marx*, 57 Ala. 169; *Belmont Coal, etc., R. Co. v. Smith*, 74 Ala. 206; *Louisville, etc., R. Co. v. Carl*, 91 Ala. 271, 9 So. 334; *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912, 914; *Betts v. Planter's, etc., Bank*, 3 Stew. 18.

"But acts or declarations not within the scope, or done or made while not in the exercise, of the authority, as to the principal, are *res inter alios acta*, and inadmissible as evidence against him. As expressed by the only witness testifying in reference to the agency of Donald, his single duty was 'to make an inventory or check up the business of McLean, and report to the Montgomery office.' He was without authority to make any settlement with McLean, or to receive from him machines or other property 'belonging to the plaintiff.'" *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912, 914.

Admissions of an agent made during the agency and within its scope as to a matter then depending are binding on the principal. *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 953; *Williams v. Shackelford*, 16 Ala. 318.

Declarations of an agent, to bind a principal, must be made at the very time he

is doing an act he is authorized to do, and must be concerning the act he is then authorized to do, and must be concerning the act he is then doing. *McKenzie v. Stevens*, 19 Ala. 691; *Winter v. Burt*, 31 Ala. 33.

"If evidence has first been introduced tending to prove the agency or to make out a prima facie case thereof, the admissions and declarations of the alleged agent, if otherwise competent, may then be shown, and the whole case passed upon by the jury. The rule as above announced is amply supported by authority. *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442; *Talladega Ins. Co. v. Peacock*, 67 Ala. 253; *Gimon v. Terrell*, 38 Ala. 208; *McClung v. Spotswood*, 19 Ala. 165; *National Mechanics' Bank v. National Bank*, 36 Md. 5; *Supply Co. v. Thompson*, 112 Pa. 118, 3 Atl. 439." *Buist v. Guice*, 96 Ala. 255, 11 So. 280, 281.

Must Accompany Act of Agency.—

"Admissions or declarations made by an agent, even though made in reference to a matter intrusted to him, if they do not accompany some act of agency, are not competent testimony against the principal. 3 *Brick. Dig.*, p. 21, §§ 40-43; *Id.* p. 25, §§ 107, 108; *Wailes v. Neal*, 65 Ala. 528, 1 So. 59; *Henry & Co. v. Northern Bank*, 63 Ala. 527; *Hill v. Helton*, 80 Ala. 59; *Henry & Co. v. Northern Bank*, 63 Ala. 527; *Hill v. Helton*, 80 Ala. 528, 1 So. 340." *Huntsville Belt Line, etc., R. Co. v. Corpening*, 97 Ala. 681, 12 So. 295, 298.

Act and Admission Equally Binding.—

Where the acts of an agent will bind the principal, admissions of the agent respecting the subject-matter of the agency will also bind him, if made at the same time, and constituting a part of the *res gestæ*. *Strawbridge v. Spawn*, 8 Ala. 820.

Declarations Subsequent to Contract.

—The declarations of an agent made subsequent to a contract are not admissible as evidence against the principal. The agent must be produced as a witness. *Betts v. Planters' & Merchants' Bank of Huntsville*, 3 *Stew.* 18.

Beyond Scope of Agency.—The declarations of an agent as to matters outside of his agency are not admissible against the principal. *Winter v. Burt*, 31 Ala. 33.

Not Made During Agency.—On an issue as to the payment of plaintiff's claim, declarations of his agent, not shown to have been made during the agency, are not admissible against him. *Governor v. Baker*, 14 Ala. 652.

"But the admission or declaration of an agent binds his principal only when it is made during the continuance of his agency in regard to a transaction then depending, *et dum fervet opus*. It is because it is a verbal act, and part of the *res gestæ*, that it is admissible at all; and therefore it is not necessary to call the agent himself to prove it; but whenever what he did is admissible in evidence, then it is competent to prove what he said about the act while he was doing it; and it follows, that where his right to act in the particular matter in question has ceased, the principal can no longer be affected by his declarations—they being mere hearsay. 1 *Greenl. on Ev.* § 113, and citations in notes; 2 *Phil. on Ev. C. & H. Notes*, 168, *et seq.*" *Governor v. Baker*, 14 Ala. 652, 656.

"Plaintiff had previously testified in his own behalf that he called upon Fagan, defendant's agent, and, against defendant's objection, he was permitted to testify 'that said agent told him that the tobacco in question was burned in a car at Brewton on the night of the fourteenth of July, 1888; that said agent told him this a few days after the fire.' There was an exception reserved to this ruling. What an agent says at the time of and in connection with an act of agency is admissible evidence against the principal. When, however, the act is past, and the statement is merely of such past transactions, such testimony is inadmissible. *Memphis, etc., R. Co. v. Maples*, 63 Ala. 601; *Ware, etc., Co. v. Morgan*, 67 Ala. 461; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112; 9 *Am. & Eng. Enc. Law* 348, 349." *Louisville, etc., R. Co. v. Carl*, 91 Ala. 271, 9 So. 334, 335.

Assent of Agent to Plaintiff's Account.

—In an action to recover for lumber where there is evidence that it was purchased by the contractor as the defendant's agent, and in which it is sought with the agent's consent to recoup the damages suffered by the agent by reason of delay in its delivery, evidence as

to the assent of the agent to plaintiff's itemized accounts, is admissible against defendant. *Merchants' Bank v. Acme Lumber & Mfg. Co.*, 170 Ala. 443, 54 So. 58.

Fixing Liability for Tort.—Declarations of an agent, made while about the business of his master in looking after his tenants, can not be used to prove that the master was doing the work of excavating for a railroad, an explosion in the course of which had injured the tenant and her house. *Bessemer Coal, Iron & Land Co. v. Doak*, 152 Ala. 166, 44 So. 627; *S. C.*, 151 Ala. 670, 44 So. 631.

"Besides, the fact that there is no such company before the court, the declarations of an agent or officer of a corporation are not 'competent evidence against his principal, unless made within the scope of his authority and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gestæ*.' *Danner, etc., Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184, 188; *Ricketts v. Birmingham St. R. Co.*, 85 Ala. 600, 5 So. 353; *Smith v. Tallassee, etc., Plankroad Co.*, 30 Ala. 650, 667; 16 Cyc. pp. 1003, 1004; *Mechem on Agency*. From these and other authorities it is apparent that it is first necessary to prove that the agent is about his master's business, and then that the statements were made in regard to that business. So, when the agent or officer is about the business of his master in looking after his tenants, it can not be proved by his declarations that the master was doing another work, to wit, excavating for a railroad. With these expressions out, there is not any evidence tending to show that the work of excavating was being done by the defendant corporation." *Bessemer Coal, etc., Land Co. v. Doak*, 152 Ala. 166, 44 So. 627, 630.

§ 187. — Scope and Extent of Agency or Employment.

§ 187 (1) In General.

Architect of Owner.—Statements of the owner's architect, made while he was inspecting the building in order to advise the owner whether it had been constructed according to agreement, were binding upon the owner, and admissible

in evidence, in an action by the contractor for the contract price, as declarations of the owner's agent, made while engaged in the work of his agency. *Fleming v. Lunsford*, 163 Ala. 540, 50 So. 921.

"And in such connection circumstances and transactions which have no direct connection with the issues tried may be considered when they are such as illustrate the general nature of the business intrusted to the agent. *Lytle v. Bank*, 121 Ala. 215, 26 So. 6; *United States Life Ins. Co. v. Lesser*, 126 Ala. 568, 28 So. 646." *Birmingham, etc., R. Co. v. Tennessee Coal, etc., R. Co.*, 127 Ala. 137, 28 So. 679, 681.

An employee of defendant gave plaintiff a written assignment of wages, which H., to whom plaintiff gave it for that purpose, filed in defendant's office. Held, in an action on the assignment, that what C. said, when withdrawing the assignment from the office, was not competent; it not being shown that he had any authority to speak or act for plaintiff, and what he might have said or done in her absence not being binding on her. *Mobile, J. & K. C. R. Co. v. Odom*, 169 Ala. 507, 53 So. 765.

Servant of Hotel.—In an action by a guest against an innkeeper for the loss of money, the conduct, demeanor, or appearance of a servant at the hotel, while on trial charged with its larceny, though it might be competent evidence against himself as an implied admission or confession, is admissible against defendant, his employer. *Beale v. Posey*, 72 Ala. 323.

Deed Made by Agent.—A deed of warranty of soundness of a slave, made by the agent of the owner on making a sale of the slave, though not binding on the principal by reason of the agent's having no authority to warrant by deed, may be given in evidence as an admission of the terms of the contract. *Cocke v. Campbell*, 13 Ala. 286.

Agent of Shipper.—An account of sales of cotton, rendered by an agent to his principal, is admissible in evidence against the shipper, if the agent was also agent of the latter. *Ball v. Bank of Alabama*, 8 Ala. 590.

In an action against a carrier by the consignee for failure to deliver goods, the bill of lading, which contained a stipula-

tion exempting the carrier from liability for loss or damage to the goods by fire, and which was made out by the consignors on one of their own special blanks, was properly received in evidence, as the consignors were necessarily the agents of the consignee for the shipment, and could bind the consignee by the bill of lading without express authority. *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 29 So. 602.

Explanatory of Contract Made by Agent.—Declarations of an agent who has made a contract are admissible against the principal, if explanatory of the contract, or forming part of his report to his principal. *Baldwin v. Ashby*, 54 Ala. 82.

Letter Written by Daughter of Plaintiff.—A letter relevant to the question at issue, written by the plaintiff's daughter, is admissible in evidence, in behalf of defendant, in connection with evidence tending to show the authority of the daughter as agent of the plaintiff. *Buchanan v. Collins*, 42 Ala. 419.

Agent Committing Trespass.—In trespass against a principal for the wrongful act of his agent in seizing personal property under orders of the principal, declarations of the agent while committing the trespass were competent evidence against the principal. *Raisler v. Springer*, 38 Ala. 703.

§ 187 (2) Agents with Special or Limited Authority.

Agent to Take Inventory and Report Business.—An agent authorized merely to take an inventory and report the business of a salesman can not bind his principal by a declaration of the amount due from the salesman. *Singer Mfg. Co. v. McLean*, 105 Ala. 316, 16 So. 912.

Purchasing Agent.—Declarations of an agent, charged with the duty of going to a third person and buying his merchandise and bringing the same to the store of the principal, made as to the ownership of the goods while in the act of bringing the goods to the store, are competent. *Montgomery Moore Mfg. Co. v. Leeth*, 162 Ala. 246, 50 So. 210.

Agent to Demand Property.—In an action of detinue to recover a mule, the defendant can not introduce as evidence admissions or declarations of a party

who was the plaintiff's agent merely to demand and get the mule, in disparagement of the plaintiff's right to the mule. *Bynum v. Southern Pump & Pipe Co.*, 63 Ala. 462.

§ 187 (3) Persons in Possession of Property.

Showing by Whose Direction They Were Acting.—Defendant having admitted that the parties who took possession of the premises upon the vacation of plaintiff's tenant were acting under his direction, the declarations of such parties, made in the act of taking such possession, that they were acting by defendant's direction, were admissible. *Bibby v. Thomas*, 131 Ala. 350, 31 So. 432.

§ 188. — Admissions before or after Transaction or Event.

§ 188 (1) After Transaction or Event in General.

Declarations of an agent made after the occurrence of an act claimed to be a conversion held not admissible to bind the principal in an action for the conversion. *Henderson-Mizell Mercantile Co. v. C. D. Chapman & Co.*, 3 Ala. App. 296, 57 So. 82.

"The agent's admission, or declaration, related to a past fact, with which it had no connection, was not made in pursuance of any authority from the constituent, nor connected with an authorized act as explanatory of it, so as to constitute part of the *res gestæ*. 1 Greenl. Ev. § 113; *Williams v. Shackelford*, 16 Ala. 318; 24 Eng. C. L. Rep. 112; 5 ib. 454; 17 ib. 133; 24 ib. 353; 28 ib. 273. In this case, the agent's reply to the party presenting the order for the goods, that there were none there belonging to Lundie, was admissible; for that was a part of the transaction, and necessary in order to show his failure to comply with the order of the principal; but that portion of his declarations, relating to a transaction which had taken place ten days before, is not evidence to prove the past fact to which they relate. They constitute hearsay evidence merely, and as such, were improperly received by the court below." *Lundie v. Cosper*, 20 Ala. 123, 126.

"But this doctrine does not let in the

agent's admissions of a past or outside transaction not in negotiation or process of consummation at the time of the admission. It must be *res gestæ* of something then occurring, and not a narrative of a past transaction. 3 Brick. Dig., p. 419, § 187 et seq.; 1 Greenl. Ev., §§ 113, 114; 2 Whart. Ev., §§ 1173, 1183." *Tennessee, etc., Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395, 397, cited in note in 19 L. R. A. 746.

During Continuance of Agency.—An agent's declarations, after the making of a contract by the agent, but during the continuance of the agency, are admissible in evidence against the principal, where they are mutually explanatory of the contract forming a part of the conversation between the parties and of the report of the agent to the principal. *Baldwin v. Ashby*, 54 Ala. 82.

Manager of Defendant Day after Occurrence.—Where a heifer was killed by falling into an open unguarded pit maintained by defendant, declarations of the manager of defendant, made the day after the accident, did not bind it. *Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98, cited in note in 42 L. R. A., N. S., 945.

"The company would not be bound by statements of Southerland made in reference to past transactions. *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112; *Louisville, etc., R. Co. v. Carl*, 91 Ala. 271, 9 So. 334. This witness, Joe Houston, was allowed, against appellant's objection, to testify to what he said and what Southerland said in this conversation. The court was in error in overruling each of the several objections to the questions eliciting the conversation, and in overruling the motion to exclude the answer." *Jefferson Fertilizer Co. v. Houston*, 3 Ala. App. 348, 57 So. 98, 99, cited in note in 42 L. R. A., N. S., 945.

Mere Narrative of Past Transactions.—In an injury action, declarations of defendant's servant made after the accident had occurred, not part of the *res gestæ*, but merely in the nature of a narrative of a past transaction, were not binding upon defendant, and were incompetent. *Sloss-Sheffield Steel & Iron Co. v. Bibb*, 164 Ala. 62, 51 So. 345, cited in note in 42 L. R. A., N. S., 919.

And declarations of the man in charge of the hoisting apparatus, made after plaintiff was hurt in a mine, by reason of the cage descending too fast, were held inadmissible, being merely a narration of past transactions, and were not *res gestæ*. *Sloss-Sheffield Steel, etc., Co. v. Bibb*, 164 Ala. 62, 51 So. 345, cited in note in 42 L. R. A., N. S., 919.

Statement as to Forwarding of Goods.

—A., having goods at B., contracted with D. for the hauling of them to his house in C. D. agreed to start for the goods with his wagon on Sunday, but did not start until the following Tuesday. On arriving at B., he was informed by the receiving and forwarding agent that A.'s goods had been sent off ten days previously, and that he then had no goods at that place. D. brought *assumpsit* on the contract, and it was held that the agent's statement as to A.'s goods having been sent off ten days previously was inadmissible, since it related to a past fact. *Lundie v. Cosper*, 20 Ala. 123.

Letter Relating to Past Transaction.—

A letter written by defendant's agent to a representative of plaintiff with reference to the matter in controversy was inadmissible under the rule excluding admissions and declarations of an agent as to past transactions. *Western Newspaper Union v. Judson*, 1 Ala. App. 615, 55 So. 1026.

"Even if there had been evidence tending to show that Bailey was an agent of the defendant when he wrote the letter to a representative of the plaintiff, the exclusion of that letter would have been proper under the rule declaring it to be beyond the scope of an agent's authority to bind his principal by admissions and declarations having reference to by-gone transactions. *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 So. 299. It is all the more plain that an ex-agent is without power so to bind his former employer." *Western Newspaper Union v. Judson*, 1 Ala. App. 615, 55 So. 1026, 1027.

A letter written by an ex-agent to a creditor of the principal containing declarations or admissions is inadmissible to bind the principal. *Western Newspaper Union v. Judson*, 1 Ala. App. 615, 55 So. 1026.

§ 188 (2) To Show Existence or Terms of Contract.

Declarations of an agent, made after the execution for his principal of an alleged contract, are inadmissible to prove the contract. *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 So. 34.

§ 189. Corporate Officers or Agents.

§ 189 (1) Competency of Admissions in General.

Must Show Authority to Represent Corporation.—It is error to admit in evidence against defendant company a letter from a third person to plaintiff, where such third person has not been shown to have authority to represent defendant. *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55.

Must Be within Scope of Authority.—The declarations of an agent or officer of a corporation are not competent evidence against the principal, unless made within the scope of his authority and while in the discharge of his duties in the particular transaction of which they constitute a part of the *res gestæ*. *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

"Nor are the declarations of an agent or officer of a corporation 'competent evidence against his principal, unless made within the scope of his authority and while in the discharge of his duties in and about the particular transaction of which they constitute a part of the *res gestæ*.' *Buist v. Guice*, 96 Ala. 255, 11 So. 280; *Postal Tel., etc., Co. v. Le Noir*, 107 Ala. 640, 18 So. 266; *Danner, etc., Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184; *Bessemer Coal, etc., Land Co. v. Doak*, 152 Ala. 166, 44 So. 627; *Learned, etc., Lumber Co. v. Ohatchie Lumber Co.*, 111 Ala. 453, 17 So. 934; *George v. Ross*, 128 Ala. 666, 29 So. 651." *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48, 50; *Bohannon v. Chapman*, 13 Ala. 641; *Cunningham v. Cochran*, 18 Ala. 479, 480.

President and General-Manager.—Admissions by the president and general-manager of a corporation relating to the sale of coal, made subsequent to the negotiations for the sale, are binding on the corporation. *Home Ice Factory v. Howells Min. Co.*, 157 Ala. 603, 48 So. 117.

Authorized Agent of Plaintiff.—Where, in an action for forcible entry and detainer, plaintiff claimed title by adverse possession, declarations made by plaintiff's authorized agent, for and in its behalf, tending to show that plaintiff did not claim the land, were admissible. *Bailey v. Blacksher Co.*, 142 Ala. 254, 37 So. 827.

Statement of Railroad Station Agent.—Where the complaint alleged that the plaintiff was in the station at the invitation of the agent to wait until he bought his ticket, a question as to the statement made by the ticket agent did not call for hearsay testimony. *Louisville, etc., R. Co. v. Kay (Ala.)*, 62 So. 1014.

Stockholder and Officer.—In an action against a corporation, declarations made by a stockholder and an officer in regard to the existence of a loan, when not acting for it in connection with the transactions concerning which the declarations were made, were inadmissible. *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 So. 299.

Statements in Individual Capacity.—A letter, written by a person since deceased, who was at the time an agent of a corporation, but containing only statements made in his individual capacity, and not in the discharge of the duties of his agency, is not admissible in evidence against the corporation. *Alabama & M. R. Co. v. Johnson*, 42 Ala. 242.

§ 189 (2) Statements by Officers of Banks.

President.—In an action against an incorporated bank, the declarations or admissions of its president can not be received to establish a liability against it. *Henry v. Northern Bank*, 63 Ala. 527.

Admissions of the president of a bank are not admissible to charge the bank with liability, merely because he is president; but, to be admissible, they should, as those of any other agent, be made at the time of doing some act required of him by his office, or in the execution and within the scope of an authority directed to him. *Cunningham's Ex'r v. Cochran*, 18 Ala. 479.

Deceased Cashier.—In an action by a bank on a note, evidence that \$125 or \$130 in cash was paid by defendant on the note, and that the bank cashier, since deceased said that that paid the note, was

not objectionable, because it did not appear that the bank received the benefit of the work, with the proceeds of which the note was paid, or that the note was paid in money. *First Nat. Bank v. Alexander*, 161 Ala. 580, 50 So. 45.

An admission by a bank cashier, since deceased, that defendant had paid off a note sued on and the cashier's agreement to bring him the note was admissible against the bank. *First Nat. Bank v. Alexander*, 161 Ala. 580, 50 So. 45.

§ 189 (3) Statements by Officers of Carriers.

President of Street Railway.—Declarations of a street railway president as to the ownership of the railway, which are not shown to have been made while in performance of his duties as such officer, or while action for the company, or while doing business contemporaneous with the declarations which they serve to explain, are not binding on the company. *Ricketts v. Birmingham St. Ry. Co.*, 85 Ala. 600, 5 So. 353.

Declarations of Chief Engineer.—In an action by subcontractors against a railroad company for construction work done by them, evidence of declarations by the chief engineer, showing a direct contract between plaintiffs and defendant, are not competent, against the company, in the absence of proof of authority to make them, or subsequent ratification with full knowledge of the facts. *Huntsville, B. L. & M. S. Ry. Co. v. Corpening*, 97 Ala. 681, 12 So. 295.

Recognition of Title.—In ejectment against a railroad company for land claimed by plaintiff by adverse possession, plaintiff can not prove that an officer of the company recognized her title to the land, by offering to purchase from her, unless such officer's authority or a ratification by the company is first shown. *Mobile & G. R. Co. v. Cogsbill*, 85 Ala. 456, 5 So. 188.

Statement of Assistant Superintendent.—A station agent was notified by the superintendent to report to the assistant superintendent, who informed him that he wished to transfer him to another station, and went with him to that station and placed him in charge. Held, in an action by the agent against the company for the

increased compensation promised by the assistant-superintendent for the new station, that statements by the assistant-superintendent while negotiating the transfer were admissible against defendant. *Alabama G. S. R. Co. v. Hill*, 76 Ala. 303.

§ 189 (4) Statements by Agents and Employees in General.

Superintendent of Mine.—In an action for the breach of a contract to permit plaintiff to mine ore in a specified territory, and to pay for it when delivered free from foreign substances, in a manner satisfactory to a furnace company, the declaration of the company's superintendent, made while receiving a part of the ore, tending to show that it was satisfactory, is competent and material. *Worthington v. Given*, 119 Ala. 44, 24 So. 739.

Foreman of Telegraph Company.—In an action against a telegraph company to recover for the wrongful cutting by it of timber on plaintiff's land, it was error to permit a witness to testify that at the time the line was being constructed the foreman in charge of the work had stated to him that it was being constructed for defendant. *Postal Tel. Cable Co. v. Le Noir*, 107 Ala. 640, 18 So. 266.

In an action for conversion, declarations of an agent of the defendant corporation made after the occurrence charged to have been a conversion, and not shown to have been made in connection with any transaction at that time by or on behalf of the defendant with the property in question, were inadmissible as without the scope of the agent's authority to bind the principal. *Henderson-Mizell, etc., Co. v. Chapman & Co.*, 3 Ala. App. 296, 57 So. 82.

"The trial court was in error in admitting, over the objection of the defendant, evidence of a declaration or statement made by an agent of the defendant in reference to the occurrence after it had happened, and not shown to have been made in connection with any transaction or dealing at that time by or on behalf of the defendant with the property in question. It was beyond the scope of the agent's authority to bind his principal by such admissions or declarations having reference to a by-gone transaction. West-

ern Newspaper Union *v.* Judson, 1 Ala. App. 615, 55 So. 1026; Tennessee, etc., Transp. Co. *v.* Kavanaugh, 93 Ala. 324, 9 So. 395." Henderson-Mizell, etc., Co. *v.* Chapman & Co., 3 Ala. App. 296, 57 So. 82, 83.

§ 189 (5) Statements by Agents and Employees of Carriers.

Agent of Railroad Company Destroying Trees.—In an action against a railroad company for wrongfully cutting trees on an alleged right of way, evidence of the declaration and conduct of defendant's agent in so doing is admissible, where there is independent proof that he was ordered to clear such alleged right of way of trees. Louisville & N. R. Co. *v.* Hill, 115 Ala. 334, 22 So. 163.

Certificate of Indebtness Issued by Engineer.—A certificate of indebtedness alleged to have been issued by a railroad company through an engineer as its agent and which is the basis of an action against it, is evidence of the existence of the indebtedness stated in it and that it was made for sufficient consideration, where there is sworn plea denying its execution. Alabama & M. R. R. Co. *v.* Sanford, 36 Ala. 703.

§ 189 (6) Statements Made before Transaction or Event.

The declaration of a yard-master, made the night before the accident, "Never mind the switch; it was all right," was admissible to show that he knew where the switch was located. Louisville, etc., R. Co. *v.* Mothershed, 97 Ala. 261, 12 So. 714.

Statement of Conductor as to Condition of Tracks.—In an action against a railroad for injuries to the person, declarations by the conductor of the train to a passenger, a moment before the accident, of the bad condition of the road, and his train having run off the track five consecutive times next preceding the present trip, are not admissible in proof of negligence, either as *res gestæ*, or as admissions of an agent binding on the principal. Mobile & M. R. Co. *v.* Ashcraft, 48 Ala. 15, cited in notes in 19 L. R. A. 747, 749, 42 L. R. A., N. S., 942.

Reasons Given by Brakeman for Jumping from Train.—"A passenger in a 'cab car' of a freight train jumped off after the

conductor and brakeman had jumped. The train was off the track and was running. The brakeman was asked before the train stopped, why he jumped off, and answered that when he saw the conductor jump off, he thought it was time for him to go too. This was held competent as part of the *res gestæ*, and intended to show that plaintiff was prudent." Mobile, etc., R. Co. *v.* Ashcraft, 48 Ala. 15, cited in note in 42 L. R. A., N. S., 942.

§ 189 (7) Statements Made after Transaction or Event in General.

"During the progress of the trial, on cross-examination, the plaintiff asked the engineer if he did not say, in the presence of Kent and Rowland, after the injury had been inflicted, that 'you would pull the train up and run over him.' There is no pretense that the engineer was guilty of any such willful or wanton misconduct. It was simply a declaration of the engineer, if such was made, after the injury, as to a future act, that was proposed to be proven. It was entirely incompetent to show that a past act was wantonly or willfully done by the subsequent declarations of the engineer." Chewning *v.* Ensley R. Co., 100 Ala. 493, 14 So. 204, 205, cited in note in 42 L. R. A., N. S., 921.

§ 189 (8) To Establish Liability of Carrier for Loss of or Injury to Property.

Declaration of Motorman as to Killing of Dog.—In an action against a street railway company for the negligent killing of a dog, the declaration of the motorman in charge of the car, made after the occurrence, was not binding on defendant, and was inadmissible. Wallace *v.* North Alabama Traction Co., 145 Ala. 682, 40 So. 89.

Destruction of Goods by Fire.—In an action against a common carrier for goods alleged to have been received by it from a connecting carrier, but never delivered at their destination, the declaration of defendant's agent that the goods were burned in a car at that destination, made to plaintiff several days after the fire, is not admissible against defendant. Louisville & N. R. Co. *v.* Carl, 91 Ala. 271, 9 So. 334.

§ 190. Attorneys.

"It is said admissions made by at-

torneys of record bind their client in all matters to the progress and trial of the cause. But to this end they must be distinct and formal, or such as are termed solemn admission, made for the express purpose of alleviating the stringency of some rule of practice, or if dispensing with the formal proof of some fact at the trial. In such cases they are in general conclusive. *Greenl. Ev. 218, § 186.*" *Starke v. Kenan*, 11 Ala. 818, 820.

Showing Collection of Money.—When an attorney employed to collect money is called on for a settlement, his admission of the amount collected is competent evidence against his client, but the client may nevertheless show by other proof that the fact admitted did not in truth exist. *McRea v. Insurance Bank*, 16 Ala. 755.

Action against Sheriff.—In a suit for breach of a sheriff's bond in failing to require and take a forthcoming bond of the plaintiff in detinue, evidence as to statements of counsel for plaintiff in the detinue suit, made after the termination of that suit, that the plaintiff never gave a forthcoming bond, was properly excluded. *Carmichael v. United States Fidelity & Guaranty Co.*, 163 Ala. 320, 50 So. 1003.

§ 191. Persons Referred to for Information.

Identification of Property.—In assumpsit by a detective against railroad company for services on a contract making his compensation contingent on furnishing proof that car breakers stole defendant's goods, it was competent for the detective to testify as to what property was identified by the employee to whom he was referred by defendant's agents. *Louisville & N. R. Co. v. Morgan*, 95 Ala. 608, 10 So. 834.

§ 192. Husband or Wife.

§ 192 (1) In General.

Declaration of Husband as Affecting Wife.—A wife's rights in property are not affected by her husband's declarations not made in her presence. *Brunson v. Brooks*, 68 Ala. 248.

Admission of Payment by Wife.—When husband and wife sue jointly for services rendered by the wife during coverture, her admissions of payment, can not

be received in evidence against them. *Jordan's Adm'r v. Hubbard*, 26 Ala. 433.

Husband Listing Property for Taxation.—On a trial of right of property between a wife and a judgment creditor of the husband, listing of the property by the husband for taxation as his own is inadmissible to show title in him. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666.

Receipt of Wife.—Defendant, in an action for money due by account, having claimed credit for cotton which the evidence tended to show was delivered by him to the wife of one of the plaintiffs at their home and received by plaintiffs, there was no error in admitting the receipt for the cotton given by the wife. *Smith Bros. & Co. v. Miller*, 152 Ala. 485, 44 So. 399.

§ 192 (2) Authority in Particular Instances.

Statement by Husband as to Payment of Mortgage.—On the trial of a claimant's right to certain attached property, the claim being based on a mortgage of the property, evidence is incompetent of a declaration made by claimant's husband and agent, in the absence of claimant, that the mortgage debt had been paid. *Mitcham v. Schuessler*, 98 Ala. 635, 13 So. 617.

Disclaiming by Husband of Right of Possession.—In ejectment by a married woman, who averred possession only of her husband as her agent, evidence of his declarations disclaiming possession or the right of possession was admissible against her. *Pearson v. Adams*, 129 Ala. 157, 29 So. 977.

Statement of Manner of Wife's Holdings.—Admissions by one that his wife held land subject to a certain mortgage, not being shown to have been made within the scope of his authority as her agent, do not bind a purchaser of the land. *Pearce v. Smith*, 126 Ala. 116, 28 So. 37.

Admission as to Terms of Wager.—In an action brought under the statute for the use of a wife, to recover money lost by her husband on a wager upon a horse race, the admissions of the husband, made after the terms of the wager were agreed on, and before the race was decided, that he had had no interest in the bet, are competent evidence in favor of

the defendant. *Davis v. Orme*, 36 Ala. 540.

Damages for Assault and Battery.—In an action for damages for an assault and battery by the wife of the defendant upon the wife of the plaintiff, the admissions of the wife of defendant are not admissible in evidence to charge her husband. *Hussey v. Elrod*, 2 Ala. 339.

A bill in chancery filed by the wife, with the knowledge of her husband, against him and his attaching creditor, asserting an interest in a stock of goods which had been attached as the property of the husband, is not admissible evidence against the husband in a suit subsequently instituted by him against the attaching creditor to recover damages for the wrongful and malicious suing out of the attachment. *Stetson v. Goldsmith*, 30 Ala. 602.

In Construing Deed.—In construing a deed executed by a feme sole the day before her marriage with an insolvent, as to whether the marital rights of the intended husband were thereby excluded, the condition of the parties at the execution of the deed is admissible, but the declaration or acts of the husband after marriage can not be shown. *Mitchell v. Gates*, 23 Ala. 438.

The declarations of the wife in reference to the title of a slave, over which she is merely exercising control as a domestic in the family, are not admissible against the husband. *Perry v. Graham*, 18 Ala. 822.

"But what she said about her grandfather having given the slave to her, is not explanatory of the possession, but of the manner in which she acquired title to the slave, and falls within another rule, well established by numerous decisions, that declarations of the party in possession, going beyond explanation of his possession and constituting no part of the *res gestæ*, should be rejected. See the rule exemplified in *Nelson v. Iverson*, 17 Ala. 216; *Hadden v. Powell*, 17 Ala. 314, and *Thompson v. Mawhinney*, 17 Ala. 362. This portion of the deposition was properly excluded." *Perry v. Graham*, 18 Ala. 822.

§ 192 (3) Husband and Wife Jointly Sued.

Admissions as to Existence of Contract.—Where the existence of a contract made

by a husband and wife is denied in the answer, the subsequent admissions of the husband as to the terms of the contract are not competent evidence against the wife, when she had no connection with such declaration. *Caver v. Eads*, 65 Ala. 190.

§ 192 (4) Statements Made after Transaction or Event.

Declarations of a husband, acting as agent for his wife, in regard to the business of a partnership in which she is a member, are inadmissible, where they are merely narrative of past transactions. *Ward v. Johnson*, 80 Ala. 281.

§ 193. Partners and Joint Contractors.

§ 193 (1) In General.

Preliminary Proof of Partnership.—"It is only when the partnership has been otherwise proved, that the declarations of one partner are admissible against the other in the conduct of the partnership business. The existence of a partnership is a fact, to which a witness may testify when he has knowledge of its existence, but it can never be established by general reputation or on hearsay evidence. *Clark v. Taylor & Co.*, 68 Ala. 453; *Central R. etc., Co. v. Smith*, 76 Ala. 572. All this evidence, then, of said witness, Moody, which was excluded, constituting the basis for assignments of error from six to twelve, inclusive, was properly excluded." *First Nat. Bank v. Leland*, 122 Ala. 289, 25 So. 195, 197.

To Prove Existence of Partnership.—Declarations of an alleged partner, not made in the presence of the alleged copartner, are inadmissible to prove the partnership. *First Nat. Bank v. Leland*, 122 Ala. 289, 25 So. 195.

The admissions of one person that another was his partner, is not evidence to establish the existence of a partnership, and the fact that the party making the admission is not sued in the same action, or is dead, can have no influence upon the admissibility of the evidence; the representatives of a deceased partner are made liable at law, if the survivors are insolvent. *Thornton v. Kerr*, 6 Ala. 823.

"So, we may further add that, generally speaking, the declaration or act of one partner, not in the presence of his copart-

ner, as above intimated, is not competent evidence to establish the fact of an existing partnership between them, unless such declaration be one against interest made by one deceased, or fall within some other recognized exception to the rule excluding hearsay evidence. *Clark v. Taylor & Co.*, 68 Ala. 453. But, as we have sought clearly to indicate above, the declarations of one partner, strictly explanatory of possession whether against interest or not, within the above rule, are admissible in corroboration of other and independent evidence of an alleged partnership." *Humes v. O'Bryan*, 74 Ala. 64, 81.

"While the acts and declarations of one in possession are admissible to explain his possession, yet they are not admissible to prove ownership of or with another, unless notice thereof is brought home to the other. *Central R., etc., Co. v. Smith*, 76 Ala. 572, 579; *Humes v. O'Bryan*, 74 Ala. 64, 81. In the case just cited, the court held that the declarations of the partner were admissible, if at all, only because made against his interest, and because he 'possessed competent knowledge of the facts, and is deceased at the time the declarations are proposed to be proved,' but that even 'they can not be said to be evidence against the defendant, *Humes*, of the existence of the partnership in question, unless some notice of them was brought to his knowledge.' It is true, as intimated in that and in other cases, that where a partnership is sought to be proved by circumstantial acts, among which are continuous transactions by the partners, there may be cases where the declarations of one, acting continuously and openly in the partnership name, may be admissible as a circumstance, but that does not militate against the general principle." *Cohn, etc., Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853, 857.

Opening Account in Name of Individual Partner.—A declaration by one of the firm that he was authorized by his partner to open the account in his own name was admissible to show to whom credit was given, and why the partner's name alone appeared on the books. *Clark v. Taylor*, 68 Ala. 453.

Right to Recover on Note.—The declarations of one partner, made after a note payable to a third person, but of

which the firm were the proprietors, had been delivered to another to collect and pay his share in the concern, are inadmissible to affect the right of the latter to recover the amount thereof in an action thereon to his own use. *Rowland v. Boozer*, 10 Ala. 690.

"The declarations of the treasurer of the company, after the note was delivered by their order to the beneficial plaintiff in this action, were clearly inadmissible. It was not competent for him, by an act done, to prejudice the plaintiff's right to recover—he was not authorized to collect the debt, or to release it. Such a declaration was not referable to any *res gestæ*, and we can conceive of no principle upon which its admission could be defended. *McBride v. Thompson*, 8 Ala. 650; *Abney v. Kingsland & Co.*, 10 Ala. 355." *Rowland v. Boozer*, 10 Ala. 690, 694.

Liability on Mortgage.—A mortgage being executed in the name of a partnership by one of the partners, it is not competent to prove the admissions of the partner who executed it that it was made to secure the debt due by the firm. *Scott v. Dansby*, 12 Ala. 714.

After Proof of Partnership.—In an action against partners jointly, an answer in chancery of one of them may be given in evidence by the plaintiff, after the partnership has been proved, to show admissions of the plaintiff's demand; and, in such case, evidence to discredit the answer can not be offered by the other members of the copartnership. *Hutchins v. Childress*, 4 Stew. & P. 34.

The declarations of one partner, while in possession and carrying on the business, strictly explanatory of his possession, whether against interest or not, are admissible as evidence against the person sought to be charged as his copartner, in corroboration of other and independent evidence of the alleged partnership; but his declarations as to where he had bought the goods, or a portion of them, or on whose account, being merely narrative of a past transaction, do not come within this principle; and his declaration of his inability to induce the defendant to become his surety for a sum of money, which he wished to borrow, is not admissible. *Humes v. O'Bryan*, 74 Ala. 64.

Recognition of Firm Name.—In an ac-

tion against a firm by its firm name (Code, § 2142) to recover damages for the loss of a hired horse, the declarations or admissions of one partner, made in the course of the partnership business, having a tendency to show a recognition by the partnership of the firm name by which it is sued, are admissible evidence against the partnership. *Jemison v. Minor*, 34 Ala. 33.

Declarations of Deceased Partner.—In an action against a surviving partner in a livery stable for the price of a horse, the declaration of the deceased partner, made during the existence of the firm, that he had purchased the horse for the firm, is admissible in evidence. *Smitha v. Cureton*, 31 Ala. 652.

In Action of Trover.—In trover against a partnership, the admissions of one partner during the existence of the partnership are competent evidence. *Fail v. McArthur*, 31 Ala. 26.

Revocation of Authority.—The testimony of one of two brokers, who were partners in the business, that the firm never received the alleged letter revoking their authority, was competent to show that neither he nor his partner had received it. *Sayre v. Wilson*, 86 Ala. 151, 5 So. 157.

Notification of Certain Fact.—In an action against a partnership, evidence by a partner that his partner or the firm had never been notified of a certain fact is inadmissible, as hearsay or opinion. *Dunn, etc., Bros. v. Gunn*, 149 Ala. 583, 42 So. 686.

§ 193 (2) Statements Made after Dissolution.

Not Evidence against Firm.—The admission of a partner after the dissolution of the partnership is no evidence against the firm. *Barringer v. Sneed*, 3 Stew. 201, cited in note in 35 L. R. A. 339.

Showing No Cause of Action.—In a suit at law by partners, the admission of one of them, after the dissolution of the firm, that he has no right of action, is competent testimony in bar of the suit. *Cochran v. Cunningham's Ex'r*, 16 Ala. 448.

As to Existence of Debt.—The admission of one partner as to the existence of a debt against the firm, made subsequently to the dissolution of the partnership, is

not binding on the other partners. *Wilson v. Torbert*, 3 Stew. 296.

Showing Want of Authority to Make Partnership Note.—In an action against all the partners upon a note made in the partnership name by one of them after the dissolution, the maker's want of authority to make the note can not be shown by the declarations of another partner with regard to other notes made under similar circumstances. *Catlin v. Gilders*, 3 Ala. 536.

Statement upon Obtaining Loan.—Where, upon the dissolution of a partnership, the several partners are invested with authority to borrow money on account of the partnership, the statement of one of them upon obtaining a loan of money is evidence against all. *Catlin v. Gilders*, 3 Ala. 536.

Entries in Firm Books.—In an action founded on a partnership debt of a late firm, entries found in one of the books of the firm, in the handwriting of one of the defendants, are admissible in evidence. If made before the dissolution of the firm, they are evidence against both the partners. If not, they are evidence against the party who made them. *Kahn v. Boltz*, 39 Ala. 66, cited in note in 52 L. R. A. 838.

Correctness of Claim.—An admission by a partner as to the correctness of a claim against the firm, made after the dissolution of the firm, is not binding on the copartner, who was absent. *Smith v. Allen (Ala.)*, 62 So. 296; *Harwell v. Phillips, etc., Mfg. Co.*, 123 Ala. 460, 26 So. 501.

After Transfer of Interest.—The admissions of one partner, made after a dissolution of the partnership, and after he had transferred his interest to his copartner, are not admissible in evidence against the latter, in a suit between him and a debtor of the partnership. *Jeffries v. Castleman*, 75 Ala. 262.

§ 194. Principal or Surety.

The admissions of a principal, made at any time, which are acts or part of acts, in analogy to the admissions of agents, are evidence against his surety. *Bondurant v. Bank of Alabama*, 7 Ala. 830.

Admissions of Officer.—The admissions of an officer are not evidence against his

securities, unless they are made while in the performance of some official act or duty connected with the transaction out of which the breach of the condition of his bond is alleged to have arisen. *Dumas v. Patterson*, 9 Ala. 484; *Dennis v. Chapman*, 19 Ala. 29; *Lewis v. Lee County*, 72 Ala. 148.

Admissions or declarations of the principal, not made in the course of any business, or as parts of any acts with which the surety is connected by his contract, but merely narrative of a past transaction, are hearsay, and not competent evidence against the surety, whether he is sued alone, or jointly with the principal. *Lewis v. Lee County*, 73 Ala. 148.

A statement made by a tax collector that he expected that he and the treasurer would have a lawsuit, and that he (the collector) had the advantage, was admissible in an action against the collector's bondsmen for his failure to turn over taxes collected, though not made in their presence. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 52 L. R. A. 541.

After Expiration of Term of Office.—In a suit on an official bond, the admissions of the principal, made after his term of office has expired, or after he has been removed, are not admissible as evidence against his surety on the bond. *Evans v. State Bank*, 13 Ala. 787.

An admission by the sheriff, after the expiration of his term of office, that he had collected the money upon an execution, is not evidence of the fact against his sureties. *Evans v. State Bank*, 13 Ala. 787.

Admission of Indebtedness.—Where the county treasurer, when the report of a committee, showing him in default, was read to the county commissioners, assented to a part of such report, that part is admissible against him in an action on his official bond. *Lewis v. Lee County*, 73 Ala. 148.

The declarations of a sheriff, which are a part of the *res gestæ* complained of, are admissible in evidence against his sureties. *Casky v. Haviland*, 13 Ala. 314.

Admission of Personal Representative.—No such relation or privity exists between a surety on an administration bond and the personal representative of his

principal as to make the admissions of the latter, or his recognition of the administration as a subsisting trust, binding on or evidence against the surety. *Harrison v. Heflin*, 54 Ala. 552.

To Show Discharge as to One of Two Sureties.—In a suit by one of two cosureties against the other to recover a moiety of the proceeds of a compromise made by the latter without the consent of the former of a previous joint action against their principal, the declarations of such principal are not admissible evidence to show that said joint claim had been discharged, as to the first surety, previous to the compromise. *Robinson v. Brooks*, 32 Ala. 222.

Admission of Principal against Guarantor.—The statement of the principal debtor, made during the pendency of the negotiation for the goods, "that he had been unfortunate and was without means," is admissible evidence against the guarantor, in a suit on the guaranty, as tending to show that the credit was given to him. *Walker v. Forbes*, 25 Ala. 139.

§ 195. Trustee or Beneficiary.

§ 195 (1) In General.

Declarations of Naked Trustee.—The declarations of a naked trustee, having no interest, are not admissible to affect his *cestui que trust*. *Graham v. Lockhart*, 8 Ala. 9; *Thompson v. Drake*, 32 Ala. 99.

Declarations When Subscribing for Stock.—Where shares of stock are subscribed for in the name of a person as trustee without disclosing the name of the beneficiary, the declarations of the trustee made at the time of subscription, as well as his declarations made while in possession of the stock, are admissible to prove the identity of the beneficiary. *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273.

"It seems to be well adjudicated that a trust in personal property may be declared and proven by parol. See 27 Am. & Eng. Ency. Law (1st Ed.) p. 54, where authorities are cited in note. We do not understand that the appellants controvert this proposition. The declarations of T. H. Amberson at the time he paid and subscribed for the stock in the defendant bank were admissible in evidence to show the creation of the trust in the stock, and

for whom the trust was created, the certificate having been issued to 'T. H. Anderson, Trustee,' omitting the name of the beneficiary. So, too, were his subsequent declarations while in the possession of the stock, to the effect that he had subscribed and paid for the stock for his minor son Ernest, and that it belonged to his said son, etc. 9 Am. & Eng. Ency. Law (2d Ed.) p. 12, and note; *Wheeler v. Glasgow*, 97 Ala. 700, 11 So. 758; *Gillespie v. Burleson*, 28 Ala. 551." *Johnson v. Amberson*, 140 Ala. 342, 37 So. 273, 274.

§ 195 (2) Personal Representatives.

Admission of One Administrator Binding Another.—In a suit against an administrator de bonis non, on a note purporting to have been executed by his intestate, an admission made by the former administrator of the genuineness of the signature is not admissible against the defendant. *Rogers v. Grannis*, 20 Ala. 247.

A memorandum made by a former executor of the insolvency of certain debtors of the estate is not evidence for or against a succeeding administrator. *McLaughlin v. Nelms*, 9 Ala. 925.

Admission of Administrator as Binding Cestuis Que Trustent.—In a suit in chancery for the purpose of subjecting to the payment of the intestate's debts property which is standing in the name of a trustee for the benefit of his wife and children, and which is alleged to have been purchased by the intestate with his individual means, and fraudulently added to the trust estate, the admission by the administrator of the presentation of the complainant's demand is evidence, not only against the administrator, but also against the cestuis que trustent. *Pharis v. Leachman*, 20 Ala. 662.

Acknowledgment of Presentation of Claim.—A written acknowledgment by an acting executor that a claim was presented within the time required by law is evidence of the fact of presentment, and the subsequent resignation of the executor will not impair its value as evidence. *Starke v. Keenan's Ex'rs*, 5 Ala. 590.

Relating to Testator's Guardianship.—Declarations of the executor, touching transactions of his testator, which related to said testator's guardianship, admissible

for the ward. *Owen v. Peebles*, 42 Ala. 338.

§ 196. Conspirators and Persons Acting Together.

After Proof of Conspiracy.—When conspiracy is shown prima facie, acts or declarations of co-conspirators in connection with the furtherance of the common purpose are admissible, so that in an action for malicious prosecution and false imprisonment on a charge of enticing away defendant's laborers, in which the evidence authorized a finding that C. and another conspired to entice away defendant's laborers, and that plaintiff went to a certain place to co-operate with them for that purpose, it was error to exclude evidence of what C. told witness as to what plaintiff came to such place for. *Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596.

Declaration Showing Attempt to Break Will.—Where the theory of contestants to a will was that there was a scheme by the proponent and his family to induce the execution of the will in their favor, testimony was competent showing that after the burial of testatrix proponent's sister said to the testatrix's sister: "You will be sure to be surprised when you hear that will read, and what you do not understand I will tell you. K. [meaning the testatrix's husband] is going to try to break this will, and W. [meaning the proponent] is going to fight that will for you"—since it was a declaration by one of the conspirators while carrying out the scheme. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

Fraudulent Conveyances.—The declarations of the vendor are admissible against his vendee where the purpose of both was to consummate a fraud by the sale. *Borland v. Mayo*, 8 Ala. 104.

(E) PROOF AND EFFECT.

§ 197. Laying Foundation for Impeachment of Testimony of Party.

Declarations in Rebuttal.—In an action involving the issue of a sale of cattle to defendant, who testifies in his own behalf that the sale was to a third person, and not to him, his declarations on particular occasion to the effect that he had the cattle are admissible in rebuttal; and the court can not require plaintiff, having the

right to rejoin, to first call defendant back, and ask him if he made such declarations, before introducing them in rebuttal. *Kimmey v. Calloway*, 52 Ala. 222.

Need Not Lay Predicate.—Where, in an action for the price of a horse sold, defendant denies the sale, his declarations against interest to the effect that he had purchased the horse were properly introduced without the laying of any predicate as in cases of impeachment. *Moore v. Crosthwait*, 135 Ala. 272, 33 So. 28.

§ 198. Preliminary Evidence.

§ 199. — In General.

Admission of Adverse Party.—Where testimony is of such a character as to constitute an admission by the adverse party, it is not necessary to lay a predicate or foundation for its admission. *Burton v. Phillips*, 4 Ala. App. 225, 57 So. 152.

Such proof being adduced, the acts and declarations of the supposed agent may be received to shed light upon the material questions involved in the controversy, to be considered by the jury, if, upon the independent proof of agency, they shall be of opinion that that relation did exist; but they can not be considered, when it is not shown that the supposed principal had in any wise committed himself to them, for the purpose of proving the relation itself. 3 Brick. Dig., p. 21, § 43; *Womack v. Bird*, 63 Ala. 500; *Tanner, etc., Engine Co. v. Hall*, 86 Ala. 305, 5 So. 584; *Martin, etc., Co. v. Brown, etc., Co.*, 75 Ala. 442. As this error operates to reverse the judgment, we will not pass upon the assignments of error touching the judgments of the court upon the motion for a new trial. Reversed and remanded. *Learned, etc., Lumber Co. v. Ohatchie Lumber Co.*, 111 Ala. 453, 17 So. 934.

Letters Containing Hearsay Statements.—In an action for slander, letters purporting to be from the plaintiff to a man with whom she was said to have had intercourse, which were only connected with her by the hearsay statements of the recipient, or by the fact that they were written in a lady's hand, purporting to be signed by her first name, and were handed to the recipient by her nephew, are not

admissible as admissions of the truth of the acts charged, but where they were shown to the defendant they are admissible in mitigation as tending to show a reasonable belief by the defendant of the truth of the statements. *Webb v. Gray* (Ala.), 62 So. 194.

§ 200. — Existence and Extent of Agency or Authority.

Declaration of Professing Agent.—The acts or declarations of a person who assumes to act as the agent of another are not admissible evidence against his supposed principal, without some independent proof of his authority or agency. *Wailes v. Neal*, 65 Ala. 59; *Cobb v. Malone*, 86 Ala. 571, 6 So. 6; *Home Protection of North Alabama v. Whidden*, 103 Ala. 203, 15 So. 567.

Where proof of V.'s being an agent of defendant, and authorized to make a contract on his behalf to sell a certain amount of produce to plaintiff, rests in parol, and there is evidence tending to show such agency, consisting of correspondence of defendant with plaintiff, and the deposition of defendant's bookkeeper tending to show a recognition by defendant of V.'s authority, and a ratification of his acts in making the sale, V.'s acts and declarations may be considered by the jury, and it is not error that they were admitted before the other evidence on which their consideration is dependent. *Buist v. Guice*, 96 Ala. 255, 11 So. 280.

After Establishment of Agency.—The acts and declarations of one professing to act as agent of another, unknown to and not ratified by the supposed principal, can not be received to establish agency, but they are admissible on the questions involved in the controversy after the agency has been established by proof aliunde. *Learned-Letcher Lumber Co. v. Ohatchie Lumber Co.*, 111 Ala. 453, 17 So. 934.

In Action of Trover.—Declarations of an agent as to the person for whom he was acting, and by what authority he took the corn, are admissible in evidence against the principal, in trover for seizure and removal of ninety bushels of corn against the owner's wishes; and it is immaterial whether proof of the agency precede or follow proof of the declarations. *Rhodes v. Lowry*, 54 Ala. 4.

Location of Boundary Line.—Declaration by an agent as to the location of a boundary line is inadmissible where the character and scope of the agency were not indicated. *Clark v. Dunn*, 161 Ala. 633, 50 So. 93.

"The effort to show a declaration by an agent of Mary T. Clark and Wm. Atkins as to the location of the line between Mary Clark and R. W. Terrell land was properly disallowed. The character and scope of the agency imputed to the alleged declarant was not indicated, and hence the inquiry was not brought within the ruling in *Pearson v. Adams*, 129 Ala. 157, 29 So. 977." *Clark v. Dunn*, 161 Ala. 633, 50 So. 93, 95.

Statement of Bookkeeper.—The testimony of a witness that the bookkeeper of a mortgagee sent him and a third person to get a new mortgage from the mortgagor, and instructed them what assurance to give if the mortgagor would execute a new mortgage, and testimony by the mortgagee that he gave instructions to his bookkeeper what to do about it, proved agency, so that the witness could testify as to what took place when he and the third person called on the mortgagor. *Davis v. Anderson*, 163 Ala. 385, 50 So. 1002.

Authority to Make Statement Must Be Shown.—Before the written statement of one who was once the clerk or bookkeeper of another can be admitted as evidence against the latter, it must be shown that the former was such clerk or bookkeeper at the time the statement was made, and had authority to make it. *Brown v. Harrison*, 17 Ala. 774.

§ 201. — Existence of Partnership.

Partnership Must Be Established.—Before admissions made by one partner can be received in evidence to charge the other, the partnership must be established by evidence independent of the admissions. *Cross v. Langley*, 50 Ala. 8.

§ 202. — Existence of Conspiracy or Common Purpose.

When two or more persons combine or associate together, for the prosecution of some fraudulent or illegal purpose, the acts and declarations of any one of them, made in furtherance of the common purpose, and forming a part of the *res gestæ*,

are admissible as evidence against the others; secus, as to subsequent acts, admissions, or declarations. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

To authorize the admission of such acts and declarations, as evidence against the other conspirators, a proper predicate must be first laid by the introduction of evidence aliunde, *prima facie* sufficient, in the opinion of the presiding judge, to establish the existence of such conspiracy; as in the analogous case of agency, where the acts or declarations of the agent are offered in evidence against the principal, and are only received when the fact of agency has been first *prima facie* established. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

Proof Sufficient to Establish Conspiracy.

—In an action on a marine insurance policy, the defense was that the cargo was fictitious, some of the barrels insured as whisky being filled with water. A witness for the defense, having found some of the barrels filled with water bearing the ship's marks, went to plaintiff's store, and talked with him about the barrels. Plaintiff manifested no interest until informed that the barrels were filled with water, whereupon he consulted with his partner, and went out, asking witness to await his return. Witness, after waiting some time, went to another store, telling plaintiff's clerk where he was going, and was soon joined there by plaintiff's brother-in-law, who had not been present at the conversation between plaintiff and witness, and who at once began to talk about the barrels. Held sufficient, *prima facie*, to establish a conspiracy or the relation of principal and agent between plaintiff and his brother-in-law, so as to render admissible a proposition by the latter to buy or destroy the barrels. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284.

Conspiracy to Defraud Creditors.—The declarations of a seller are not admissible evidence against the purchaser, without first establishing facts, from which an inference may fairly be deduced that there was a combination between vendor and vendee to defraud the creditors of the former. *Weaver v. Yeatmans*, 15 Ala. 539.

Declaration in Absence of Proof of Conspiracy.—On a trial of the right of property between the plaintiff in execu-

tion and one claiming under a purchase from the defendant, the declaration of the defendant, that the sale was fraudulent, made when he was not in possession of the property, and when the claimant was not present, is *prima facie* inadmissible against the claimant, in the absence of proof connecting him with the fraud. *Bilberry's Adm'r v. Mobley*, 21 Ala. 277, cited in note in 32 L. R. A. 689.

§ 203. Mode and Requisites of Proof of Admissions.

Exact Language or Substance.—A witness who deposes to the declarations or admissions of a party must give the precise language used by him, if he can, or at least the substance of what he said. *Dennis v. Chapman*, 19 Ala. 29.

§ 204. Explanation or Limitation.

§ 204 (1) In General.

Explanation of Husband's Statement.—In ejectment by a married woman, who averred only the possession of her husband as her agent, evidence having been admitted of his declarations denying possession or the right of possession, his testimony in explanation of how he had made such admissions was incompetent. *Pearson v. Adams*, 129 Ala. 157, 29 So. 977.

Evidence Excluded on Another Trial.—When a witness admitted the recovery of a judgment for rent, it was held that he might answer that he was prepared at the trial to prove that it was due to another, but that his evidence was excluded. *Yarborough v. Moss*, 9 Ala. 382.

§ 204 (2) Right to Show Entire Statement or Conversation.

Showing Whole Admission.—Where the admission of a person is offered in evidence, the whole of such admission must be given. *Hudson v. Howlett*, 32 Ala. 478.

Entire Conversation May Be Shown.—Defendant having introduced part of a conversation between witness and plaintiff, as being in the nature of an admission, it was competent for plaintiff to prove the whole of the conversation on the same subject-matter by his wife, in whose presence it occurred. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46.

When a part of a conversation has been

introduced in evidence by a party in a cause, the adverse party has a right to put in evidence the rest of it. *Jones v. Ort*, 36 Ala. 449.

"It was not permissible for plaintiff to avail himself of a portion of this quasi admission, and exclude that portion which he thought would probably make against him, or which might, perchance, open the door to further explanation. This question is, in substance, very like the one considered and settled in *McLean v. State*, 16 Ala. 672. See, also, *Lyde v. Taylor*, 17 Ala. 270." *Hudson v. Howlett*, 32 Ala. 478, 480.

Statement as to Receipt.—Where the plaintiff proved that the defendant, being applied to, said he would see the plaintiff about his claim, the defendant may also prove that at the same time he said he had a receipt in full. *Scruggs v. Bibb*, 33 Ala. 481.

Declarations in Party's Favor.—If admissions or declarations be used for a purpose adverse to the claim of the party making them, those made at the same time and in such party's favor must be also received. *Hudson v. Howlett*, 32 Ala. 478.

Assertions of Title to Slaves.—The plaintiff having proved that the slaves in controversy were appraised as a part of his intestate's estate in the defendant's presence, and that the defendant then asserted no title to them, it is competent for the defendant to rebut this evidence by proof of her private assertions of title, to one of the appraisers, before the completion of the appraisal. *Wittick's Adm'r v. Keiffer*, 31 Ala. 199.

§ 204 (3) Contrary Statements Made at a Different Time.

Declarations at Other Times in Rebuttal.—A party can not rebut the evidence of his own admissions by different declarations made at other times. *Lee v. Hamilton*, 3 Ala. 529, cited in note in 5 L. R. A., N. S., 949; *Roberts v. Trawick*, 22 Ala. 490; *Woodruff v. Winston*, 68 Ala. 412.

Subsequent Declaration.—Where the declarations of a vendor are given in evidence against him, in order to prove representations made by him at the sale it is competent to prove everything he

said at the time upon the subject, but not what he said subsequently. *Bradford v. Bush*, 10 Ala. 386.

Declaration as to Gift.—Where a gift has been proved by evidence of the declarations of the giver, his subsequent declarations that the property was only lent can not be given in evidence by the adverse party. *High v. Stainback*, 1 Stew. 24.

§ 204 (4) Pleadings, Affidavits, or Depositions.

Averments of Bill.—Where a witness admitted signing an answer admitting the averments of a bill, the bill was admissible to prove the admissions. *New v. Young*, 148 Ala. 253, 41 So. 523.

Amended Bill.—When a bill in chancery is offered in evidence in another suit as an admission of the complainant in such bill, he can not use his amended bill as rebutting evidence against the original. *Pearsall v. McCartney*, 28 Ala. 110.

Entire Answer Taken Together.—Where plaintiff reads in evidence part of defendant's answer in another suit, defendant should be allowed to read the whole of it. *Callan v. McDaniel*, 72 Ala. 96.

When an answer in chancery is used by the complainant as evidence in an action at law afterwards instituted, the whole answer, so far as it is pertinent to the issue, must be taken together, whether its allegations are strictly responsive, or set up affirmative matter in avoidance. *Crocker v. Clement*, 23 Ala. 296.

§ 205. Construction.

Statement as to Account of Orders.—A drummer's statement that his employer's account of orders taken by him is correct, but that he disputes his right to make deductions from his commissions where the goods ordered were not paid for, is not an admission of the correctness of a transcript of the employer's books, stating an account of the number of orders taken, and charging the drummer with his commissions on orders procured by him where the customers failed to pay for the merchandise. *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425.

Admission of Indebtedness.—A letter from a client to his attorney contained the expressions: "I agree with you, and

think myself that your exertions in the appeal case are well worth the \$500 you charge. But I did think, and do now believe, the \$3,000, the charge in the case, was too much. Still, as the opposite party received that amount I did not expect to get off with less." Held, that this letter, construed in connection with the letter to which it was a reply, and which mentioned particularly the services on the appeal, but did not refer to the case in the lower court, or to the fee charged for services there rendered, was an admission of a present indebtedness only as to the \$500. *Nooe's Ex'r v. Garner's Adm'r*, 70 Ala. 443.

Release of Actions.—A release of "all actions, and rights of action, given by plaintiff to defendant for valuable consideration, after suit brought, is not an admission by defendant of indebtedness at the commencement of the suit. *Crawford v. McLeod*, 64 Ala. 240.

Sale of Property.—Where, in an action for the conversion of cotton bought by the plaintiff of a third person, it appeared that the cotton had, a short time before the sale, belonged to the defendant, and was still upon his premises, held, that a statement made by defendant to plaintiff that "the trade was a good one," and that "he laid no claim to the cotton," was sufficient to justify the inference that defendant had either sold the cotton to plaintiff's vendor, or had authorized him to sell it. *Darnell v. Griffin*, 46 Ala. 520.

§ 206. Conclusiveness and Effect.

§ 206 (1) In General.

Received with Caution.—Verbal admissions or declarations must be received with great caution, being unsatisfactory as evidence, and their value depends greatly on their consistency with other evidence not subject to like infirmities. *Lehman v. McQueen*, 65 Ala. 570.

"The rule in respect to verbal admissions or declarations of a party in interest is that they should be received with great caution, 'and that the value of evidence of them depends greatly upon its consistency with other evidence not subject to its infirmities. When there is no reason to apprehend fabrication, there is such danger of mistake or imperfection in the repetition of the mere oral statements

of another, so much of uncertainty as to the clearness with which his meaning was expressed, or whether he was understood by the witness as he intended to be understood, that in its own nature the evidence is unsatisfactory.' And, as well said in *Reeves v. Abercrombie*, 108 Ala. 535, 19 So. 41. 'Loose declarations of trust and casual conversations derogatory of the grantee's title have not been regarded as possessing much probative force in cases like this, even when proven to have been made, while the unsatisfactory and unreliable character of evidence of verbal statements, easy to be misunderstood and difficult to be accurately reproduced, is everywhere recognized by those accustomed to deciding controverted questions of fact, particularly when given long after the event and without motive to impress the conversation upon the memory.' *Lehman Bros. v. McQueen*, 65 Ala. 570, 573; *Reeves v. Abercrombie*, 108 Ala. 535, 19 So. 41; *Brantley v. West*, 27 Ala. 542, 553." *Rogers v. Burt*, 157 Ala. 91, 47 So. 226, 229.

Admission from Silence.—Evidence of admissions by a party's failure to deny statements with reference to his interest made in his presence by others should be cautiously credited. *Stephens v. Barnwell*, 154 Ala. 124, 45 So. 233.

Should Amount to Estoppel in Pais.—Admissions, to be conclusive on the party making them, must be made under such circumstances as to amount to an estoppel in pais. *Garrett's Adm'rs v. Garrett*, 27 Ala. 687.

Party's Statement Received with Caution.—Verbal admissions or declarations of a party in interest should be received with great caution, and the value of evidence of them depends upon its consistency with other evidence not subject to its infirmities. *Rogers v. Burt*, 157 Ala. 91, 47 So. 226.

Admissions Acted Upon.—Admissions which have been acted on by the others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. It is immaterial whether the admission be true or false, whether expressly made or only to be inferred from the conduct of the party. It being the fact that another person has been misled by it, that renders

it conclusive. *McCravey v. Remson*, 19 Ala. 430.

It is well settled that admissions which have been acted on by others are conclusive against the party making them, in all cases between him and the person whose conduct he has influenced. Nor is it material whether the admission is expressly made, or is to be inferred from the conduct of a party. And in the operation of this rule, it is unimportant whether the admission is true or false, made fraudulently or innocently, it being the fact of another's having acted on it, that renders it conclusive. *McCravey v. Remson*, 19 Ala. 430, 436.

Promise to Give Horses.—The declarations of a party that he had promised to a stage line four horses are not evidence sufficient to warrant the inference that he was a joint proprietor, and it is competent to repel all inferences to his prejudice by showing that he actually sold three horses to the agent of the ostensible proprietor of the line. *Anderson v. Snow*, 9 Ala. 247.

§ 206 (2) As to Particular Facts in General.

Receipt of Deed.—A written acknowledgment by an attorney of the receipt of a note for collection does not prevent a creditor of the holder of the note from proving by the attorney that the holder directed the attorney to pay over the money collected to such creditor. *Echols v. Exum*, 5 Ala. 419.

§ 206 (3) As to Indebtedness.

Admission of Justness of Debt.—In an action to enforce payment from the proceeds of a life insurance policy of the amount of a note dated subsequent to the date of the policy, an answer admitting the justness of the debt does not admit its prior existence, so as to entitle the holder to payment from such proceeds. *Lehman v. Gunn*, 154 Ala. 369, 45 So. 620.

Against Another Creditor.—An admission of indebtedness is not evidence against another creditor, whose debt existed at the time the admission was made. *Taylor v. Branch Bank*, 14 Ala. 633.

Proof of an admission by a debtor that a fixed sum is due, which was claimed of him on an account by the creditor, supports a count on a stated account, though

the admission was made in response to the assertion of a claim by the creditor, unaccompanied by a statement of the items compromising the account. *Smith v. Allen* (Ala.), 62 So. 296.

Admission in Deed of Trust.—Admissions of indebtedness made by a debtor in a deed of trust to secure the creditor are evidence of the fact of indebtedness, against one who was not at that time a creditor of the grantor. *Dubose v. Young*, 14 Ala. 139.

Indebtedness for Liquors.—In assumption to recover the amount of a tavern bill, consisting mostly of items for spirituous liquors, the plaintiff having introduced evidence tending to show the defendant's admission of the correctness of the account, the defendant can not introduce proof of his habits of sobriety, or that he was frequently at the tavern without drinking at all. *Jones v. Cooper*, 22 Ala. 551.

Jury May Believe One Portion and Reject Another.—When the admissions of a party are given in evidence in the course of a trial, the whole declaration of a party, made at one time, as well that in his favor as that which is against him, must be received and weighed; but the jury are at liberty to believe one portion and disbelieve the other, as they may in the case of any other species of evidence. *Wilson v. Calvert*, 8 Ala. 757.

§ 206 (4) As to Payment.

Admissions of Payment in Bill of Sale.—The admission in a bill of sale that the purchase money was paid is inconclusive against the seller, and will not be allowed to defeat a promise subsequently made for its payment, so as to invalidate a lien given to him. *Vaughn v. Wood*, 5 Ala. 304.

§ 206 (5) As to Title or Possession.

Father's Title to Land at Time of Death.—Where plaintiff in ejectment relied on her father's will as a source of title to the property in controversy, only after a prior deed conveying the land to her had been improperly excluded, she was not estopped thereby from claiming title under the deed, nor by her admission that her father was in possession, and was the owner of the land at his death, made for the purpose of making the father the

common source of title. *Mays v. Burleson* (Ala.), 61 So. 75.

§ 206 (6) Judicial Admissions in General.

Right to Withdraw Admissions in Appellate.—Where an admission of record is made by counsel in the court below to obviate the necessity of proof, it will be presumed that he had authority to make it, and the admission can not be withdrawn in the appellate court. *Montgomery v. Givhan*, 24 Ala. 568.

§ 206 (7) Admissions Qualified, Limited, or Contradicted.

Disputed by Other Evidence.—An admission, being denied and disputed by other evidence, is not conclusive. *Boswell v. Thompson*, 160 Ala. 306, 49 So. 73.

§ 206 (8) Admissions Made Through Ignorance or Mistake.

Hastily and Inconsiderately Made.—It is competent to prove that an admission by a party of the correctness of an account was hastily and inconsiderately made, without a knowledge of its accuracy. *Stewart v. Conner*, 13 Ala. 94.

§ 206 (9) Conclusiveness as against Privies, Codefendants, and Persons Represented by or Jointly Interested with Declarant.

The admissions of a deceased donor, while admissible, are insufficient to establish a completed gift. *Thomas v. Tilley*, 147 Ala. 189, 41 So. 854.

"While the children's father had possession of the slaves, the court says there was 'no evidence that they were delivered to him for any such purpose,' and that such declarations ('that he had given the slaves to the children') 'can not constitute a valid gift, in the absence of proof of actual delivery.' *Hunley v. Hunley*, 15 Ala. 91, 104. In the case of *Wheeler v. Glasgow*, 97 Ala. 700, 11 So. 750, the certificate of deposit was indorsed and delivered to the donee, and a witness testified that the donor used words of gift when he handed the same to the donee. *Wheeler v. Glasgow*, 97 Ala. 700, 11 So. 758. Other authorities hold that admissions, while admissible, are not sufficient to establish a completed gift. 14 Am. & Eng. Ency. Law (2d Ed.), p. 1051; *Rooney v. Minor*, 56 Vt.

527. And another case holds that, even where the donee was already in possession, there should be a delivery to him at the time of donation. *Allen v. Allen* (Minn.), 77 N. W. 567, 74 Am. St. Rep. 442." *Thomas v. Tilley*, 147 Ala. 189, 41 So. 854, 855.

§ 206 (10) Weight and Credibility.

Verbal Admission Received with Caution.—The rule that verbal admissions are to be received with caution is especially true, when the witnesses had no occasion to treasure up the words employed, and they testified long after the event. *Ladd v. Lookout Distilling Co.*, 147 Ala. 173, 40 So. 610.

"We have not overlooked the testimony of two witnesses for the original complainant who speak of a statement or admission upon one occasion by the mortgagee as to the payment of all the mortgagor owned up to that time, and as to his satisfying the mortgage. The witnesses do not agree as to the terms of the admission, and the answer of one of them in chief does not correspond in the substance with his answer on cross-examination. This evidence does not alter our opinion. It but serves to furnish striking proof of the accuracy of Mr. Greenleaf's observation that evidence of verbal admissions is to be received with great caution, 1 Greenleaf on Ev., § 200. This is especially true when the witnesses had no occasion to treasure up the words employed, and they testify long after the event. *Ladd v. Lookout Distilling Co.*, 147 Ala. 173, 40 So. 610, 611.

Testimony Insufficient to Establish Admissions.—The contract reciting a sale of both real and personal property for a consideration in gross, evidence of oral admissions of a deceased party to the contract, made thirteen years before suit, is insufficient to prove that the sale of the personalty was without consideration, when these are only proved by the testimony of a brother of the opposite party, who has made mistakes in other parts of his testimony, showing that his recollection of the matters in controversy is defective. *Alexander v. Hooks*, 84 Ala. 605, 4 So. 417.

Jury Judges of Credit to Be Given Admissions.—When the admission is not a

whole or entire thing, but consists of parts, the jury can not capriciously reject the portion favorable to the party making it, though slight facts or circumstances would be sufficient to justify them in disregarding it. In such a case the jury, and not the court, is the proper judge of the credit to be given to the different parts of the admission. *Wilson v. Calvert*, 8 Ala. 757.

Instruction as to Weight of Admission.—Although a verbal admission, deliberately made, may afford proof of the most satisfactory character, yet it is erroneous to instruct the jury that it is "the best kind of evidence." *Wittick's Adm'r v. Keiffer*, 31 Ala. 199.

VIII. DECLARATIONS.

(A) NATURE, FORM, AND INCIDENTS IN GENERAL.

§ 207. Nature and Grounds for Admission in General.

Statement of Rule.—The general rule is that declarations made by a third person in the absence of a party against whom they are offered in evidence are inadmissible. *Baker v. Drake*, 148 Ala. 513, 41 So. 845.

Conversation between Witness and Third Person.—In forcible entry and detainer, evidence of a conversation between witness and a third person with reference to the property was inadmissible. *Fowler v. Prichard*, 148 Ala. 261, 41 So. 667.

Admission of Race.—On the issue whether deceased was a negro, evidence that he had made a statement to a court that he was a negro was admissible. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008.

Declarations of Third Persons to Prove Title.—Declarations of third persons are inadmissible to prove the sources of title to land. *Inglis v. Webb*, 117 Ala. 387, 23 So. 125.

Declarations of Customers.—Plaintiff, manager of defendant's store, was discharged before the expiration of the terms of employment, and in an action for full compensation defendant sought to justify the discharge by showing that in conducting the business plaintiff had driven away patrons. Held, that the

plaintiff's misconduct in driving away customers from defendant's store could not be proved by the declarations of such customers. *Morris, etc., Mfg. Co. v. Knox*, 96 Ala. 320, 11 So. 207.

Declarations by Former Owner as to Age of Horse.—A. sold a mare to B., B. to C., and C. sold her to D., representing that she was but two years old. At the time of the sale by A., he informed B. that the mare was four years old. Held, that the representation by A. to B. was inadmissible in a suit by D. against C., it not appearing that C. or his agent was aware that it had been made. *Bradford v. Bush*, 10 Ala. 386.

Beneficiary of Accommodation Paper.—In an action by the holder of accommodation paper against the accommodation maker, the declarations of the person for whose accommodation it was made, at the time he sold the paper, are not admissible. *Metcalf v. Watkins*, 1 Port. 57.

§ 208. Making of Statement Fact in Issue.

"The only evidence having a tendency to prove a statement of the account between the plaintiff and any of the defendants was furnished by the testimony of the plaintiff himself. While it can not be claimed that his version of an interview he had with A. C. Smith, one of the defendants, shows that there was anything like a formal accounting between them resulting in the striking of a balance, yet it was such as to furnish some support for a conclusion that on that occasion the attention of this defendant was called to the amount claimed to be due from A. C. & B. M. Smith for their overdraft on the bank, and that he assented to the correctness of the claim thus made. Evidence of an admission by defendant that a fixed and certain sum is due, which was claimed of him on an account by the plaintiff, will support a count on a stated account, though such admission was made in response to the assertion of a claim by the plaintiff which was not accompanied by a statement of the items comprising the account; the essential matter being that the account received the assent of both parties to it. 1 Cyc. 367; *Loventhal v. Morris*, 103 Ala. 332, 15

So. 672; *Carlisle v. Davis*, 9 Ala. 858." *Smith v. Allen* (Ala.), 62 So. 296, 297.

§ 209. Statements Showing Physical or Mental Condition.

See ante, "Acts and Statements of Person Sick or Injured," § 91.

Statements as to Illness.—In an action for failure to deliver a telegram, whereby plaintiff was delayed for two days in reaching his sick wife, it was competent to prove that the wife was sick and nervous when the plaintiff reached her, and had been previous to that time, and the declarations of the wife, made to the plaintiff when he reached her, that she had been "mighty" sick and nervous, were admissible to prove this. *Western Union Telegraph Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

In an action for personal injuries, it is competent for the physician, who attended plaintiff, to testify that, when he first saw her, she was complaining of pain from an injury she said she had received. *Birmingham Union R. Co. v. Hale*, 90 Ala. 8, 8 So. 142, cited in note in 24 L. R. A., N. S., 254.

Complaints to Witness of Pain.—In an action for injuries, evidence of a witness, who had seen plaintiff frequently after he was injured, that he had heard him complain of pain in his spinal cord, was admissible. *Kansas City, M. & B. R. Co. v. Butler*, 143 Ala. 262, 38 So. 1024, cited in note in 24 L. R. A., N. S., 254.

Statement of Illness Previous to Accident.—Plaintiff, a brakeman, was sent ahead of his train with a red lantern and a white lantern to signal an incoming train, and claimed that while in the discharge of his duty he became sick, and fell in an unconscious condition on the track, where he was run over, and that his lanterns both remained on the track, so that the engineer should have seen them and stopped. Held, that plaintiff could show by members of his own crew, who were present, that when he was ordered by his engineer to go ahead and signal the train he complained of being sick. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276, cited in note in 24 L. R. A., N. S., 264.

The declarations of a slave, while sick, as to the nature of her disease, are ad-

missible evidence on the principle of *res gestæ*, as well as from the necessity of the case, although made to a person who is not a physician. *Wilkinson v. Moseley*, 30 Ala. 562, cited in note in 24 L. R. A., N. S., 254.

In covenant to recover damages for the breach of a warranty of soundness contained in a sealed bill of sale of a slave, the slave's declarations to persons not skilled in the science of medicine as to his symptoms and condition during similar previous attacks, the medicines which he then took, and his opinion that those attacks were similar to his present sickness, are not admissible in evidence. *Eckles v. Bates*, 26 Ala. 655, cited in note in 24 L. R. A., N. S., 254.

"The question is whether the slave's declarations relative to his symptoms, etc., were admissible evidence. The case of *Tumey v. Knox*, 7 T. B. Mon. 88, is not at hand, but it is briefly stated by the court in *Mauldin v. Mitchell*, 14 Ala. 814, thus—the declarations of a negro judged inadmissible, because he was an incompetent witness; it was, however, held, that they might be received in connection with, and as the foundation of the opinion of a physician, to whom the communication was made. Other cases were cited also in *Mauldin & Cerrell v. Mitchel*, but none going so far as *Tumey v. Knox*, which qualified and limited the general rule as to such declarations, because the party making them was an incompetent witness. The general rule is, that whenever the bodily or mental feelings of an individual are material to be proved, the usual expression of such feelings, made at the time in question are original evidence. So, also, the representation, by a sick person, of the nature, symptoms and effects of the malady, under which he is laboring at the time, are received as original evidence, whether made to a medical attendant or any other person, though not, in the latter case, of so much weight. 1 Greenl. Ev., 178, § 102. In all such cases the weight or verdict due to the evidence is a question for the jury, to be determined in view of the attending circumstances. But I do not think that such representations are inadmissible as evidence, because the individual making them was incompetent as a

witness in the cause. Its admissibility is said to stand upon the doctrine of *res gestæ* (2 Phil. Ev. 577; Cow. & Hill's Notes, note 447), as well as upon the necessity of the case." *Rowland v. Walker*, 18 Ala. 749, 750.

§ 210. Statements Showing Intent, Motive, or Nature of Act.

§ 210 (1) In General.

Desire of Recovery.—"There was no error in allowing the defendant's witness Walls to testify on cross-examination by the plaintiff that the assured after he had shot himself made declarations showing a hope or desire to recover. It was relevant for the purpose of showing whether or not the act was intentional, and the defendant had examined this witness on direct examination with reference to what the assured had said in this connection for a similar purpose. All this evidence was relevant and proper to be considered and weighed by the jury as tending to show the character of the transaction and as bearing on the nature of the act. There was no variance between the policy or certificate offered in evidence and that declared on in the complaint. It was further identified by being shown to be the same certificate as that issued on the application introduced in evidence by the defendant." *Woodmen v. Wright* (Ala.), 60 So. 1006, 1008.

Declarations Assertive of Authority.—On the issue of undue influence by a nurse inducing the execution of a will in her favor, it was competent to show that two or three nights before the death of the testatrix the nurse said: "I am not going out of that room tonight. I am going to put M. [referring to the daughter-in-law of testatrix] out of the room, if she enters it tonight. I am mistress of this house, and I will have you and everybody else know it"—as showing her control of the sickroom, and a plan to exclude therefrom the friends and relatives of the testatrix. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

On the issue of undue influence in the execution of a will, evidence that, a week after its execution, testatrix said to her sister, speaking of being bothered about her will: "I don't mean you, but the C. family [referring to those alleged to have

exercised undue influence]. Put them out of the house"—was competent as tending to show the feelings of testatrix towards them. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

Intention to Leave State.—Declarations made by plaintiff anterior to the suing out of the attachment, as to her intention of leaving the state for a visit only, are not competent, unless made at the time of leaving, and in explanation of the act. *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364, cited in note in 23 L. R. A., N. S., 368, 371.

Declarations of a testatrix made after the execution of a will are not competent to establish acts constituting undue influence, unless part of the *res gestæ*, being hearsay. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

Purpose in Entering Land.—Declarations of a person as to the purpose for which he was going upon land are not competent proof of his possession of the land. *Mills v. Clayton*, 73 Ala. 359.

§ 210 (2) Statements by Persons Transferring Property.

"As relevant and bearing on the question of delivery of the deeds, it was competent to show by the witness Napier, a justice of the peace who prepared the deeds and took the acknowledgment, all that was said and done at the time of the signing of the same by the grantor, as well as what was then said by the witness to the grantor relative to the making of the deeds. *Napier v. Elliott*, 146 Ala. 213, 40 So. 752; *Fitzpatrick v. Briggman*, 133 Ala. 242, 31 So. 940." *Napier v. Elliott*, 152 Ala. 248, 44 So. 552.

Explanatory of Conveyance.—The declarations of a grantor, made contemporaneously with the signing and acknowledgment of a deed and explanatory of his subsequent act in having the deed recorded, are competent on the question whether the deed was delivered or not. *Napier v. Elliott* 146 Ala. 213, 40 So. 752.

The declarations of a father-in-law, made during the interval which elapsed between the marriage of his daughter and her leaving his house with her husband to commence housekeeping, explaining the nature of the title he intended to make

to slaves which his daughter was to take as her portion, are competent evidence to show what title he intended his son-in-law should have in them. Declarations made afterwards would not be evidence for him. *Powell v. Olds*, 9 Ala. 861.

If a parent, before sending property home to his son-in-law, declares that he intends it for a loan, and not an absolute gift, and about the same time, and while he retains possession of it, he makes his will, in which the same intent is declared, the will is admissible to prove the intent. *Miller v. Eastman*, 11 Ala. 609.

Sustaining Validity of Sale.—Where the validity of a sale was in issue, the declarations of the seller, expressing his opinion that the sale was valid, were not admissible in evidence on behalf of the purchaser. *McArthur v. Carrie's Adm'r*, 32 Ala. 75.

§ 211. Difficulty of Producing Direct Evidence.

An affidavit, made *ex parte*, that an account is just and true, is not competent testimony to prove the account, though the affidavit is made by the bookkeeper of the plaintiff, and he has left this country and gone to Europe. *Brown v. Steele*, 14 Ala. 63.

"But the rule is too well settled, now to be shaken, that memoranda, entries *ex parte*, affidavits, certificates, or other papers framed by private persons, are of themselves, merely hearsay, and can not become evidence against third persons. See the cases collected in 2 Phil. Ev., C. & H.'s Notes, 674." *Brown v. Steele*, 14 Ala. 63, 64.

§ 212. Self-Serving Declarations in General.

§ 212 (1) Statements by Parties of Record in General.

Statement of Rule.—The declarations of a party are not evidence for himself unless they constitute a part of the *res gestæ*. *Kennedy v. Meador*, 1 Stew. & P. 220; *Martin v. Williams*, 18 Ala. 190.

"In general the declarations of one party made in the absence of the other can not be given in evidence in his own favor, though they may be against him. *Wesson v. Carroll*, Minor 251.

Declarations to Adversary.—Declarations of a party, which promote his interests, and are not part of the *res gestæ*, or of facts lying within the knowledge of his adversary, and which, if untrue, it is reasonable to presume he would contradict, are not admissible in favor of the declarant, although made to his adversary. *Street v. Kelly*, 67 Ala. 478.

Defendant's declarations to a stranger were inadmissible in his behalf. *Alexander v. Handley*, 96 Ala. 220, 11 So. 390.

Declaration as to Commission.—The statement in a letter by a real estate broker to another that the principal would pay the broker a commission for negotiating a purchase was inadmissible, in an action for the commission, as being a self-serving declaration. *Hanna v. Espalla*, 148 Ala. 313, 42 So. 443.

Declarations Favoring Grantor in Deed.—Where the chief evidence of a delivery of a deed was its registration, evidence to show that the registration did not amount to delivery consisting of addenda to the deed, setting out that the deed was not delivered before the change in the deed, the addenda being made fifty-two days after the registration, was a declaration in favor of the grantor tending to defeat the deed and was not admissible. *Gulf Red Cedar Co. v. Cranshaw*, 169 Ala. 606, 53 So. 812. See also, ante, "Existence, Nature, or Validity of Contract or 'Transfer of Property,'" § 90 (4).

Detailing Circumstances of Robbery.—The declarations of the tax-collector, detailing the circumstances of his robbery, not constituting a part of the *res gestæ*, are not competent evidence for him and his sureties, when sued on his official bond. *State v. Houston*, 78 Ala. 576.

In Absence of Other Party.—Declarations of a party to an action, in his own behalf made in the absence of the other party, and forming no part of the *res gestæ*, are not admissible. *Gordon v. Clapp*, 38 Ala. 357.

Failure to Do Household Work.—"The plaintiff showed by other witnesses that she did her household work before the injury and did not do it afterwards, and this was done over the objection of the defendant. The court, upon the suggestion of plaintiff's counsel, limited this evidence as going to show 'the extent of

her injury, not for recovery.' This evidence should not have been admitted, as it was but a self-serving act of the plaintiff after the alleged injury. She had the right to show that she was so injured that she could not work and the extent of her injury by her own evidence and that of other witnesses, which seems to have been done; but a perfectly sound and well person could stop work, and in fact many such persons have been known to do little or no work. Self-serving acts as well as declarations, except in very limited instances, are not admissible. *Pope v. State*, 168 Ala. 33, 53 So. 292; 1 Greenl. on Ev. 469." *Birmingham R., etc., Power Co. v. Cockrum (Ala.)*, 60 So. 304, 309.

Action for Failure of Title to Timber.—Where, in an action for damages for failure of title to timber sold plaintiff, the court charged that plaintiff was entitled to recover only upon the theory that there was an unconditional promise to pay him for a release, evidence tending to show that plaintiff had a contract with a sawmill to cut the timber, and after making the alleged contract with defendant notified the mill not to cut it, was inadmissible, being a self-serving declaration, and not being a part of the *res gestæ* of the contract with defendant, but *res inter alios acta*. *Marsh v. Fricke*, 1 Ala. App. 649, 56 So. 110.

§ 212 (2) Application of Rule in General.

In an action for malicious prosecution, it was proper to sustain an objection to a question asked the justice before whom the prosecution was heard as to whether defendant stated, immediately before the case against plaintiff was called, that he desired the prosecution dismissed. *Rutherford v. Dyer*, 146 Ala. 665, 40 So. 974.

Action for Failure to Credit Payment.—Defendant, in an action by a mortgagor under Code 1896, § 1065, for the penalty provided where the mortgagee of a recorded mortgage, who has received a partial payment thereon, fails, on request of the mortgagor, to enter such payment on the margin of the record of the mortgage, may not ask plaintiff's witness if, when he delivered to defendant the written request to enter the partial payment,

defendant did not tell him that the mortgage had been satisfied, and that plaintiff could have the original on calling for it; this being an attempt of defendant to prove his own *ex parte* statement made in his own interest, and in the absence of plaintiff. *Lynn v. Bean*, 141 Ala. 236, 37 So. 515.

Trial of Right of Property.—On the trial of a claimant's right to certain attached property, the claim being based on a mortgage of the property, the law day of which had elapsed, evidence is incompetent of a declaration made by defendant in attachment to claimant, in the absence of plaintiff, that he would deliver claimant the attached property if the mortgage debt were not paid before a certain time. *Mitcham v. Schuessler*, 98 Ala. 635, 13 So. 617.

Declarations When Returning Slave.—Where plaintiff undertook to take charge of a slave belonging to defendant, and effect a cure of him, and defendant promised, in consideration thereof, to pay a certain sum six months from the time the cure should be effected, or from the date on which the slave should be returned and pronounced well, plaintiff's declaration, when he returned the slave, that he was well, was admissible in evidence for him, not as evidence that a perfect cure had been effected, but to show that plaintiff had returned him as well, and thus fix the time when the six months should commence to run. *Jordan v. Roney*, 23 Ala. 758.

Declarations as to Precautions to Keep Cattle from Trespassing.—In an action of trespass for injuries to land through the incursions of the defendant's cattle, evidence as to the declarations of the defendant, made to a third party, as to his fastening poles to the horns of his cattle to prevent their breaking into the plaintiff's field, is inadmissible. *Pike v. Elliott*, 36 Ala. 69.

Refusal to Accept Confederate Money.—In an action on a note, the issue being whether the plaintiff had agreed to receive eight per cent confederate bonds in payment, proof that plaintiff, during the war, refused to accept payment of a large debt in confederate money from a debtor who came from a distance, and proof of declarations by her "that she would not

accept confederate money or bonds in payment of debts due her," is inadmissible; it being evidence of acts and declarations of the plaintiff in her own favor, with which defendant had no connection. *King v. Mitchell*, 52 Ala. 557.

In a *qui tam* action by a father against a clerk for issuing a license to marry his daughter, she being under age, neither a memorandum of the father, nor any declaration made by him *ante litem motam*, is admissible to show the age of the daughter, because the father voluntarily incapacitated himself to testify by becoming plaintiff in the action, which was not necessary to support the action. *Blann v. Beal*, 5 Ala. 357.

Willingness to Perform Services.—In an action against the defendant for refusing to employ the plaintiff as agreed, the plaintiff's own declarations to the defendant of his willingness to perform the services, though not conclusive, and perhaps weak, are yet competent evidence thereof. *Sayre v. Durwood*, 35 Ala. 247.

§ 212 (3) Statements by Partners, Joint Contractors, or Codefendants.

Declarations of Individual Partners Inadmissible against Firm.—The acts, declarations, or admissions of one of two partners are not admissible as evidence for them, in an action against them as a firm, and where they have jointly pleaded the general issue. *Hutchins v. Childress*, 4 Stew. & P. 34.

Statement of Deceased Partner.—Where plaintiff's evidence tended to prove that defendant was liable as surviving partner, declarations of the alleged deceased partner that he was the sole proprietor of the business, not made in the presence of either of the parties, nor under circumstances rendering them unfavorable to the pecuniary or proprietary interest of the deceased partner, nor under such circumstances as to raise a presumption of freedom from the infirmities which justify the exclusion of such declarations, were inadmissible as hearsay as against plaintiff. *Letson v. Hall*, 4 Ala. App. 537, 58 So. 740.

"The evidence so admitted, being as to mere declarations of a third party, made extra-judicially in the absence of the party against whom they were of-

ferred, plainly was hearsay; and the declarations testified to were not of such a nature, nor were they shown to have been made under such circumstances, as to raise a presumption that they were free from the infirmities which usually justify the exclusion of such evidence when offered against a third party, or to bring them within any recognized exception to the general rule against the admissibility of hearsay testimony. *Alexander v. Handley*, 96 Ala. 220, 11 So. 390; *Humes v. O'Bryan*, 74 Ala. 64; *Hart v. Kendall*, 82 Ala. 144, 3 So. 41; *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696; *Jones on Evidence*, §§ 323, 324." *Letson v. Hall*, 4 Ala. App. 537, 58 So. 740.

To Prove Partnership.—In an action to recover from a partner a debt of the firm, the written agreement under which he and his fellows were doing business having been shown, the testimony of his fellow as to whether they were partners was inadmissible, being an expression of opinion as to the effect of the contract, whose construction was for the court. *Alexander v. Handley*, 96 Ala. 220, 11 So. 390.

§ 212 (4) Statement by Debtor as to Payment.

Declarations of insured after his premium on a life policy became due, made in the course of a partnership settlement in which he had charged himself with partnership debts collected, that he made the collections to pay the premium, but did not do so because he was informed by the secretary of defendant that his policy was cancelled, are hearsay, and are not admissible in an action on the policy. *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

§ 212 (5) Statements to Agents, Employees, or Attorneys.

Declarations Showing Permission to Cut Trees.—In an action to recover the penalty imposed by Code, § 4137, providing that any one who cuts down any tree on the land of another without his consent must pay a certain sum, declarations of defendant to his employees, at the time he directed the cutting, to the effect that he had obtained permission from the owner, are properly excluded, as be-

ing self-serving. *Jernigan v. Clark*, 134 Ala. 313, 32 So. 686.

Statement to Attorney.—Where a party advertises as surviving partner on the advice of his attorney, his statement to the attorney, though not evidence of the facts themselves, may be received in evidence, in connection with the advice given, as showing the grounds on which it was based, and as explanatory of the advertisement. *Edgar v. McArn*, 22 Ala. 796.

Instructions to Master of Boat.—In an action against boat owners for negligence, though defendants show instructions to the master of the boat not to take any freight until he reached a point on the river below that at which plaintiff's cotton, for which the action was brought, was shipped, evidence of the reason assigned by defendants for such instruction, that a full cargo for the boat had been engaged at the points below, is inadmissible. *Steele v. McTyer's Adm'r*, 31 Ala. 667.

§ 212 (6) Statements as to Intent, Motive, or Nature of Act.

Declarations of Husband.—In an action by a married woman to recover a mule alleged to have been bought with her separate earnings, and mortgaged by her husband without her consent, declarations of plaintiff that she intended to purchase a mule, and the subsequent statement of the husband that he had purchased the mule in question for his wife, are inadmissible. *Glaze v. Blake*, 56 Ala. 379.

§ 212 (7) Statements as to Terms or Meaning of Contract.

Declaration When Executing Contract.—In an action on a written agreement, evidence of declaration made by defendant at time of executing it not admissible. *Wesson v. Carroll*, Minor 251.

§ 212 (8) Statements as to Title.

Gift of Mule.—Where, in detinue for a mule, plaintiff claimed under a gift from his father, testimony of a witness that plaintiff had stated that his father gave him the mule was inadmissible. *Couch v. Couch*, 141 Ala. 361, 37 So. 405.

Where, in detinue for a mule, plaintiff claimed it by gift from his father, and de-

defendant claimed it as the administrator of the father, plaintiff's testimony that he claimed the mule as his own, after receiving notice of defendant's claim, was inadmissible. *Couch v. Couch*, 141 Ala. 361, 37 So. 405.

"Plaintiff claimed title to the mule in controversy as donee of Thomas Couch, who was his father, and who died before the beginning of this suit. The defendant, though sued in his individual capacity, is the administrator of the estate of that decedent. A witness, after testifying that plaintiff had possession of the animal for about two years, stated, 'He said that his father gave him the mule,' and this statement was, against defendant's objection, allowed as evidence. In this there was error. The declaration deposed to was not a mere claim of ownership such as might have been admissible as *res gestæ*, explanatory of possession, but, as pointed out in the objection, it was a declaration respecting the source of plaintiff's alleged title, and, being so, was not a proper subject of proof. *Ray v. Jackson*, 90 Ala. 513, 7 So. 747; *Daffron v. Crump*, 69 Ala. 77; *Vincent v. State*, 74 Ala. 274." *Couch v. Couch*, 141 Ala. 361, 37 So. 405, 406.

Title to Lumber.—Where plaintiff in trover against the owner of a tract of land, for conversion of lumber used in constructing a house thereon, claims under a sale by the builder, alleged to have been made by defendant's authority and consent, evidence for defendant of what he said and what authority he gave the builder prior to his sale to plaintiff about the sale of the lumber in the house is admissible, as bearing on the builder's ownership and his right to sell, though plaintiff was not present. *Powers v. Harris*, 68 Ala. 409.

Renting of Land.—The testimony of a witness in forcible entry and detainer that plaintiff told him that he could have the land, or part of it, during a certain year, was inadmissible, because it amounts to nothing more than the mere assertion of a right by plaintiff. *Huffaker v. Boring*, 8 Ala. 87.

Declarations of ownership of a slave, made by a party who is not shown to have had possession at the time, are not admissible evidence for him in a suit in-

volving the title. *Rowan v. Hutchisson*, 27 Ala. 328.

§ 212 (9) Statements after Controversy or Suit Commenced.

Acts or Declarations of Debtors.—

Neither the acts nor declarations of a debtor subsequent to the institution of a suit against him to recover a tract of land sold under execution can be given in evidence against a creditor. *Falkner v. Leith*, 15 Ala. 9.

Declarations after Trespass.—Declarations of a plaintiff in trespass, made in relation to his title after the trespass complained of, are not competent evidence in his own favor. Neither is the act of the sheriff, in omitting to make sale of the property as that of a third person, evidence, when induced by such declarations of the plaintiff after the trespass. *Cox v. Easley*, 11 Ala. 362.

§ 212 (10) Statements by Third Persons in General.

Held, upon the authority of *Abraham & Bro. v. Nunn*, 42 Ala. 51, that the admission as evidence against the objection of defendant, of the declarations of a third person, is in no way connected with the suit, made to the plaintiff, being a witness for himself, is illegal and will reverse the case on error, although it does not appear that any injury resulted from such admission, to the defendant, the bill of exceptions not purporting to set out all the evidence introduced on the trial. *Alabama, etc., R. Co. v. Watson*, 42 Ala. 74.

§ 212 (11) Statements by Agents, Employees, or Attorneys.

Declarations of Deceased Agent.—The terms of a contract made by a deceased agent can not be proved by his report of the transaction to his principal. *Warten v. Strane*, 82 Ala. 311, 8 So. 231.

"So, it was equally incompetent for the plaintiff to prove the terms of the contract made between his deceased agent and the defendant, by the *ex parte* declarations of such agent. It is only where such contract is established aliunde that the report of the transaction by the agent to his principal may be regarded as part of the *res estæ*, and admissible in favor of the principal. *Meyer v. Hearst*, 75

Ala. 390, 394." *Warten v. Strane*, 82 Ala. 311, 8 So. 231, 232.

The declarations of an agent, who is dead, as to the rescission of a contract made by him as such agent, are not admissible in evidence in an action on that contract. *Dickerson v. Hodges*, 1 Port. 99.

§ 212 (12) Statements by Grantors, Assignors, or Former Owners.

Showing Fraud.—Ordinarily the declarations of fraudulent intent made by the vendor after the transfer are not admissible as against the vendee to affect his title. *Bilberry v. Mobley*, 21 Ala. 277; *Strong v. Brewer*, 17 Ala. 706, cited in note in 41 L. R. A., N. S., 20.

§ 212 (13) Written Statements in General.

Endorsement on Note.—A credit indorsed on a note by the plaintiff which is beneficial to him and prejudicial to the defendant is not of itself admissible evidence for the former, and should be excluded from the jury. *Sorrell v. Craig*, 15 Ala. 789.

§ 212 (14) Letters.

Letter of Party.—A letter written by the defendant to the plaintiff, denying the right of one to sign the note in suit, as his agent, but upon certain conditions, which were not complied with, is not evidence for any purpose. *Gayle v. Bishop*, 14 Ala. 552.

Letter of Agent of Party.—In an action of assumpsit, where the plaintiff seeks to recover for goods sold to defendant, a letter written by the agent of the plaintiff, when it is not shown that the defendant saw the letter, or knew that it was written, is a mere *ex parte* statement, and not binding on the defendant, and is, therefore, inadmissible in evidence. *Lehman v. Shiver*, 129 Ala. 318, 29 So. 698.

§ 212 (15) Pleadings.

A bill in equity is not evidence for the party filing it, in an action at law respecting the same subject-matter. *Cawsey v. Driver*, 13 Ala. 818.

Plea in Previous Suit.—Where, in an action for work and labor, defendants filed a plea in set-off for a balance due

from plaintiff, a plea of plaintiff in a previous suit by defendants against him is not admissible in evidence. *Hartsell v. Masterson*, 132 Ala. 275, 31 So. 616.

Answer in Prior Suit.—Where, in a prior suit for the cancellation of certain deeds, witness had filed an answer admitting the allegations of the bill, and such answer was offered in evidence in a subsequent ejectment suit, the witness was not entitled to testify that she afterwards filed an amended answer denying the allegations of the bill. *New v. Young*, 148 Ala. 253, 41 So. 523.

Answer to Bill of Discovery.—The answer of a collector to a bill of discovery filed by his securities against him and the county treasurer is not admissible as evidence for the defendants in a proceeding against the securities and the collector for his failure to collect and pay over the county taxes. *Boring v. Williams*, 17 Ala. 510.

Answer to Garnishment.—A., being indebted to B., gave him his note payable to C., who, A. was informed, had agreed to advance the money on it. Afterwards A. was garnished as the debtor to B., and having answered, judgment was rendered against him, without C. being made a party to the proceeding. Held, that the answer of A. to the garnishment was not admissible as evidence for him in a suit by C. to recover the amount of the note. *McClellan v. Young*, 17 Ala. 498.

§ 212 (16) Affidavits.

On trial of a contested application for letters of administration, the petitioner will not be allowed to read, as evidence, his own sworn application. *Jordan v. Thompson*, 67 Ala. 469.

§ 213. Declarations against Interest in General.

See, also, post, "Declarations against Interest in General," § 217.

"It is an established rule of evidence, that while, in ordinary cases, the mere declarations, of a person as to a particular fact are not evidence of that fact, being regarded as hearsay; yet declarations made by a person which are at variance with his pecuniary or proprietary interest, are admissible in evidence of their own truth, under certain circumstances. These

conditions are, that the declarant possessed competent knowledge of the facts, and is deceased at the time his declarations are proposed to be proved. The absence of any motive of a pecuniary nature, which would tempt him to falsehood, creates a strong and intrinsic probability of the truth of his declaration; and it is, therefore, admitted as secondary evidence, after the death of the declarant, being the best which the nature of the case will, under the peculiar circumstances, permit. 1 Greenl. Ev., § 147; Starkie's Ev. (Shar.) 64; Higham v. Ridgway, 2 Smith's Lead. Cases, 183; 1 Whart. Ev., § 226, et seq. The weight and value of such evidence depends, of course, upon many considerations of a variable character. Raines v. Raines, 30 Ala. 425." Humes v. O'Bryan, 74 Ala. 64, 78.

"The declarations and admissions of a party against his interest are admissible as evidence against him." Dennis v. Chapman, 19 Ala. 29, 31.

As Res Gestæ.—The declarations of one who is in possession of property, either real or personal, explanatory of his possession, are admissible evidence as part of the *res gestæ*. Degraffenreid v. Thomas, 14 Ala. 681; Perry v. Graham, 18 Ala. 822; Fontaine v. Beers, 19 Ala. 722.

Declaration of Payment.—In an action under Code, §§ 3440-3444, to subject a balance due a contractor to the payment of materials furnished, and to establish a lien, declarations of the contractor that he had been paid in full are inadmissible to prove that nothing was due, unless the declarant is dead. Trammell v. Hudmon, 78 Ala. 222.

"The declaration made by Worthington—that Hudmon had paid him all he owed, and that nothing remained due—although competent as an admission against the defendant, was not binding on a third person whose rights might be affected by it. Such declarations, although made against interest, are regarded as mere hearsay, except when it is shown that the declarant is since deceased, and then they are admitted only on the principle, that they constitute the best evidence of which the nature of the case will admit. Humes v. O'Bryan, 74

Ala. 64." Trammell v. Hudmon, 78 Ala. 222, 223.

By Grantee in Deed.—Declarations against interest by one of the grantees in a deed attacked for the grantor's alleged insanity, made after the declarant had parted with his interest in the property, were inadmissible. Pritchard v. Fowler, 171 Ala. 662, 55 So. 147.

§ 214. Declarations of Persons in Possession or Control as to Title of Possession.

§ 214 (1) In General.

Explanatory of Possession.—While the declarations of a party in possession of land or of personal property are admissible as explanatory of his possession, it is not permissible to prove everything he said in respect to the title, how it was acquired, etc., and an inquiry embracing so extensive a scope should be rejected. McBride v. Thompson, 8 Ala. 650; Abney v. Kingsland, 10 Ala. 355; Thompson v. Mawhinney, 17 Ala. 362; Perry v. Graham, 18 Ala. 822; Mims v. Sturdevant, 23 Ala. 664; Ray v. Jackson, 90 Ala. 513, 7 So. 747; 9 A. & E. Ency. Law, p. 12; Nelson v. Iverson, 24 Ala. 9; Shaw v. Cleveland, 5 Ala. App. 333, 59 So. 534, 536; Dent v. Chiles, 5 Stew. & P. 383; Brown v. Brown, 5 Ala. 508, 511.

The declarations of a person who is in possession of property, made in good faith, explanatory of his possession, and showing the character or extent of his claim to the property—whether in his own exclusive right, or as tenant of another; or the capacity in which he holds, as partner, trustee, or agent of another—are competent evidence as a part of the *res gestæ*, whenever the fact of possession itself is pertinent to the issue, no matter who may be the parties to the litigation. Humes v. O'Bryan, 74 Ala. 64.

"While it is admissible to prove the declarations of a party in possession of property, as explanatory of his possession, they must be proved by a witness competent to testify. As an exception to the competency of parties as witnesses, the statute provides: 'Neither party shall be allowed to testify against the other, as to any transaction with, or statement by, any deceased person whose estate is

interested in the result of such suit.' The effect of the testimony of the defendant, which was excluded by the court, would have been, if believed, to increase the amount of the assets of the estate. In such case, the personal representative is incompetent to testify, as against the other party, to transactions with, or statements by his intestate. The exclusion extends to both the adversary parties. Code, § 3058; *Dunlap v. Mobley*, 71 Ala. 102." *Adler v. Pin*, 80 Ala. 351, 353, cited in note in 42 L. R. A., N. S., 306.

Nature of Possession.—The declarations of a party in possession are admissible to explain the nature of his possession—as that he holds under a claim of his own or under that of another,—but they are not admissible to show that he had previously sold the property to a third person. *Hadden's Ex'rs v. Powell*, 17 Ala. 314.

Source of Title.—Declarations by one in possession of property as to the source from which his title thereto was derived are not admissible in evidence. *Vincent v. State*, 74 Ala. 274.

Disparagement of Title.—Declarations made by a person who is in possession of property explanatory of his possession, or in disparagement of his title, are admissible in evidence. *Vincent v. State*, 74 Ala. 274; *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147, 150.

In *detinue*, plaintiff's declaration, made while in possession of the property, that the property belonged to another, is admissible against plaintiff. *Nelson v. Iverson*, 24 Ala. 9.

Declarations of a party in possession of property in regard to his title, made against his interest, are admissible. *Babcock v. Huntington*, 9 Ala. 869.

The declarations of an agent as to the ownership of property in his possession as such agent are not admissible as evidence in a case in which he is a competent witness. *Standefor v. Chisholm*, 1 Stew. & P. 449.

Possession Must Be Established.—Before the declaration of a party can be received in evidence in his own favor, as explanatory of his possession, the fact of possession must be established to the satisfaction of the court; otherwise, the

declarations would be made evidence of the possession itself, or the title, rather than as explanatory of the nature of the possession. *Thomas v. Degraffenreid*, 17 Ala. 602.

§ 214 (2) Real Property in General.

Explanatory of Possession.—"Declarations of a party in possession of land, of the character in which he holds, made in good faith, are admissible in evidence upon an issue of disputed ownership, no matter who may be the party to the litigation. *Daffron v. Crump*, 69 Ala. 77, 79; *Jones v. Pelham*, 84 Ala. 208, 4 So. 22; *Humes v. O'Bryan*, 74 Ala. 64; *Lucy v. Tennessee, etc., R. Co.*, 92 Ala. 246, 8 So. 806; *Steed v. Knowles*, 97 Ala. 573, 12 So. 75." *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935, 938.

Evidence of the declarations of one in possession of land, to the effect that he took possession as the agent of another, is admissible on the question as to the character of such possession. *Kirkland v. Trott*, 66 Ala. 417. See, also, *Bliss v. Winston*, 1 Ala. 344; *Fontaine v. Beers*, 19 Ala. 722.

"It seems to have been an admitted fact, that Hogan was in actual possession of the premises at the time of his declaration to Trott that he had taken possession as the agent of Kirkland. The declaration was explanatory of the nature and character of his possession, and was admissible as part of the *res geste*. *Bliss v. Winston*, 1 Ala. 344; *Fontaine v. Beers*, 19 Ala. 722." *Kirkland v. Trott*, 66 Ala. 417, 420.

Possession of land is a fact, and must be proved as other facts are proved, by legal evidence; and neither unsworn statements of past transactions, nor declarations by the person whose possession is sought to be established, of the purpose for which he was going on the land, are admissible in proof of it. *Mills v. Clayton*, 73 Ala. 359.

While statements explanatory of a possession proven are admissible, the possession itself can not be proven by a statement of the person claiming it, so that a question put to a witness in ejectment as to whether the defendant showed him a deed, and stated that he was in possession of the land embraced, was

properly excluded. *McBride v. Lowe*, 175 Ala. 408, 57 So. 832.

"The declaration of Stephens Brown, as testified to by the defendant Holton, was made while he was in possession of the premises in controversy, and tended to show that he was holding them in his own right, and not as the tenant or agent of another. They were therefore properly explanatory of his possession; and, such possession being pertinent to the issues of this case, the declarations were relevant and competent evidence. *Humes v. O'Bryan*, 74 Ala. 64; 1 Greenl. Ev., § 109. The plaintiff should have requested instructions from the court limiting the effect of this evidence, if he apprehended any injury from its bearing on the merits of the title." *Turnley v. Hanna*, 82 Ala. 139, 2 So. 483, 485.

Declarations as to Source of Title.—

Declarations of one holding by adverse possession under color of title, that he had bought the lands at tax sale, are inadmissible. *Doe v. Clayton*, 81 Ala. 391, 2 So. 24.

Though declarations made by claimants to land as to the source of title, whether in possession or not, are not admissible in evidence against another, a party in possession of land may make declarations explanatory of his possession, either in claim or disclaim of ownership, which will be admissible on the issue of disputed ownership, no matter who may be parties, since possession is the principal fact, and the declarations are part of the *res gestæ* of the possession and are admissible, whether actually on the land or not at the time of the making of the declarations. *Owen v. Moxom*, 167 Ala. 615, 52 So. 527.

"As a general rule, a party's own declarations, made in the absence of his adversary, can not be admitted as evidence for him. An exception to the general rule is that the declarations of one in possession of property, explanatory of the possession, may be received in evidence as constituting a part of the *res gestæ*. His declarations, however, respecting the source of his title, and not explanatory of the possession, are inadmissible. The defense of the statute of limitations having been set up to the present suit, it was necessary for the de-

fendants to show adverse possession under claim of right during the statutory period. For this purpose the declarations of Pelham, while in possession of the property, that he owned it, were admissible, in a proper case, as explanatory of his possession, and as showing an adverse claim. But there is evidence tending to show that he went into possession as the tenant of George, plaintiff's intestate, or by his permission. If such be the fact, his assertion of an independent hostile claim must be brought to the knowledge of Jones, by whose permission he entered into possession, in order to put the statute of limitations in operation. *Wells v. Sheerer*, 78 Ala. 142. His declarations of ownership, made in the absence of George, are not admissible evidence of such fact, and in order that they may be received as evidence of the assertion of an adverse claim for the purpose of putting the statute of limitations in operation against George, if Pelham went into possession by his permission, they should have been connected with proof offered, or proposed to be offered, that such assertion was brought home to him. In the absence of such evidence, or of an assurance that such evidence would be subsequently introduced, they should not have been admitted for the purpose of the defense of the statute of limitations. The testimony of Parsons, if admissible for the purpose of impeaching the witness Hayden, which we do not decide, could not be received for any other purpose." *Jones v. Pelham*, 84 Ala. 208, 4 So. 22, 23.

Permissive Possession.—Where there was evidence that defendant's possession was adverse, and also that it was merely permissive, it was competent to prove a statement, by defendant's husband in her presence, that they (meaning defendant and himself) had no home, as a circumstance indicating whether the land had been held adversely or permissively. *Chambers v. Morris*, 159 Ala. 606, 48 So. 687.

Hearsay Testimony as to Chain of Title.—A chain of title in ejectment can not be proved by hearsay testimony as to what a person did or did not claim. *Hoyle v. Mann*, 144 Ala. 516, 41 So. 835.

Declaration of Loss of Deed.—A dec-

laration of a person in possession of land that he has lost his deed is not admissible in evidence under the rule allowing proof of statements by a party in possession explanatory of his possession. *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, cited in note in 18 L. R. A., N. S., 521.

The declaration of the deceased patentee of land, made when he was on the land, but while he was not living on it and did not claim to own it, that he had sold it to a certain person, is not admissible in favor of plaintiff in ejectment, claiming through such third person. *Aniston City Land Co. v. Edmondson*, 145 Ala. 557, 40 So. 505.

Declarations of Parties Never in Possession.—The rule permitting the introduction in evidence of declarations of ownership by a party in possession for the purpose of establishing adverse possession, does not include acts of parties who have never been in possession. *Lawrence v. Doe*, 144 Ala. 524, 41 So. 612, cited in note in 23 L. R. A., N. S., 369, 371.

To Prove Joint Ownership with Third Person.—The acts and declarations of a party in possession of property are admissible so far as explanatory of his possession, but not to prove joint ownership with a third person, unless notice of them is brought to the knowledge of such third person; but they may be received to corroborate or rebut other evidence to prove the existence of a partnership. *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572.

As to Price of Land.—Statements by the party in possession of land explanatory of such possession are admissible, but declarations as to the person from whom he bought the land, and the price paid, are not admissible. *Dothard v. Denison*, 72 Ala. 541.

§ 214 (3) Self-Serving Declarations Relating to Real Property.

Claim of Ownership.—Claim of ownership by one in possession of lands may be shown by his declarations while in possession. *Henry v. Brown*, 143 Ala. 446, 39 So. 325.

"Claims of ownership of one in possession of lands is an ingredient of ad-

verse possession, and it may be shown by the declarations of the party while in possession. *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369; *Jones v. Pelham*, 84 Ala. 208, 4 So. 22; *Woods v. Montevallo Coal, etc., Co.*, 84 Ala. 560, 3 So. 475; *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382." *Henry v. Brown*, 143 Ala. 446, 39 So. 325, 328.

In an action of forcible entry and detainer, the declarations of the person in possession, showing that he held in his own right, and not as a tenant or agent of another, are admissible as evidence on the principle of *res gestæ*. *Turnley v. Hanna*, 82 Ala. 139, 2 So. 483.

Where defendant, with his family and his father, lived together on the father's land, by his permission, until his death, and there was no evidence that the father was informed that defendant claimed the land adversely, evidence that defendant told third persons that he claimed the land as his own was properly excluded. *Butler v. Butler*, 133 Ala. 377, 32 So. 579.

Declarations as to Incumbrances on Land.—In an action for dower, and a defense of sale thereof, though not evidenced by a conveyance, declarations as to incumbrances on the land in dispute, made at the time of giving a mortgage of the premises by plaintiff's son, who lived thereon and owned the reversion, and who, it was claimed, had also acquired the right to the dower interest subsequently to the sale of her interest by the plaintiff, are admissible for the purpose of showing that the son held the land adversely to plaintiff. *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281, cited in note in 53 L. R. A. 526.

Purchase at Tax Sale.—Declarations of one holding by adverse possession under color of title, that he had bought the lands at tax sale, are inadmissible. *Doe v. Clayton*, 81 Ala. 391, 2 So. 24.

Declaration That Land Belonged to Named Person.—Where defendant claims by adverse possession, testimony by a witness as to an admission by defendant that the land belonged to A. Moore is admissible to show that his title was not adverse to F. Moore, there being evidence to justify an inference

that there was a mistake in the name. *Savery, v. Moore*, 71 Ala. 236.

Declaration of Tenant.—Declarations of ownership by defendant in possession as plaintiff's tenant, or with his permission, made in the absence of plaintiff, and without showing that such declarations were brought to plaintiff's knowledge, are not admissible to show adverse possession. *Jones v. Pelham*, 84 Ala. 208, 4 So. 22.

Statement of Father of Claimant.—In ejectment, wherein plaintiff claimed by adverse possession on the part of her father, it was not error to refuse to permit her to testify that she had heard her father say that he had paid taxes on the land. *Chastang v. Chastang*, 141 Ala. 451, 37 So. 799.

Past Transactions.—Declarations of one in possession of land as to past transactions respecting it are inadmissible; and hence, in ejectment, defendant's witnesses were properly prevented from testifying whether they heard defendant's predecessor say that he and plaintiff had traded lands and had made a certain road the line between the tracts. *Wilkinson v. Bottoms* (Ala.), 56 So. 948.

"It is well settled with us that the declarations of one in the possession of land, 'narrative of past transactions in respect thereto,' are inadmissible. *Dothard v. Denson*, 72 Ala. 541; *Couch v. Couch*, 141 Ala. 361, 37 So. 405, among others. Such was the character of the testimony offered by defendants and excluded by the court. Accordingly there was no error in rulings made the basis assignments 1 to 5, inclusive." *Wilkinson v. Bottoms* (Ala.), 56 So. 948, 949.

Source of Title.—Declarations of one as to the source of her title to land of which she is shown to have been in actual possession are inadmissible in support of her possession. *McCleod v. Bishop*, 110 Ala. 640, 20 So. 130.

"The principle that declarations of one shown to be at the time in actual possession of property, asserting title of ownership in himself, are admissible as *res gestæ*, does not extend to declarations as to the source of his title, or the manner in which he acquired the property. 1 Brick. Dig., p. 843, § 560; *Ray v. Jackson*, 90 Ala. 513, 7 So. 747, and

authorities cited. There was error, therefore, in admitting the testimony objected to, and overruling the motion to exclude it. The same is true of the declaration made by her in the presence of her father. There was testimony by two other witnesses of admissions made by D. H. Bishop that the lands belonged to his wife." *McCleod v. Bishop*, 110 Ala. 640, 20 So. 130.

§ 214 (4) Declarations against Interest Relating to Real Property.

Admission of Another's Title.—Evidence that defendant, while in possession of the land sued for, either before or after the expiration of a period sufficient to ripen an adverse possession into a perfect title, admitted plaintiff's title, may be considered in determining whether defendant's possession was adverse. *Jones v. Williams*, 108 Ala. 282, 19 So. 317, following *Trufant v. White*, 99 Ala. 536, 13 So. 83.

Evidence that defendant, while in possession of the land sued for, either before or after the expiration of a period sufficient to ripen an adverse possession into a perfect title, admitted plaintiff's title, may be considered in determining whether defendant's possession was adverse. *Trufant v. White*, 99 Ala. 526, 13 So. 83, following *Jones v. Williams*, 108 Ala. 282, 19 So. 317.

Evidence that the person claiming by adverse possession had told witness that "the land did not belong to him, but belonged to C.," is competent. *Beasley v. Howell*, 117 Ala. 499, 22 So. 989.

Declarations made by the defendant in execution, while in possession of a slave in controversy, that it did not belong to him, but to his daughter, the claimant, are admissible evidence on a trial of the right of property. *Thomas v. DeGraffenreid*, 27 Ala. 651.

Holding as Agent.—The declaration of a person in possession of land that he took possession as agent of another is admissible in evidence as a part of the *res gestæ* in an action against his alleged principal. *Kirkland v. Trott*, 66 Ala. 417.

Holding as Tenant.—The declaration of a person, since deceased, in the actual occupation of a house made at the time of such occupation, that he held the

house under the defendant as a tenant, is admissible in evidence in a proceeding for forcible entry and detainer, where the only evidence of possession adduced by the plaintiff was that he retained the key of the house after the death of the tenant. *Bliss v. Winston*, 1 Ala. 344.

"The elementary writers upon evidence, consider it a well established exception to the general rule, that the declarations of a deceased occupier of land, that he held as the tenant of another are admissible to prove the seizin of the other, *Phillips on Ev.* 182; 1 *Starkie's Ev.* 70. And *Starkie* adds; 'such a declaration was, in some degree, against his interest, since it would have been evidence against him, by the landlord, in an action for use and occupation.'" *Bliss v. Winston*, 1 Ala. 344, 348.

§ 214 (5) Personal Property.

See, also, ante, "Ownership or Possession of Property," § 88 (6).

In General—Explanatory of Possession.—"As a general rule, the admissions of one in possession, is proper evidence to explain the nature of that possession. *McBride v. Thompson*, 8 Ala. 650." *Webster v. Smith*, 10 Ala. 429, 430; *Nelson v. Iverson*, 17 Ala. 216; *Hadden v. Powell*, 17 Ala. 314; *Mobley v. Bilberry*, 17 Ala. 428; *Thomas v. Degraffenreid*, 17 Ala. 602; *Gary v. Terrill*, 9 Ala. 206; *McBride v. Thompson*, 8 Ala. 650; *Perry v. Graham*, 18 Ala. 822, 825.

"The declarations of *Thomas*, made by him to the defendants while he was in possession of the cotton in controversy were explanatory of his possession, as showing the extent of his claim to it—tending to show that he held it as agent of another, and not as his own, and were, therefore, admissible in evidence to prove the fact of such ownership. *Humes v. O'Bryan*, 74 Ala. 64, and cases cited on page 80." *Drum v. Harrison*, 83 Ala. 384, 3 So. 715, 717.

"The general rule is that the declaration of one made while in the actual possession and control of personal property and explanatory thereof, is admissible in evidence, and this upon the idea that it is a part of the *res gestæ* of such possession. *Mayfield's Digest*, vol. 3, p.

453, § 355." *Cohn, etc., Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853, 855.

Where, in a trial of the right of property, the plaintiff proves possession in the defendant, the declarations of the latter, contemporaneous with and explanatory of such possession, are admissible evidence for one claimant. *Thomas v. Degraffenreid*, 17 Ala. 602.

Declarations of a person in possession of slaves that they belonged to him are competent to explain his possession. *Upson v. Ralford*, 29 Ala. 188.

Explanatory of Possession to Slaves.—Declarations of a party in possession of slaves, explanatory of such possession and in disparagement of title, are admissible in evidence, although he claimed to hold them under a will which was not produced. *Patterson v. Flanagan*, 37 Ala. 513.

The admission of a defendant in execution, made while in possession of the slave levied on, that it belonged to the claimant, and was held under him by hiring, are admissible in evidence in a claim suit against the plaintiff in execution, notwithstanding the statute which excludes the defendant in execution from being a witness in such suits. *Webster v. Smith*, 10 Ala. 429.

Ownership of Money in Sheriff's Hands.—Where a prisoner delivered certain money in a bag to the sheriff who arrested him, declaring it to be the property of A., such declarations are admissible in a suit by A. against the sheriff to recover the property. *Spence v. McMillan*, 10 Ala. 583.

Declarations to Past Transactions.—Declarations of ownership of a slave, when accompanied with possession, are admissible evidence as a part of the *res gestæ*; but declarations referring to a past transaction are mere hearsay, and therefore inadmissible. *Martin v. Hardesty*, 27 Ala. 458, cited in note in 14 L. R. A., N. S., 756.

Declarations of Servant.—"Another fact may be noticed, to wit, that in all the cases where this testimony was admitted the point at issue was whether the party making the declaration was claiming the property himself, or, disclaiming any ownership, acknowledged that he held for another. In none of them

was a party, who was acknowledged by both parties to have no interest in the property, allowed, by his mere declarations, to show that the title to the property was in either one or the other, simply because he had been employed to transport it from one point to another. The fact is that a servant is not in the possession of personal property intrusted to him, but that his possession is the possession of his master. 'A servant's declarations regarding the rights or liabilities of the master are incompetent, in the absence of some proof of express agency and evidence that the statements were within the line of the declarant's duty and made while he was in good faith seeking to discharge it.' 16 Cyc. 1030. It is inconceivable that any court should declare that a mere servant, employed to drive a team, could, by his mere declarations as to the ownership of the team, fix a liability on the master, and that, too, when the servant is present, and can be examined under oath, and made to show whether he knows anything about it." Cohn, etc., *Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853, 857.

Declarations of Slave.—The declarations of an old female slave, who lived at the same house with her grandchildren, respecting her possession of them, are not admissible evidence on the question of ownership, since (other reasons aside) she can not have such possession as will authorize their admission. *Rowan v. Hutchisson*, 27 Ala. 328.

Self-Serving Declarations—Claim of Ownership.—The declarations of a party in possession of personal property are admissible to prove that he claimed the property as his own. *Clealand v. Huey*, 18 Ala. 343.

The declaration of a party while in possession of a slave "that she was his negro, and that he intended to keep her," is admissible in evidence, as part of the *res gestæ*, to prove the character of his possession. *Nelson v. Iverson*, 19 Ala. 95; S. C., 24 Ala. 9.

Showing Ownership of Note.—In an action of trover to recover damages for the conversation of a note, the declaration of plaintiff showing his ownership of the note, made at the time of handing

it to witness, who was requested to send it to another for collection, is admissible. *Donnell v. Thompson*, 13 Ala. 440.

Possession Tortiously Acquired.—The exception to the general rule by which the declarations of the defendant in trover in reply to a demand of the property, when they amount to a reasonable excuse of qualification of his refusal to deliver it, are allowed to go to the jury, does not apply where the possession has been tortiously acquired. *Parker v. Goldsmith*, 16 Ala. 526.

Ownership of Slaves.—The declaration of one in possession of a slave, that it belongs to him, is competent testimony in a suit where the slave was claimed by another. The weight it is entitled to is a question for the jury, under all the circumstances of the case. *Gary v. Terrill*, 9 Ala. 206.

Explanatory of Title.—The declaration of a person, while in possession of a slave, to the effect that her father gave it to her, is not explanatory of possession, but relates to title. *Allen v. Prater*, 30 Ala. 458.

Declarations Showing Possessor Acting as Bailee.—The declaration of one in possession of a slave, made at the time of hiring her to the witness, that the slave belonged to the plaintiffs, who were minors and orphans, is admissible evidence for the plaintiffs in an action of trover subsequently instituted by them for her conversion against a third person, as showing that he was but the plaintiff's bailee, and held the slave in that capacity in subordination to their title, and not adversely. *Barnes v. Mobley*, 21 Ala. 232.

Claim by Mortgagor.—In *detinue* for a mule, plaintiff claimed under a mortgage on the mule executed to him on a sale of the mule by him to the mortgagor, and defendant claimed under a mortgage executed by the mortgagor prior in point of time to plaintiff's mortgage, and it appeared that the mortgagor had been in possession of the mule when defendant's mortgage was executed. Held, that a witness should have been permitted to testify that the mortgagor, at the time he executed defendant's mortgage, claimed the mule as his own. *Holman v. Clark*, 148 Ala. 286, 41 So. 765.

Declarations of Wife.—On a trial of right of property between a wife and an execution creditor of her husband, declarations of the wife, made while in possession claiming title by sale from the husband made prior to the execution levy, are, wherever made, admissible as part of the *res gestæ*. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666.

The declarations of the wife, made contemporaneously with the delivery of money to another person, to the effect that it was her separate property, and did not belong to her husband, are admissible evidence as a part of the *res gestæ*, *secus*, as to her declarations, made at the same time, to the effect that the money was the proceeds of her own labor, under an agreement with her husband that she might retain it as her own. *McLemore v. Pinkston*, 31 Ala. 266.

A wife's assertion of title to chattels, when not made in the husband's presence, nor communicated to him, is not competent evidence for her vendee in an action against him by the husband's administrator, unless such assertion was made while the wife had possession of the property, explanatory of her possession. *Gillespie's Adm'r v. Burleson*, 28 Ala. 551.

Declarations against Interest.—Declaration to Mortgagee's Agent.—In an action by a married woman to recover chattels from a mortgagee of her husband, the declaration of plaintiff to the mortgagee's agent, when he took the property, that it belonged to her, is admissible on the question of ownership. *Glaze v. Blake*, 56 Ala. 379.

Declaration of Mortgagor.—In detinue for an engine purchased by the plaintiffs at a mortgage foreclosure sale, the mortgagor's declaration, made while in possession of the engine and before the mortgage was given, that he had sold it to another and then rented it back, was admissible in evidence. *Shaw v. Cleveland*, 5 Ala. App. 333, 59 So. 534.

Holding as Another's Agent.—The declarations of one in possession of personalty, that he hold it as agent of another, are admissible as evidence of such ownership. *Drum v. Harrison*, 83 Ala. 384, 3 So. 715.

In detinue for property purchased at mortgage sale, declarations of mortgagor

while in possession, that he had sold the property to another and then rented it back, are admissible. *Shaw & Shaw v. Cleveland*, 5 Ala. App. 333, 59 So. 534.

Showing Ownership in Father.—Declaration of the party in possession of personal property that it belonged to his father is competent in the father's behalf against the creditors of the son, and is not objectionable because made after the commencement of the suit. *Beall v. Ledlow*, 14 Ala. 523.

Showing Third Person Joint Owner.—The declarations of one in possession of, and having the charge of, a steamboat, are competent evidence to show that a third person is, with him, a joint owner thereof. *Darling v. Bryant*, 17 Ala. 10.

Ownership in Son.—The declarations of the mother of an infant, while she has the possession of a slave, which she holds as guardian or bailee for her infant son, can not be received in evidence to defeat his rights. Yet if she claims the slave as his property, asserting his title in an open, notorious manner, as adverse to the claim of every one else, it would be admissible to prove, by her acts and declarations contemporaneous with her possession, and tending to show its character, that she held the slave as the property of another, and not for her son. *Nelson v. Iverson*, 19 Ala. 95.

The declarations of a person who is in possession of personal property, that it belongs to his son, are competent evidence, but his declarations as to the source of his son's title are not. *Rawles v. James*, 49 Ala. 183.

Showing Ownership in Brother.—In detinue for a slave, plaintiff claimed under a parol gift from his maternal uncle, and the character of his mother's possession (whether she held as guardian for her infant son, or under a loan as a nurse to herself) was disputed. Held, that her declaration, while in possession, that the slave belonged to her brother, was admissible evidence against the plaintiff. *Nelson v. Iverson*, 24 Ala. 9.

Showing Ownership in Third Person.—“The general rule is, that the declaration of persons in possession of chattels, are always admissible as evidence, with respect to the title being in some other person, but it is difficult to say in advance,

that the rule is applicable to all declarations. Numerous cases are found in the books sustaining this rule, and many of them are cited in the briefs of the counsel." *Spence v. McMillan*, 10 Ala. 583, 587.

Declaration of a driver, after an accident, as to ownership of the team, is not admissible; the object not being to explain the witness' possession, nor the accident, but solely to prove that the property belonged to defendant, and no notice of such declaration having been given it. *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853.

"The proof made by the witness Mayhew of the declarations of Bryant, who was in possession of the boat at the time such declarations were made, was properly admitted by the court. It is a principle of law not any where disputed, that the declarations of a tenant in possession either of real or personal property, explanatory of his possession, showing that he holds in his own right or in subordination to the title of another, constitutes part of the *res gestæ*, and are properly allowable as evidence. This principle is not denied by the counsel for the plaintiff in error; but they insist that the declarations of Bryant are not evidence of the title in Walker, and suppose that the cases of *McBride v. Thompson*, 8 Ala. 650, and *Abney v. Kingsland & Co.*, 10 Ala. 355." *Darling v. Bryant*, 17 Ala. 10, 11.

In an action of trover, the declaration of the defendant, in reply to a demand of the property, that he holds it as the guardian of a third person, and that the plaintiff has no right to it, is not competent evidence in his own favor. *Parker v. Goldsmith*, 16 Ala. 526.

Where certain property was seized under execution while it was in the hands of a third person to whom it had been delivered by the execution debtor, the act of the third person in labeling the property as belonging to the claimant was admissible against the attaching debtor, as such acts are competent when they tend to show that the title is in some one other than the parties in possession. *Brazier v. Burt*, 18 Ala. 201.

"The admission of one in possession of

property, that the title is in another, is admissible, either as a part of the *res gestæ*, or as a declaration against his interest; but it has never been supposed that it was competent for a party to prove by his own declarations, the nature of his own title, though he might admit that he had none, and the title was in another. This question was fully considered in *McBride v. Thompson*, 8 Ala. 650, where it is said the declaration of the person in possession is only proper, to qualify or explain the possession, but that 'declarations to the title, how, when, and from whom he acquired it, are inadmissible.' See also, this question further considered in *Abney v. Kingsland & Co.*, 10 Ala. 355, 360. It is quite obvious, the declaration of E. Dansby, here relied on, goes beyond the limit here assigned to this species of evidence. It does not merely relate to and, qualify the possession of the slaves, but it goes to his own title, and the manner of its acquisition." *Scott, etc., Co. v. Dansby*, 12 Ala. 714, 719.

Declarations of Grantor of Slaves.—

The written declarations of the grantor, while in possession of the slaves conveyed, to the effect that he held for the grantee, are admissible evidence as part of the *res gestæ*, explanatory of his possession. *Johnson v. Boyles*, 26 Ala. 576, cited in note in 20 L. R. A. 111.

§ 215. Declarations as to Boundaries.

§ 215 (1) In General.

Ancient Boundaries.—Hearsay evidence, if pertinent and material to the issue between the parties, should be received to establish ancient boundaries. *Taylor v. Fomby*, 116 Ala. 621, 22 So. 910.

Declarations of Third Persons.—To render admissible in evidence the declaration of persons other than the owner who was in possession at the time of making the declaration, for the purpose of showing ancient boundary lines, it must be shown that the person who made said declaration was dead, and that he had had an opportunity to know and *prima facie* had the knowledge whereof he speaks, and had been on the land at the time of making the declaration, or was in possession of it when he made the declaration. *Barrett v. Kelly*, 131 Ala. 378, 30 So. 824.

§ 215 (2) Title or Interest at Time of Declaration.

Declarations of Defendant.—Where plaintiff sought to maintain ejectment upon prior possession under claim of title, maintaining that defendant, after the true line was ascertained surrendered possession, evidence of defendant's declarations at the time of investigation and survey of the line is admissible. *Hornsby v. Tucker* (Ala.), 61 So. 928.

Where defendant set up adverse possession in an action of ejectment, evidence of his declaration and acts when the true division line between the lands of the parties was ascertained by survey is admissible. *Hornsby v. Tucker* (Ala.), 61 So. 928.

Acts and Declarations of Codefendants.—In an action for trespass involving the location of a boundary line, cross-examination of a defendant as to acts and declarations of a codefendant concerning the location of the boundary, and cross-examination of defendants' witnesses relative to the same matters, was proper, as bearing on the character of the codefendant's possession. *Cooper v. Slaughter*, 175 Ala. 211, 57 So. 477.

§ 215 (3) Declarations by Third Persons in General.

Persons Holding Possession but Not Title.—A permission by one in possession of a lot to another, claiming a part of it, to move the fence so as to take in a part of the lot, may be given in evidence, upon a question of boundary, as an admission of the person then in possession against his interest, though a stranger to the title. It would not be conclusive, even if made by one claiming title, or by his authorized agent. *Farmer's Heirs v. City of Mobile*, 8 Ala. 279.

§ 215 (4) Declarations by Adjoining Owners.

Declarant Available as Witness.—In an action in which the boundary line of land comes in dispute, the declaration of one owning on the opposite side of the disputed line is not admissible as evidence, where it does not appear that he could not be had as a witness. *Lamar v. Minter*, 13 Ala. 31.

§ 215 (5) Declarations by Former Owners.

When Former Owner Was in Possession of Land.—Where M., while riding over the land in controversy with plaintiff, prior to plaintiff's purchase thereof, without any intent to misrepresent, stated to plaintiff, "These are our woods, the line is further out there," such declaration was admissible in ejectment as a declaration made respecting boundaries at a time when M. was in possession of the land. *Driver v. King*, 145 Ala. 585, 40 So. 315.

§ 215 (6) Declarations by Deceased Persons in General.

Deceased Officer of Corporation.—Evidence of declarations of deceased officers of a corporation owning real estate as to the location of the boundaries thereof, not shown to have been made when the officers were discharging some duty in reference thereto, is hearsay and inadmissible in behalf of the grantee of the corporation in a suit with a third party involving the boundary. *Southern Iron Works v. Central of Georgia Ry. Co.*, 131 Ala. 649, 31 So. 723.

§ 215 (7) Deceased Former Owners.

Deceased Grantor.—A party in ejectment may introduce in evidence declaration of his deceased grantor, made while on the land or in possession of it, as to its boundaries. *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

§ 216. Declaration in Course of Business or Performance of Duty.

Declaration of Cashier of Bank.—It was error to permit defendant to testify that the cashier of the bank with which the bond was to have been filed told him that no bond had been filed with the bank, the declaration not being in the usual course of business. *Equitable Mfg. Co. v. Howard*, 140 Ala. 252, 37 So. 106.

(B) BY DECEDENTS AGAINST INTEREST.

See, also, ante, "Declaration against Interest in General," § 213.

§ 217. Declarations against Interest in General.

As a general rule, the declarations of a third person are regarded as mere hear-

say, and are not competent evidence; yet, they become competent, as the best evidence of which the nature of the case will admit, when it is shown that they were against the interest of the declarant when made, that he had competent knowledge of the facts stated, and that he is since deceased. *Humes v. O'Bryan*, 74 Ala. 64.

Declarations or entries made by a person since deceased, against his interest at the time, are admissible as evidence against a third person whose rights may be affected. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41, cited in note in 52 L. R. A. 595.

Nonexistence of Partnership.—In an action against a surviving partner for goods sold, statements by the deceased that there was no partnership when the goods were sold, the firm being insolvent at the time of the statements, are admissible, as against interest. *Humes v. O'Bryan*, 74 Ala. 64.

The defendant in this case being sued as partner in a mercantile business with a person since deceased, by whom the business was conducted; held, that the acts and declarations of the deceased while in possession of the goods, and carrying on the business, so far as they were explanatory of his possession, as indicating whether the goods were his own, or were claimed by him as joint partner with another person, were competent and admissible as evidence, as part of the *res gestæ*; but were not admissible evidence, as against the defendant, of the existence of the alleged partnership, unless some notice or knowledge of them was brought home to him; though they were relevant to corroborate or rebut, as the case may be, other evidence offered to prove the existence or nonexistence of such partnership. *Humes v. O'Bryan*, 74 Ala. 64.

Makers of Note Showing Nonpayment of Debt.—Declarations made by one of the makers of a note secured by a mortgage executed by the other makers to the effect that all the debt had not been paid are declarations against interest, and admissible after his death to prove nonpayment. *Burton v. Phillips*, 161 Ala. 664, 49 So. 848.

"The trial court erred in not letting the witness Busby testify as to a conversation he had with 'Squire Wright with

reference to the mortgage debt due the defendant. He signed the note with the plaintiffs, and was liable for the debt, and his declarations, tending to show that the notes had not been paid, were against his interest. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41; *Humes v. O'Bryan*, 74 Ala. 64; *Camp v. Dill*, 27 Ala. 553." *Burton v. Phillips*, 161 Ala. 664, 49 So. 848, 849.

Disclaimer of Interest in Partnership.—Where the creditors of an estate contest a report of its insolvency, and seek to establish for the decedent a partnership interest in a mercantile firm which was not included in the administrator's schedule of assets, the admissions of the decedent to the effect that he was not a partner are competent evidence for the administrator, as being against interest. *Raines' Adm'r v. Raines' Creditors*, 30 Ala. 425.

§ 218. Disparagement of Title.

Declarations Disproving Possession.—In ejectment, where defendant claimed under adverse possession by inheritance from H., having offered evidence of his possession for twenty years before his death, declarations by H. before his death as to his efforts to buy the land, whether he was on the land at the time or not, etc., were admissible as declarations against interest which tended to disprove his possession and were erroneously excluded. *Knight v. Hunter*, 155 Ala. 238, 46 So. 235.

§ 219. Statements as to Fact or Nature of Transfer or Gift.

Declaration of Grantor of Grantee's Possession of Deeds.—Where in ejectment the issue was as to the delivery of certain deeds by a grantor to or for the plaintiff, testimony of a person, who had leased timber on the land in question, that when he went to the grantor to make the lease he was sent to the plaintiff and her husband, the grantor telling him that they had the deeds, and that he then went to them and found the deeds in their possession, was admissible as an admission against interest to show possession of the deeds in the plaintiff with the knowledge and approval of the grantor. *Napier v. Elliott (Ala.)*, 58 So. 435.

Declarations of Father as to Gift of

Land.—Where defendant and his father lived together on his father's land until his death, when defendant claimed the land by adverse possession as against plaintiffs, the other heirs, evidence of declarations of the father that he had given the land to defendant was inadmissible. *Butler v. Butler*, 133 Ala. 377, 32 So. 579.

Not Intended as Advancement.—On a distribution contest under Rev. Code, § 1907, any acts or declarations of the decedent tending to show that any particular property given or lent by him to a distributee was not intended as an advancement, is competent evidence for the distributee. *Clements v. Hood*, 57 Ala. 459.

(C) AS TO PEDIGREE, BIRTH, AND RELATIONSHIP.

§ 230. General and Family Reputation.

Relationship of Parent and Child.—General reputation and common report in the neighborhood is admissible to prove the relationship of parent and child and legitimacy. *Lay v. Fuller* (Ala.), 59 So. 609.

Treatment as Child.—Evidence that deceased was treated by a negro couple as their child was admissible on the issue whether he was a negro. *Locklayer v. Locklayer*, 139 Ala. 354, 35 So. 1008.

Children of Slaves.—In an action of trover to recover slaves, it is irregular to ask a witness whether some of the slaves were reputed by the family of the defendant as the children of another of them. To let in the declarations of third persons in case of pedigree, it must be shown that they are dead. *White v. Strother*, 11 Ala. 720.

"The question asked the witness as to the reputation in the defendant's family of the relation between Silvey and the other slaves, does not come within the rule of hearsay evidence, as applicable to proof of pedigree. Hearsay evidence is never admissible, even in such cases, except to prove the declarations of deceased persons. *Phil. on Ev.* 238; *Greenl. Ev.* § 103. The reputation of relationship, if it existed, in the family, must have arisen from the knowledge of the fact, in some of the members, and their subsequent declarations to others, or from the acts

and conduct of the slaves themselves, or of the whole members of the family, towards them, and in either case the individuals making the declaration, or witnessing the acts and conduct, would furnish better evidence." *White v. Strother*, 11 Ala. 720, 724.

Age of Plaintiff.—On an issue as to plaintiff's age, the evidence of his brother and brother-in-law as to the understanding on the point in plaintiff's family is inadmissible. *Rogers v. De Bardeleben Coal & Iron Co.*, 97 Ala. 154, 12 So. 81.

"The plaintiff introduced two witnesses who testified, against the objection of the defendant, the one that he was the brother, and the other that he was the husband of the sister, of the plaintiff, and each that he knew the reputation in plaintiff's family as to his age, and that reputation was that he was under twenty-one years; and the defendant moved to exclude from the jury the testimony of these witnesses, on the ground that it was illegal and hearsay, and the court granted the motion, and excluded the evidence. We hold there was no error in this ruling, because, as we long ago held, approved by a later rendering, 'hearsay evidence is never admissible in such cases [pedigree and age] except to prove the declarations of deceased persons. The reputation of relationship, if it existed, in the family, must have arisen from the knowledge of the fact in some of the members, and their subsequent declaration to others, or from the acts and conduct of the person whose pedigree or age is the subject of inquiry, or of the members of the family towards him, and in either case the individuals making the declaration or witnessing the acts and conduct would furnish better evidence.' *White v. Strother*, 11 Ala. 720, 724; *Cherry v. State*, 68 Ala. 29. In this latter case it was said: 'The better opinion seems to be that the declarations of third persons can not be admitted to prove pedigree, [held to embrace particular facts of birth, marriage, and death, and the times when these events may have happened], unless it is shown that they are deceased.' 1 *Greenl. Ev.* § 104; 2 *Greenl. Ev.* § 103; 1 *Phil. Ev.* p. 211; 2 *Best, Ev.* § 498; *Inhabitants of Braintree v. Inhabitants of Hingham*, 1 *Pick.* 245. There is no error

in the record, and the judgment is affirmed." *Rogers v. De Bardelaben Coal, etc., Co.*, 97 Ala. 154, 12 So. 81.

§ 221. Declarations by Members of Family.

§ 222. — In General.

Family Conduct of Slaves.—The acts and conduct of slaves towards each other, as family conduct, may be shown in evidence, and the conduct of a slave child in calling another slave mother is a circumstance which may be proved to a jury to identify the relation of mother and child. *White v. Strother*, 11 Ala. 720.

§ 223. — By Deceased Members.

To Establish Parentage or Descent.—Declarations of deceased members of a family are admissible to establish the parentage or descent of a particular individual whose relationship is the subject of investigation. *Rowland v. Ladiga's Heirs*, 21 Ala. 9.

§ 224. — Necessity That Declarant Be Dead.

Death Must Be Shown.—To render a declaration by a member of the family of decedent that he is dead admissible on the theory of pedigree evidence, it must appear, also, that the person making the declaration is dead. *Chambers v. Morris*, 159 Ala. 606, 48 So. 687.

"Evidence of the declarations of the physician and the neighbors as to the death of Varnum were hearsay, and by no rule of evidence admissible; and to render declarations made by a member of the family of the deceased admissible as to such death, on the theory of pedigree evidence, it must appear, also, that the party making the declaration is dead, since, if living, his testimony would be not only obtainable, but the best evidence, *Elder v. State*, 124 Ala. 69, 27 So. 305; *White v. Strother*, 11 Ala. 720." *Chambers v. Morris*, 159 Ala. 606, 48 So. 687.

§ 225. — Relationship to Family.

Showing Deceased Member of Family.—It is only necessary to show that a declarant, since deceased, was a member of a family to which it is sought to attach a third person, to render proofs of the

statements of the declarant with respect to the pedigree of the third person admissible in evidence. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26, cited in note in 36 L. R. A., N. S., 531.

"The principles of law are few and well understood on this question, to wit: That, in matters of pedigree, the general reputé in the family may be testified to by a member of the family; also that declarations by the deceased himself, and declarations by persons who are shown by other evidence to be members of the family, may be proven, provided such members are dead. Such declarations by members of the family must be made, either upon what said members know to be the general reputé in the family, or on what said members have heard other members of the family say. A declaration which merely expresses information collected from persons not qualified to be declarants, or from other sources than family tradition, or the statements of other members of the family who knew the facts, is not admissible. It is also true that, where a declaration of a member of the family is sought to be proved, the declaration itself should be proved, and not the declaration of the witness from it. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26, 27.

In *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26, cited in note in 36 L. R. A., N. S., 531, the declarations of the plaintiff's mother were held to be inadmissible because her statements were not those of a person having knowledge of the facts. The ground of objection was not that the person making the declarations was not shown to be a member of the family of the decedent, "for, of course," in the language of the opinion, "that is the thing to be proved by the statements; and it would be only necessary to show that the declarant was a member of the family to which it is sought to attach [the deceased] by her statements." The court went on to say that if the mother had said that she had a sister living where the deceased lived, whose name was the same as the deceased, and whose husband was named the same as the deceased's husband, then that would have been properly admitted as a statement of a deceased member of the family.

§ 226. — Mode and Form of Declaration.

Contradictory Statements.—The proof of contradictory statements made by a witness may affect his credit, but the statements thus made are not evidence of the facts stated, especially when the person whose statements are thus offered could not himself have been a witness. *Gayle v. Bishop*, 14 Ala. 552.

Proof Receipt of Letters.—On the issue whether a decedent, dying domiciled in Alabama, was a sister of a woman who died in Switzerland, and an aunt of the children of the latter, the testimony of a child, living in Switzerland, that his mother stated that her sister lived in the United States and that she used to receive letters from her, that his knowledge of the fact that decedent's maiden name was the family name of his mother and that decedent married, was from documents received from Alabama, without showing any declaration of his mother that decedent was a member of her family, was inadmissible. *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26, cited in note in 36 L. R. A., N. S., 53.

(D) PROOF AND EFFECT.

§ 227. Mode and Requisites of Proof of Declarations.

Failure to State Precise Time of Declaration.—The circumstance that a witness who is called to testify to the declarations of another can not state the precise time or place, or the names of the persons present, goes only to his credibility, and not to the admissibility of the testimony. *Walker v. Blassingame*, 17 Ala. 810.

Condition of Property Three Years Previous to Declaration.—The declarations of one in possession of personal property as to the ownership are not evidence of the condition of the same property more than three years before the declarations were made. *Bilberry v. Mobley*, 20 Ala. 260.

Conversation between Parties.—In assumpsit by plaintiff against his commission merchants to recover damages for losses on cotton, plaintiff introduced proof of a conversation between himself and defendants, for the purpose of showing that he had instructed them to sell his cotton,

and not to hold it. Held, that the fact of instructions must be determined from the whole conversation, as brought out on direct examination and cross-examination, and that the court properly refused to instruct the jury upon the effect of a particular portion of it only. *Ward v. Winston*, 20 Ala. 167.

IX. HEARSAY.

§ 228. In General.

§ 228 (1) Nature of Hearsay Evidence and Admissibility in General.

General Rule.—Hearsay evidence is inadmissible. *Scales v. Desha*, 16 Ala. 308.

Reason for Hearsay Rule.—Hearsay is excluded because the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated, and that the original statement, even if correctly reported, is not under the safeguards of the personal responsibility of the author as to its truth or the test of cross-examination. *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696.

"The reasons for the rule excluding hearsay or derivative evidence are not difficult to discover, 'for, apart from the circumstances that the probabilities of falsehood and misrepresentation, either willful or unintentional, being introduced into a statement, are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely even been made under the safeguards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy.' *Rice on Ev. (Civ.)* vol. 1, p. 367, § 212; *Reynolds, Theory of Ev.* §§ 16, 17; 1 *Greenl. (15th Ed.)* § 99; 11 *Am. & Eng. Ency. Law*, 521; 16 *Cyc.* 1196; *Glover v. Millings*, 2 *Stew. & P.* 28, 43; *Brooklyn, etc., Ins. Co. v. Bledsoe*, 52 Ala. 538, 549; *Mima Queen v. Hepburn*, 11 U. S. 291, 3 L. Ed. 348; *Hereford v. Combs*, 126 Ala. 369, 28 So. 582." *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696, 697.

Exclusion of Hearsay Evidence.—Evidence which appears to be hearsay should be excluded. *Moore v. Maxwell & Delhomme*, 155 Ala. 299, 46 So. 755.

To Prove Agency and Partnership.—Hearsay evidence is not admissible to prove the existence of an agency and partnership. *St. Louis & T. R. Packet Co. v. McPeters*, 124 Ala. 451, 27 So. 518.

"Reputation, or common report, of either the present or former residence of any voter, is not legal evidence. Neither are declarations of a party, that he has lived in a particular place or country, evidence that such is the fact, when the question arises in a contest between other persons." *Griffin v. Wall*, 32 Ala. 149, 160.

Report as to Ownership of Property.—"The evidence offered by the sheriff, in excuse, was, 'that he was informed by the debtor and his wife, that the property in his (the debtor's) possession, to wit, a negro woman and child, belonging to his (the debtor's) wife; also, that it was the understanding in the neighborhood, that the negroes belonged to the debtor's wife, or to the father of the wife, who lived in Georgia; and that he was informed of the same matters, by persons who said they knew all about the property in Georgia; and that it had been loaned to the debtor's wife. This evidence was objected to, but admitted, by the court, to go to the jury.' The evidence was clearly inadmissible. It amounted only to hearsay evidence, and did not tend to prove any fact, as to the liability of the property to the execution." *Robertson v. Beavers*, 3 Port. 385, 386.

Statements from Personal Knowledge.—In an action of ejectment, it is competent for the widow of one of the persons through whom the defendant claimed to testify that her husband purchased the land in dispute from the original entryman, giving the time of such purchase; and such testimony is not subject to the objection of being hearsay, when the statement is made by the witness as of her own personal knowledge. *Anniston City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61.

Purchase of Land by Wife.—The testimony of a witness that he knew the time the wife bought the land was not objectionable as hearsay, but was admissible to fix the date. *Elam v. Brewer Lumber Co. (Ala.)*, 57 So. 483.

Where, in a suit by a creditor of a husband to set aside, as fraudulent, a deed

to his wife of real estate purchased and paid for by him, there was evidence that \$600 was paid to the vendor as a first payment, evidence of the father of the husband and executor of the wife, since deceased, that she gave him \$500 to keep for her, and that he returned the money and loaned her \$100 to make the first payment, was not objectionable as hearsay, though he was not present when the money was paid to the vendor. *Elam v. Brewer Land Co. (Ala.)*, 57 So. 483.

Earning of Money by Wife.—Evidence as to how the wife earned the money alleged to have been paid to the vendor, and evidence of a third person obtaining a loan for her to make a payment on the land, was not objectionable as hearsay. *Elam v. Brewer Lumber Co. (Ala.)*, 57 So. 483.

Statements between Wife and Purchaser.—In an action against a husband for a broker's commission for selling the wife's land, testimony that another told defendant that plaintiff tried to sell him the property at a profit above the figure the wife asked, and as to what was said between the wife and one of the purchasers, was inadmissible. *Green v. Brady*, 152 Ala. 507, 44 So. 408.

Positive Facts from Own Knowledge.—Testimony that the macadam delivered was the identical macadam examined by the buyer, and was the amount purchased, and was delivered as agreed, is not hearsay, where the witness testified to the facts positively and of his own knowledge. *Moore v. Barber Asphalt Pav. Co.*, 118 Ala. 563, 23 So. 798.

Estimates of Work.—Where the contract for the construction of a railroad provided that estimates of the work done, certified to by the chief engineer of the railroad company, should be accepted as correct, unsworn ex parte estimates made by an agent of the company are hearsay and inadmissible. *Tennessee & C. R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502.

"The statements of estimates made out and rendered by Nourse to the defendant were not admissible as evidence. By the terms of the contract, the estimates certified to by the engineer in chief were to be accepted as correct, and were binding upon both parties; but this provision of

the agreement did not include any other estimates. Those by Nourse were ex parte, and were made by him for the defendant as its agent, and for its own purposes. These statements were not sworn to, and fall within what is denominated hearsay evidence. They are of the same character as the reports of section foremen or engineers of railroads made of injuries and casualties which occur in operating trains, and which we held, in the case of *Culver v. Alabama, etc., R. Co.*, 108 Ala. 330, 18 So. 827, to be inadmissible as original evidence. The court erred in the admission of these statements." *Tennessee, etc., R. Co. v. Danforth*, 112 Ala. 80, 20 So. 502, 504.

Proving Residence by Hearsay.—In an action against a railroad company by the personal representative of a brakeman who was killed while in its employ, a question put to the conductor whether he did not, on the night of the accident, or the next day, telegraph the superintendent that deceased lived in another state, and to send his body there, is properly excluded to prove the residence of deceased, since it is hearsay. *East Tennessee, V. & G. Ry. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

Statement of Surgeon to Patient.—While the plaintiff may prove the nature of a dangerous surgical operation, to which he was subjected in consequence of the injuries received by him, as circumstances to be considered in determining his anxiety and suffering, he can not be allowed to testify to what the surgeon said to him at the time, such declarations being mere hearsay. *Alabama, etc., R. Co. v. Arnold*, 80 Ala. 600.

"While the nature and danger of the operation to which plaintiff was subjected are proper circumstances to be considered in determining the anxiety and mental and physical pain caused thereby, and while it may have been proper to show the mere fact that he was informed, without calling for the declaration themselves, it is not permissible to prove by the plaintiff for any purpose what the surgeon said to him. They do not fall within any of the exceptions to the general rule of the admissibility of hearsay evidence. *Blackman v. Johnson*, 35 Ala. 252; *Vicksburg & Mer. R. R. Co. v. O'Brien*, 119 U.

S. 99 [7 Sup. Ct. 118, 30 L. Ed. 299]." *Alabama, etc., R. Co. v. Arnold*, 80 Ala. 600, 609.

To Prove Soundness of Slave.—In order to show fraud in a vendor of a slave in warranting her soundness, it is not competent for a witness in a suit on the notes given for the purchase price to testify that he told the agent of the vendor that the slave told him she was unsound, thus showing a scienter; the evidence being merely hearsay. *Stringfellow v. Mariott*, 1 Ala. 573.

Collection of Notes.—Where, in reply to the debtor's claim that the account had been partially paid by a delivery of corn to the creditors, one of them testifies that they had paid for the corn by turning over some of their notes to the debtor, testimony by the debtor that the creditors had subsequently collected these notes, "which I can prove," is properly excluded as hearsay, since the natural import of the language is that the debtor had no personal knowledge of the collection. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834, cited in note in 52 L. R. A. 598.

Hearsay Opinion of Partner.—In an action against a partnership, evidence by a partner that his partner or the firm had never been notified of a certain fact is inadmissible, as hearsay or opinion. *Dunn & Lallande Bros. v. Gunn*, 149 Ala. 583, 42 So. 686.

Explanation Rendering Testimony Hearsay.—Where a witness in ejectment testified as to occupancy, and then added that he was too young to remember that now, his explanation rendered his testimony hearsay. *Hardy v. Randall*, 173 Ala. 516, 55 So. 997.

Payment for Telegraph Message.—Where, in an action against a telegraph company for failure to deliver a message sent by plaintiff, plaintiff testified that defendant's agent accepted a charge for the message, but did not say who paid the charge, or that any one else told her that the charge was paid, defendant's motion to exclude her evidence on the ground that her knowledge of the payment was hearsay was properly overruled. *Western Union Telegraph Co. v. Westmoreland*, 150 Ala. 654, 43 So. 790.

§ 228 (2) Hearsay Evidence of Opinions.

Criticism of County Official.—Evidence in assumpsit to recover a sum deposited in bank by mortgagor and claimed by plaintiff mortgagee after rescinding the mortgage that plaintiff's business dealings with mortgagor as a county official had been the subject of criticism was objectionable as hearsay. *Batson v. Alexander City Bank (Ala.)*, 60 So. 313.

§ 228 (3) Evidence of Death.

Declarations of Physician.—Declarations of the former physician and neighbors of a person that he is dead are hearsay. *Chambers v. Morris*, 159 Ala. 606, 48 So. 687.

§ 229. — Oral Statements.**§ 229 (1) Conversations with Third Persons.**

Conversation between Engineer and Superintendent.—A witness having testified that, when plaintiff was preparing for the trip on the engine with the defective lubricator, he heard plaintiff ask defendant's superintendent in charge of preparing engines if the work on the lubricator had been done, and heard him state that if the work had not been done, he was not going out on the engine, witness' testimony that, after plaintiff had left the room in which the conversation occurred, the superintendent asked the foreman if he had done such work, and he replied that he had, but that the lubricator was broken, but might make the trip, was not admissible as hearsay; it going to show, not that the lubricator was in a defective condition, but that the superintendent had notice of the defect, and was admissible for that purpose. *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52.

Statement as to Working in Mine.—Where in an action for the negligent death of a minor, one of the controverted facts is the experience which the deceased, a minor, had in mining, testimony of a witness that he had been told by deceased that he worked at another mine is not hearsay. *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441, 49 So. 916.

Conversation between Conductor and Passenger.—Where a passenger was

killed while attempting to alight from a moving train, it was competent for the conductor to testify that he made inquiry of a passenger concerning whether decedent had left the train and the result of the inquiry; but the details of the conversation between the conductor and passengers as to the decedent's whereabouts were inadmissible as hearsay. *Louisville, etc., R. Co. v. Dilburn (Ala.)*, 59 So. 438.

Conversation with Partner.—Testimony of witness that it was his understanding from a conversation with a partner that defendant, a partnership, purchased property alleged to have been converted held not hearsay, but evidence of that fact. *J. R. Kilgore & Son v. Shannon & Co.*, 6 Ala. App. 537, 60 So. 520.

Statements Regarding Newspaper Publication.—Where defendant published in the newspaper observations of a citizen, written by one having no connection with the paper, concerning plaintiff's conduct in office, a question whether the writer had not told persons that the article referred to plaintiff was objectionable as hearsay. *Parsons v. Age-Herald Pub. Co. (Ala.)*, 61 So. 345.

Statement of Physician.—It was proper not to permit plaintiff to be asked whether a physician had told him that, if he did not stop drinking, it would render him insane. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113.

Statements of Plaintiff's Foreman.—What plaintiff's foreman told a witness, after plaintiff had been injured, as to the place where plaintiff was working when injured was hearsay and inadmissible. *Owen v. Alabama, etc., R. Co. (Ala.)*, 61 So. 924.

Number of Days Boat Worked.—In an action for rent of a boat, defendant could not testify as to what an employee told him as to the number of days the boat worked during a particular week when witness was absent; such testimony being hearsay. *Dickens v. Murray & Peppers*, 163 Ala. 556, 50 So. 1019.

Conversation between Sheriff and Witnesses.—In detinue for a mule, evidence of a conversation between the sheriff and witness when the sheriff went to execute the writ was inadmissible. *Beal v. McKee*, 150 Ala. 478, 43 So. 235.

Offer to Loan Money.—Evidence that

the assured spoke of the premium becoming due on his life policy, and mentioned the source from which he expected to obtain money to pay it, and that the witness offered to loan the requisite amount, is inadmissible in an action on the policy, as it is hearsay. *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538.

§ 229 (2) Statements in General.

The statements of third persons, not made in the party's presence, are hearsay and inadmissible. *Barker v. Coleman*, 35 Ala. 221, cited in note in 24 L. R. A., N. S., 254; *Wiswall v. Knevals*, 18 Ala. 65; *Alabama, etc., R. Co. v. Watson*, 42 Ala. 74.

A witness may speak of a conversation which he heard, although he was not a party to it or interested in it. *Burt v. Henry*, 10 Ala. 874.

Statements by Tenant.—In an action to recover a cow and calf taken from plaintiff's farm by defendant, plaintiff's testimony as to statements regarding the taking made to him by his tenant should be excluded as hearsay and incompetent. *Carwile v. Carwile*, 131 Ala. 603, 31 So. 568.

Persons Not Privy to Transaction.—In an action of ejectment, declarations made by persons not in privity with defendants constitute hearsay testimony, and are inadmissible. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

Statement of Agent of Carrier.—To prove that a consignment of goods sold was to the seller's order "Notify J. E. C.," testimony of the purchaser's general manager that the commercial agent of the carrier notified him over phone that such was the fact is inadmissible as hearsay. *St. Louis Hay & Grain Co. v. American Cast Iron Pipe Co.*, 167 Ala. 442, 52 So. 904.

Statement of Person in Audience.—In an action against a theater proprietor for damages for insulting and defamatory language addressed to plaintiff by a performer who had invited plaintiff to go on the stage, a remark by a person in the audience after plaintiff left the stage was hearsay. *Interstate Amusement Co. v. Martin* (Ala.), 62 So. 404.

Declarations to Sheriff.—In an action for malicious prosecution, declarations of

the sheriff to the plaintiff, not made in the presence of defendant, are inadmissible. *Motes v. Bates*, 80 Ala. 382, cited in note in 14 L. R. A., N. S., 746.

Statement of Telegraph Messenger as to Receipt of Message.—One testifying to the receipt by him of a telegram from plaintiff requesting him to notify defendant that a shipment of cotton was not the property of the shipper, but was plaintiff's, can not testify as to what the messenger said when he returned with reference to defendant's receipt of the telegram. *Moore v. Robinson*, 62 Ala. 537.

Declarations of Subtenant.—In an action by a landlord against one who, having notice of the landlord's lien for rent, carried away a crop from the leased premises, evidence of declarations made by the subtenant from whom defendant obtained the crop to the effect that it was not raised on the leased premises is inadmissible in favor of defendant. *Lavender v. Hall*, 60 Ala. 214.

Declarations of Partner in Crime.—In an action for slanderously stating that plaintiff had had intercourse with a man not her husband, the declarations of the alleged paramour, made to persons other than the defendant, as to his intercourse with plaintiff or his conduct generally, and as to his reason for leaving the community, are hearsay and admissible, even under a statute allowing the circumstances under which the words were spoken to be proved in mitigation of damages. *Webb v. Gray* (Ala.), 62 So. 194.

Nor are such statements admissible as tending to prove plaintiff's general character or the truth of the words constituting slander. *Webb v. Gray* (Ala.), 62 So. 194.

Act Not in Presence of Party.—Testimony of the acts of the man, with whom plaintiff was said to have had illicit intercourse, which were not in the presence of the defendant, is not admissible. *Webb v. Gray* (Ala.), 62 So. 194.

Declarations of Slaves.—In an action of trover for the conversion of slaves, the declaration of the slaves are not admissible in behalf of the defendant, unless shown to be part of the *res gestæ* connected with the alleged conversation. *Gimon v. Baldwin*, 38 Ala. 60.

Declarations as to Purpose of Hauling.

—The creditor proved that A., the year he applied to be declared a bankrupt, had hauled with a dray and team, managed by a slave named D., a large quantity of wood, which he sold for a considerable sum of money. To rebut this, A. offered to prove that one E., at the time said hauling was done, had declared in his (A.'s) presence, that the hauling was done on his (E.'s) account. Held, that the declaration of E. were properly excluded. *Gilbert v. Bradford*, 15 Ala. 769.

§ 229 (3) Bodily and Mental Condition.**Statement as to Warranty of Horse.—**

In a suit for damages for the breach of a warranty of a horse, the testimony of one of plaintiffs that his coplaintiff and partner told him on his return home with the horse which he had purchased that defendant had warranted him to be sound, defendant not being present, is inadmissible because it is mere hearsay, relating to a past transaction. *Smith v. Flagg*, 46 Ala. 624.

The declarations of a physician with respect to the health of a slave are not competent. *Blackman v. Johnson*, 35 Ala. 252.

Statement of Purchaser of Slave.—To prove notice by the seller of the unsoundness of a slave, the testimony of a witness, who had returned the slave after a prior purchase, as to what he had told the seller's agent of her unsoundness, is hearsay and inadmissible. *Stringfellow v. Mariott*, 1 Ala. 573.

§ 229 (4) Writings, Contracts, Agreements, and Transaction.**Statement by Husband Acting as Agent.—**

Testimony as to what complainant was told by her husband and agent with respect to a transaction in question is inadmissible. *Dooly v. Pinson*, 145 Ala. 659, 39 So. 664.

Agreement to Pay Account.—Where one rendering services claims that an account has been stated, evidence of a conversation with the debtor's brother, had during the absence of the debtor, in which the brother stated that he and the debtor would pay the amount of the bill, is inadmissible. *Lallande v. Brown*, 121 Ala. 513, 25 So. 997, cited in note in 13 L. R. A., N. S., 350.

Conversation as to Acceptance of

Draft.—In an action by the payees of a draft against the acceptor, a conversation between defendant and a stranger to the cause, in regard to the acceptance, which plaintiff did not hear, and which does not form part of the *res gestæ*, is inadmissible. *Hunt v. Johnson*, 96 Ala. 130, 11 So. 387.

Conversation as to Physician's Account.—

Where a physician claims that an account had been stated for services rendered, evidence of a conversation with the patient's brother while in the sick room, during which the bill was mentioned, is competent, though the patient was very sick, and perhaps did not hear or understand the conversation; the objection going merely to the weight of the evidence. *Lallande v. Brown*, 121 Ala. 513, 25 So. 997, cited in note in 13 L. R. A., N. S., 350.

Statement as to Mortgage.—

It was in controversy whether the acknowledgment of a lost mortgage corresponded with the statutory form. The plaintiff could neither read nor write, but testified that she heard her son reading a mortgage form out of a book, and heard her daughter-in-law say, "The mortgage [the one in question] don't read like it is in the book." Held hearsay, and improperly admitted. *McIntyre v. White*, 124 Ala. 177, 26 So. 937.

Statements of Officer of Corporation.

—Evidence of statements by an officer of a corporation which had pledged certain property, that the pledgee authorized the corporation to remove the property, is hearsay, and is inadmissible to show the corporation's right to remove the property. *American Pig-Iron Storage-Warrant Co. v. German*, 126 Ala. 194, 28 So. 603.

Conversation as to Contract with Corporations.—

The testimony of a witness as to a conversation between complainant and a third party, showing the terms of an arrangement which complainant said he had made with defendant corporation through its secretary, is competent, when no representative of defendant was present. *Downing v. Woodstock Iron Co.*, 93 Ala. 262, 9 So. 177.

The declaration of an executor, who has no interest under the will, are not

admissible in evidence on the question of the validity of the will. *Roberts v. Tra-
wick*, 13 Ala. 68, cited in note in 38 L. R.
A. 723, 735, 36 L. R. A. 69.

Statement as to Force of Deed.—A witness in ejectment can not be asked if another had not told him (witness) that defendant had said that his (defendant's) deed did not cover the land in controversy. *Payne v. Crawford*, 102 Ala. 387, 14 So. 854.

Hearsay Evidence as to Contents of Letters.—Testimony of a witness who was in the employ of defendants when the letter alleged to be a promise to pay for the goods was written, as to the contents of the letter, was properly excluded, where it merely appeared that he had heard the letter read before it was mailed, it not appearing when or by whom it was read; such evidence being hearsay. *Lacy v. Meador*, 170 Ala. 482, 54 So. 161.

Conversation as to Teacher's Contract.—In an action against the proprietor of a school for his breach of contract to employ plaintiff as a teacher, in which defendant seeks to show, in mitigation of damages, that plaintiff obtained other employment during the time covered by the contract, and received compensation therefor, the declaration of plaintiff's father, by whom the contract was negotiated on her behalf, as to such employment, and compensation, though made in her presence, are mere hearsay, and inadmissible as evidence to prove that fact. *Benziger v. Miller*, 50 Ala. 206.

§ 229 (5) Ownership and Possession.

Declaration of Stranger as to Identity of Property.—On the issue of title to property levied on under an attachment, a declaration of a stranger, who had no interest in or connection with the suit, pointing out the particular property levied on, was hearsay and inadmissible. *Roberts, Long & Co. v. Ringemann*, 145 Ala. 678, 40 So. 81.

Declarations as to Running Boundary.—Adjacent landowners agreed to select each a man to determine and stake out a boundary line. On a prosecution of one of the owners for afterwards breaking down a fence placed on the line by the other owner, one of the men testified that, when he began to run the line

neither defendant nor the other person selected was present, and that he began at a stake pointed out by W., defendant's brother, as marking the line between the lands of W. and another. Held, that the admission of the testimony as to the declarations of W. was error. *Wheeler v. State*, 109 Ala. 56, 19 So. 993.

Declaration of Vendor's Wife.—In trespass for goods alleged to have been wrongfully taken under attachment, where plaintiff claimed that he was entitled to possession under a bill of sale from the attachment debtor, and that by an agreement subsequent to the sale he had put the debtor in charge of the stock as his agent, declarations of the wife of the vendor at the time of the levy that she was the owner of the stock of goods, and in possession thereof, were mere hearsay, and not admissible in defendant's behalf. *Cook v. Thornton*, 109 Ala. 523, 20 So. 14.

Declarations of Partners.—In trover against a sheriff for levying an attachment against a partnership on goods claimed by the plaintiff under a purchase from one of the partners individually, the declarations of the other partners to the effect that they had sold out their interest in the goods to their copartner are mere hearsay, and therefore incompetent evidence. *Hartshorn v. Williams*, 31 Ala. 149.

Declarations of Bailee.—In trover against the bailee of a sheriff, the declarations of his bailor tending to show a conversion made after suit brought are not admissible evidence against him. *Spencer v. Godwin*, 30 Ala. 355.

Declarations of Stepfather.—In ejectment, or a statutory real action in the nature of ejectment, the plaintiff may show, as a fact tending to prove prior possession by him, which might ripen into a title under the statute of limitations, that the land was rented out for his use, by his stepfather, for several years; but the declarations of his stepfather, made at the time of the renting, are not competent evidence. *Jay v. Stein*, 49 Ala. 514.

Purchase of Negro.—A witness testified that at a time past a negro had been recently purchased, as he understood at the time. This was held to be

mere hearsay. *Buckley v. Cunningham*, 34 Ala. 69.

§ 229 (6) Value and Price.

Amount of Wages.—Testimony of a widow as to what her deceased husband told her his daily wages were is hearsay. *Louisville & N. R. Co. v. Fitzgerald*, 161 Ala. 397, 49 So. 860.

Value of Goods.—On the contest, by an attaching creditor, of a sale of the goods by the debtor to claimant, on the ground of undervaluation, evidence of declarations of the debtor as to the valuation of the goods, made in the absence of claimant, were properly excluded. *H. B. Clafin Co. v. Rodenberg*, 101 Ala. 213, 13 So. 272.

§ 229 (7) Indebtedness and Payment.

Charging of Goods.—In a suit for the price of goods sold to one on the credit of defendant's decedent, it was error to admit in evidence a conversation had between plaintiff and his salesman in relation to whom the goods were to be charged. *Espalla v. Richard*, 94 Ala. 159, 10 So. 137.

Declaration of Creditor as to Payment of Account.—Declarations of a creditor subsequent to the payment of an account are not admissible to show who paid the same, such evidence being mere hearsay. *Harrison v. Harrison*, 9 Ala. 73.

Source of Money.—In an action by a chattel mortgagee for conversion of mortgaged chattels by defendant purchasing them from the mortgagor, statements made by the mortgagor as to the source from which he obtained a sum paid by him on the mortgage were properly excluded as hearsay. *Polytinsky v. Patterson & Son*, 3 Ala. App. 302, 57 So. 130.

§ 229 (8) Cause.

Cause of Discharge of Servant.—Plaintiff, manager of defendant's store, was discharged before the expiration of the term of employment, and in an action for full compensation defendant sought to justify the discharge by showing that in conducting the business plaintiff had driven away patrons. Held, that declarations of persons who had ceased to deal there, that they did so because of plaintiff's conduct, were not admissible. Mor-

ris Min. & Mfg. Co. v. Knox, 96 Ala. 320, 11 So. 207.

§ 229 (9) Due Care and Nature of Act.

Different Uses of Locomotives.—In an action against a railroad company for injuries received by a switchman while coupling an engine to a car, evidence that railroad men considered the use of a road engine as a yard engine dangerous was hearsay and inadmissible. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145.

Nature of Operation.—The testimony of plaintiff as to the statement of his attending surgeon to him, "that the operation was a dangerous one," is hearsay evidence, and inadmissible. *Alabama G. S. R. Co. v. Arnold*, 80 Ala. 600, 2 So. 337.

Conversation between Husband of Plaintiff and Flagman of Defendant.—In a passenger's action for damages for carrying her beyond her destination, testimony of her husband that when he found the flagman a few minutes after the train had started again he asked him why he did not stop long enough for them to get off, and that he said that he did and that he did not have time to back the train, was inadmissible as a hearsay narrative. *Louisville, etc., R. Co. v. Cornelius* (Ala.), 62 So. 710.

"This was not of the *res gestæ* of the negligence complained of, was a narrative by the parties to the conversation, and from their respective viewpoints of a transaction then past was hearsay and should not have been allowed. Defendant's motion to exclude should have been granted. *Mobile, etc., R. Co. v. Baker*, 158 Ala. 491, 48 So. 119, and cases cited. Nor do we think, on reconsideration, that the judgment can be saved from reversal on the ground that this ruling had no prejudicial effect upon defendant's case. Very clearly plaintiff, by a part of this testimony, sought to sustain and re-enforce the testimony of her witness on the only material point of dispute in the case by showing that shortly after the transaction in question he made a statement of what happened, which statement was in accord with his testimony at the trial. We can not know what effect this testimony may have had on the jury. The

point at issue was material. The testimony was incompetent and illegal. *Mobile, etc., R. Co. v. Baker*, 158 Ala. 491, 48 So. 119; *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112." *Louisville, etc., R. Co. v. Cornelius (Ala.)*, 62 So. 710, 711.

§ 229 (10) Condition or Sufficiency of Things.

Failure of Machinery to Work.—Evidence that an expert told defendants that they could not run the machinery, because they had constructed the furnace improperly, is hearsay, and inadmissible. *Young v. Arntze*, 86 Ala. 116, 5 So. 253.

Evidence that such witness informed one of defendants that he was to buy machinery, and gave him permission to use it, is material, as explaining the use of the machinery by defendants after offer to return it. *Young v. Arntze*, 86 Ala. 116, 5 So. 253.

§ 229 (11) Representative Character and Relationship.

Declaration of Instructor's Payment of Freight.—In an action for goods sold, testimony that a person said to the witness that defendants had sent him to pay the freight on said goods, and that he was acting by instructions from defendants, and that he had got the bill of lading from defendants, is hearsay. *E. Goddard & Sons v. Garner Bros.*, 109 Ala. 98, 19 So. 513.

Agent for Purchasing Wood.—In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff and claimed by plaintiff to have been purchased for him by S. as agent, it was not competent to prove by declarations of the superintendent of a certain corporation that S., in purchasing the wood, was representing the corporation. *Smiley v. Hooper*, 147 Ala. 646, 41 So. 660.

Selection of Attorney.—It is error to permit a witness to testify that a certain witness for the other party to the suit told him that he was retained as counsel by the latter, since such testimony is hearsay. *Brown v. Prude*, 97 Ala. 639, 11 So. 838.

Statements of United States Officers.—In an action by a bailor against a bailee

of cotton for conversion, the same having been taken by an armed force, evidence of the declarations of United States military officers as to the authority of the treasury agent who took it, made to a witness, was inadmissible. *Abraham v. Nunn*, 42 Ala. 51.

§ 229 (12) Identity.

Docket of Justice of Peace.—The secondary statement of what the successor of a justice of the peace said about the authenticity of the docket of the former justice is no proof that the docket was that of the former justice. *Sibley & Sibley v. Smith*, 167 Ala. 158, 52 So. 27.

"It does not purport to be an agreement to obviate Lacy's attendance throughout the litigation. Its only office was to release Lacy on that occasion, and it was not, obviously, an agreed statement of facts, as was the case in *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600, cited for appellants. The docket was properly excluded, not being identified as that of Weaver. The evidence of the witness Perdue, as to his reception of the book from Lacy, was proper as far as it went; but clearly the secondary statement of what Lacy said about the docket being Weaver's did not identify the docket as that of Weaver." *Sibley v. Smith*, 167 Ala. 158, 52 So. 27, 28.

Identity of Car.—Testimony in an action against a street car company for injuries in a collision, as to whether the motorman, etc., in charge of a certain car with a broken step, told witness it was the same car that collided with plaintiff's vehicle, was properly excluded as hearsay; not being admissible as *res gestæ*. *Merrill v. Sheffield Co.*, 169 Ala. 242, 53 So. 219.

"There was no error in sustaining the objection to the question to the witness Hall as to whether any officer, conductor, or motorman in charge of the car with the broken step told the witness that it was the same car that had collided with plaintiff's vehicle. It was hearsay testimony, and a statement of a past transaction. *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621, 643; *Alabama, etc., R. Co. v. Hawk*, 72 Ala. 112, 117; *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149, 4 So. 618; *Mitcham v. Schuessler Bros.*, 98 Ala. 635,

13 So. 617." *Merrill v. Sheffield Co.*, 169 Ala. 242, 53 So. 219, 223.

Identity of Timber.—In an action for injuries resulting from the fall of a timber on plaintiff's foot, evidence of a witness as to the character and number of men required to handle a particular piece of timber pointed out to him was properly excluded, in the absence of accompanying testimony of some one having actual knowledge of the identity of the timber. *Alabama Great Southern R. Co. v. Vail*, 155 Ala. 382, 46 So. 587.

Identity of Horse.—In an action for breach of such warranty it was competent to ask a witness the name of the horse, as his name would tend to identify him; but an answer that he had heard him called "the big-legged runaway horse" should have been excluded as irresponsible to the question, and calculated to prejudice defendant. *Jones v. Ross*, 98 Ala. 448, 13 So. 319.

"We see no legal objection to the question as to the name of the horse, as such testimony tended to identify the horse, but the answer should have been excluded. It was not responsive to the question, was in the nature of hearsay evidence, and calculated to prejudice the jury against the defendant. The defendant asked the court to charge the jury 'that in no phase of the evidence in the case is the plaintiff entitled to recover damages for the injuries received by the running away of the horse.'" *Jones v. Ross*, 98 Ala. 448, 13 So. 319, 320.

§ 229 (13) Intention.

Intention of Railroad Company.—A witness who is a director of a bank can not be asked whether the other directors and himself knew with what intention a railroad company issued certain bills or notes. *Whetstone v. Bank at Montgomery*, 9 Ala. 875, cited in note in 23 L. R. A., N. S., 401.

§ 229 (14) Statements of Person Available as Witnesses.

Witness Must Be Produced.—The declarations or confessions of a person who is himself a competent witness are not admissible in evidence. *Bank of Alabama v. McDade*, 4 Port. 252.

"The admission of the witness to de-

pose, as to the declarations of Alexander McDade, was not permissible. Starkie lays it down, that no declaration, or entry, by any person, can be given in evidence, where the party who made such declaration, or entry, can be produced and examined as witness. Vol. 1, 390. See also *Kennedy v. Meador*, 1 Stew. & P. 220." *Bank v. M'Dade*, 4 Port. 252, 270.

§ 229 (15) Statements by Persons Since Deceased.

Declarations of Third Person Inadmissible.—Declarations of third persons which are mere hearsay are not rendered competent evidence by the fact that such third persons have since died or left the country. *Pearson v. Darrington*, 32 Ala. 227, cited in note in 52 L. R. A. 595.

"The theory of plaintiffs was that Lucien Nardin, now deceased, owned this bond and these coupons; that he lost them by accident; and that the title to them passed to Tell and John Nardin by the last will of Lucien Nardin. The burden being on plaintiffs to show Lucien Nardin's ownership of the instruments, and their accidental loss by him, they were allowed, in discharge of this burden, to show that said Julien soon after the time of the alleged loss has procured Mr. Bromberg, his agent and attorney, to insert an advertisement in a newspaper, stating that bond No. 17, involved in this suit, had been lost, offering a reward for it, and warning all persons against trading for it, etc., and the court also allowed them to introduce the advertisement as printed in the paper, purporting to be signed, 'Fred'k G. Bromberg, Attorney.' The basis of all this evidence was a mere declaration of Lucien Nardin to Mr. Bromberg, in effect, that he (Nardin) owned and had lost this bond. It was hearsay, not part of the *res gestæ* of any fact or situation pertinent to the case, and the advertisement and all the testimony relating to it should have been excluded." *Mobile County v. Sands*, 127 Ala. 493, 29 So. 26, 28.

To Show Nondelivery of Deed.—While statements of a deceased grantor are admissible against himself or successors in interest, they are inadmissible in favor of his successors to show nondelivery of a

deed in which he was grantor in ejectment in which the delivery is in issue as within the rule against hearsay. *Napier v. Elliott* (Ala.), 58 So. 435.

As such matter was not part of the *res gestæ*, it was also objectionable as hearsay. *Napier v. Elliott* (Ala.), 58 So. 435.

"Whether defendants' witness Sanders 'had a conversation' with the grantor about a month before he made the deeds was wholly irrelevant in the absence of any indication as to the subject-matter of the conversation. For excluding such a question, the trial court can not be put in error. *Phoenix Ins. Co. v. Moog*, 78 Ala. 284, 308. And, in any case, not being part of the *res gestæ*, it was objectionable as hearsay." *Napier v. Elliott* (Ala.), 58 So. 435, 438.

§ 230. — Writings.

§ 230 (1) In General.

Witness Must Read Document.—"A person who proposes to testify to the contents of a document, either by copy or otherwise, must have read it. He may not describe its contents merely on the credit of what another has told him it contains, even though his informant purports to have read it aloud in his presence. Section 1278. The following authorities, cited among others, support the text: *Edisto Phosphate Co. v. Stanford*, 112 Ala. 493, 20 So. 613; *Hooper v. Chism*, 13 Ark. 496; *Propst v. Mathis*, 115 N. C. 526, 20 S. E. 710; *Coxe v. England*, 65 Pa. 212. See, also, *Russell v. Brosseau*, 65 Cal. 607, 4 Pac. 643. The principle is that which requires that a copy must be shown to be a true copy. If it had been shown that the witness heard Lacy dictate the letter, or that he heard it read to Lacy for approval at the time of the writing, doubtless these circumstances would be accepted as a sufficient guaranty of trustworthiness. But that is not the case presented. Our conclusion is that there was no error in excluding the proffered testimony." *Lacy v. Meador*, 170 Ala. 482, 54 So. 161, 163.

Ownership and Loss of Bond.—Where plaintiffs in an action on a bond claimed the same had been lost by a testator under whom both plaintiffs claimed, it was error to permit plaintiffs to show that

after the alleged loss the testator had procured his attorney to insert an advertisement in a newspaper, stating the loss and offering a reward for it, and to introduce the advertisement as published, since, the basis of the evidence being a mere declaration of the testator that he had owned and lost the bond, it was hearsay. *Mobile County v. Sands*, 127 Ala. 493, 29 So. 26.

Protest of Officers of Lost Steamship.

—A protest made by the officers and passengers of a steamboat destroyed by fire on an inland river, whatever may be the rule in admiralty cases as to its admissibility, is not competent evidence for the owners of the vessel, when sued for the loss of freight, since *ex parte* declarations and hearsay. *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387.

Ex Parte Affidavits.—"Section 2816 of the Code of 1886, which authorizes either party to propound interrogatories to the adverse party, contemplates the eliciting of legal evidence, facts which tend to support the claim of the plaintiff or the line of the defense. Unsworn *ex parte* statements of persons not parties are mere hearsay, and *prima facie* inadmissible. These reports, made subsequent to the injury, were not competent as original evidence for any purpose. The reason assigned for withholding the reports may not have been sufficient if the reports contained competent evidence, but the withholding of statements which were not admissible as evidence gave the plaintiff no right to move for a judgment by default." *Culver v. Alabama, etc., R. Co.*, 108 Ala. 330, 18 So. 827, 830.

§ 230 (2) Letters and Telegrams.

Letter Regarding Contract.—In an action against a railroad company for breach of a contract with plaintiff by which he was to erect certain trestles for defendant, defendant denied any contract with plaintiff, claiming that it had contracted for the entire work with one P., and that the work plaintiff did was done under P.'s contract, or by permission of P. The evidence as to whether there was an independent contract with plaintiff was conflicting. Held, that a letter written by P. to plaintiff in regard to his settlement with defendant

was not admissible on behalf of plaintiff against defendant. *Mobile & B. Ry. Co. v. Worthington*, 95 Ala. 598, 10 So. 839.

Letters between Defendant and Third Person.—In an action of trover by an administrator for the conversion of bonds belonging to the estate, letters written by and between him and third persons tending to show a conversion by the defendant, and the intestate's declarations as to his investments in the bonds, are inadmissible as hearsay evidence. *David v. David's Adm'r*, 66 Ala. 139.

In an action for malicious prosecution, telegrams sent by plaintiff's employer to defendant, to induce him to abandon the prosecution, and declarations of defendant on being shown the telegram that he would not dismiss the prosecution, that plaintiff was guilty, were admissible to show defendant's zeal in the prosecution. *Mark v. Hastings*, 101 Ala. 165, 13 So. 297.

§ 230 (3) Reports.

Report as to Overcharged Electric Wire.—In an action for injuries to plaintiff's wife from an overcharged electric wire, defendant's superintendent testified on cross-examination that he sent a man out the next morning after the injury to find out what was the matter, and that he brought back an injured bird. Held, that a question as to what report in the line of his duties the man made with reference to the bird was objectionable as calling for hearsay evidence. *Alabama City, G. & A. Ry. Co. v. Appleton*, 171 Ala. 324, 54 So. 638.

§ 230 (4) Certificates and Affidavits.

An affidavit attached to the account of the executor of a deceased guardian, filed for final settlement, setting forth that his testator, as he believed, did not use the funds of his ward for his own purposes; that he (the testator) was unable during certain years to loan out the funds of his ward, etc., held not available for any purpose, against the ward. *Owen v. Peebles*, 42 Ala. 338.

§ 230 (5) Pleadings.

In an action against a railroad company for breach of a contract with plaintiff by which he was to erect certain trestles for defendant, where plaintiff al-

leges that, after doing part of the work, he was prevented by defendant from doing the balance, and was put "to great expense and trouble in the maintenance of necessary teams," and where the bill of particulars gives notice of items of corn, etc., for which compensation is claimed, defendant can not object to evidence on the part of plaintiff that teams were necessary in order to do the work required by the contract on the ground that there is no such specification in the bill of particulars, since the pleadings and bill give it sufficient notice of the claim to prevent surprise. *Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839.

§ 231. Evidence Founded on Hearsay.

§ 232. — In General.

Possession of Property.—On an issue as to whether defendant in ejectment was in possession of the land sued for at the commencement of the action, plaintiff, though entitled to testify to the fact of his own knowledge could not testify that defendant was in possession, based on a survey made by third persons. *Ross v. Roy* (Ala.), 39 So. 583.

Contents of Bank Book.—Where the garnishees denied indebtedness to defendant, evidence that defendant's secretary exhibited his passbook to the witness, showing a credit with the garnishees, is hearsay and inadmissible. *Curtis v. Parker & Co.*, 136 Ala. 217, 33 So. 935.

A clerk of a bank can not testify to facts, of which he has no knowledge, from notes or memoranda taken from the books of the bank. *Crawford v. Branch Bank at Mobile*, 8 Ala. 79, cited in note in 52 L. R. A. 604, 608.

State of Account.—A witness can not testify as to the state of an account, where all his knowledge is derived from certain books, unless he first shows that he made the entries in the books, or had knowledge of their correctness, even though said books are in his custody and possession. *Memphis & C. R. Co. v. Maples*, 63 Ala. 601.

Balance Due on Mortgage.—Where a witness had no knowledge, and his testimony would have been hearsay, the court properly sustained an objection to a question asking the witness to state the balance due on certain mortgages in con-

troversy. *Plott v. Foster* (Ala.), 62 So. 299.

Existence of Partnership.—In an action in which it is sought to hold a defendant liable as partner, it is not competent to prove the existence of the alleged partnership by common report and general reputation. *Marble v. Lypes*, 82 Ala. 322, 2 So. 701.

"The rule is settled, however, that when once a partnership is shown to exist by independent testimony, it is then competent to prove a general reputation or common report of its existence, in order to impute a probable knowledge of such fact to a plaintiff. And for a like purpose, the notoriety of a dissolution may be shown to charge one with notice of such fact. Perhaps the same rule might apply, as contended, to the nonexistence of a partnership in certain cases. The reason of the rule is obvious. It is based upon the probability that the plaintiff would be likely to know a fact of which no one else in the neighborhood seemed to be ignorant. It should, in our opinion, have no application to persons living at a distance in another state, unless they are shown to have had an opportunity of hearing the common report by frequently visiting the residence of the alleged partners, or otherwise. The prevalence of a local rumor in a county neighborhood in Alabama, without more, would afford no reasonable ground of inference that it was known to the mercantile community of a distant city in Tennessee. What the witness Jarman is shown to have said to the plaintiff, in Nashville, had no reference to any common fame touching the existence or nonexistence of the disputed partnership." *Humes v. O'Bryan*, 74 Ala. 64, 81.

§ 233. — Testimony of Person as to His Age.

In *Cherry v. State*, 68 Ala. 29, cited in note in 41 L. R. A. 453, the testimony of a party as to his own age, who stated that he knew his age from the fact that his mother told him, and that it was written in a book which his father carried in his pocket in the courthouse, was held admissible. It is not specially shown in this case whether or not the book was a family Bible.

Such evidence is not only admitted owing to the extreme difficulty of producing any better, but on the ground of the interest of the declarant in a matter of family relationship. *Cherry v. State*, 68 Ala. 29, 30, cited in note in 41 L. R. A. 452.

Pedigree.—"The better opinion would seem to be that the declarations of third persons can not be admitted to prove pedigree by means of entries in family Bibles, unless it be shown that the persons making the entries are deceased. *Cherry v. State*, 68 Ala. 29, 30, cited in note in 41 L. R. A. 454.

The general rule would seem to be that hearsay evidence is always admissible to prove pedigree, and this term embraces, not only questions of descent and relationship, but also the particular facts of birth, marriage, and death, and the times when these events may have happened, and any book, document, or paper containing entries made by a parent or relation as to such facts may be received as the written declarations of the deceased persons who respectively made them, and such evidence is held admissible, not only from the extreme difficulty of providing any better, but is resorted to on the ground of the interest of the declarants in such matters of family relationship and connection. *Cherry v. State*, 68 Ala. 29, 30, cited in note in 41 L. R. A. 449.

§ 234. — Reputation as to Persons.

§ 234 (1) In General.

Reputation as Railroad Clerk.—The question, "Did you ever hear of his being a railroad clerk?" is objectionable as calling for hearsay evidence. *Supreme Lodge Knights and Ladies of Honor v. Baker*, 163 Ala. 518, 50 So. 958.

To Determine Residence.—In determining the residence of a decedent, and the consequent jurisdiction of the probate court to grant letters of administration, evidence of general reputation and of statements of various persons is hearsay. *East Tennessee, V. & G. Ry. Co. v. Thompson*, 94 Ala. 636, 10 So. 280.

Absence of Party.—The absence of a party from the state can not be proved by general reputation. *State Bank v. Seawell*, 18 Ala. 616.

In Actions for Wrongful Attachment.

—Evidence of the plaintiff's general credit and reputation, it seems, is not admissible for him in case to recover damages for the wrongful and vexatious suing out of an attachment, until it has been assailed; but where the record shows that his general reputation was put in issue by the evidence, he may offer evidence to sustain it; and if the defendant wishes to object to the testimony of the witness, on the ground that this evidence shows that he is not qualified to testify to the fact in question, he must make a specific objection to it on that ground. *Goldsmith, etc., Co. v. Picard*, 27 Ala. 142.

To Prove Relation of Husband and Wife.

—Evidence of general reputation is not admissible to prove the relation of husband and wife, in an action brought under the statute, for the use of a wife, to recover money lost by her husband on a wager upon a horse race. *Davis v. Orme*, 36 Ala. 540.

Reputation of Captain of Steamboat.

—In an action against the owners of a steamboat to recover damages for the loss of a slave who was hired as a deck hand on the boat, and was killed in consequence of a collision with another boat, occasioned by the negligence and want of skill of the former's officers, a witness for plaintiff was asked, "What was the general reputation of defendant as a steamboat captain?" and answered that he had no reputation, for the reason that he had no experience, and that he regarded him as wholly incompetent for such duty. Held, that the question and answer were admissible. *Cook v. Parham*, 24 Ala. 21.

Boarding Place.—Testimony of a witness that it was the reputation in the community that a man was boarding at a certain place is inadmissible as hearsay, since the fact that admits of direct proof. *Abel v. State*, 90 Ala. 631, 8 So. 760.

Reason for Absence from State.—In an action against defendant for maliciously suing out an attachment against plaintiff's estate, it is not allowable for plaintiff to prove that, by common reputation in the neighborhood in which the defendant resided, it was supposed that he had gone to an adjacent state on a visit of

business or pleasure. *Pitts v. Burroughs*, 6 Ala. 733.

§ 234 (2) Character.

Character of Slave.—Evidence of the reputed character of a slave in the family to which he belongs, consisting of about eight whites and fifty blacks, is admissible. *Mose v. State*, 36 Ala. 211.

§ 234 (3) Condition of Servitude.**Inadmissible to Overcome Presumption.**

—Evidence of rumor or common report of a fact is not admissible, even in favor of freedom, where the presumption is that better evidence of that fact may be obtained. *Glover v. Millings*, 2 Stew. & P. 28.

The long established rule of evidence, that hearsay is not admissible, will not admit of an exception, in cases where a party applies for his freedom; and where he seeks to establish a fact which living witness may attest, which fact is not one of the unknown exceptions of pedigree, prescription, etc. *Glover v. Millings*, 2 Stew. & P. 28.

§ 234 (4) Mental Condition.

Capacity to Understand Account.—It is not competent to prove that, in the opinions of others, a party admitting the correctness of an account was not of sufficient capacity to understand long accounts. *Stewart v. Conner*, 13 Ala. 94.

§ 234 (5) Pecuniary Condition.

Solvency of Party.—Whether a party is insolvent or not can not be proved by general reputation. *Lawson v. Orear*, 7 Ala. 784; *Stewart v. McMurray*, 82 Ala. 269, 3 So. 47.

Insolvency of Principal.—In assumpsit on a collateral guaranty of the debt of another, the fact of the insolvency of the principal debtor can not be proven by hearsay evidence. *Walker v. Forbes*, 25 Ala. 139.

Where defendants represented to the plaintiff that an insolvent person was good for his contract hearsay was admissible to prove the notoriety of the insolvency in the neighborhood, and establish a presumption that defendants knew it when they represented him otherwise. *Ward v. Herndon*, 5 Port. 382.

To Show Knowledge of Embarrassment.—The fact that a person is embar-

rassed can not be proved by common reputation; but, the fact of the embarrassment being established *prima facie*, evidence of common reputation is admissible to raise a presumption of knowledge of the fact. *Branch Bank v. Parker*, 5 Ala. 731.

"It was competent to prove the plaintiff's ignorance of knowledge of the failing circumstances or insolvent condition of Manasses at the time he made the purchase of the flour. It was error, however, to allow Joseph to state that her firm 'understood' him to be solvent 'from general report.' The evidence does not fall within the rule, that when a fact is shown once to exist, it is competent to prove a general reputation, or common report of its existence, in the business community where the party in question resided, in order to impute a probable knowledge of such fact to such party. *Humes v. O'Bryan*, 74 Ala. 64, 81; *Stallings v. State*, 33 Ala. 425; 1 Whart. Ev., § 252. There is no evidence tending to show that Manasses was ever financially solvent, other than the alleged rumors of a false report are not admissible to prove one's ignorance of the truth." *McCormick v. Joseph*, 77 Ala. 236, 240.

§ 235. — Market Value Shown by Sales, Offers to Purchase or Sell, or Market Quotations.

§ 235 (1) In General.

Opinions Based on Hearsay.—The market price of property may be proved by the opinions of witnesses based in part on hearsay. *Burks v. Hubbard*, 69 Ala. 379.

§ 235 (2) Offers to Purchase or Sell.

Offers to Purchase Land.—On an issue as to the value of land evidence of an offer to buy lands in the same locality at a certain price is not admissible. *Tennessee Coal, Iron & R. Co. v. State*, 141 Ala. 103, 37 So. 433.

§ 235 (3) Market Quotations.

Postal Cards Sent by Cotton Factors.—By Civ. Code 1886, § 2779, prices current and commercial lists printed at any commercial mart are presumptive evidence of the value of any article of merchandise specified therein. Held, that postal cards sent out by cotton factors from time to

time are not "prices current or commercial lists," within the statute, and are not admissible to prove the market value of merchandise quoted therein. *Tyson v. Chestnut*, 118 Ala. 387, 24 So. 73.

§ 236. — Repute as to Facts.

§ 236 (1) In General.

Number of Acres in Tract of Land.—Common reputation is inadmissible in ejectment to prove the number of acres in the tract in suit, because of its hearsay character. *Busbee v. Thomas*, 175 Ala. 423, 57 So. 587.

Character of House.—Where a witness was asked, "Didn't you say that was a sporting house?" his answer, "It had the reputation of being one," should be excluded as being hearsay. *Ramsey v. Smith*, 138 Ala. 333, 35 So. 325.

Destruction of Warehouse by Fire.—It is admissible to prove that the burning of a warehouse was generally known in the town where it was situated, to bring home a knowledge of the fact to one who had cotton destroyed by the fire, who lived within twenty or twenty-five miles of the place, and traded in it, and two months after the fire executed his note for an advance on the cotton. *Jones v. Hatchett*, 14 Ala. 743.

Reason for Doing Act.—A reason for doing an act, when the reason is founded on a rumor, is not admissible in evidence. *State v. Campbell*, 17 Ala. 566.

Cash Value of Land.—A witness can not be asked what was the estimated cash value put on lands by the neighborhood generally. This is but hearsay, and those forming the opinions can themselves be called as witnesses. *Powell v. Governor*, 9 Ala. 36.

"The court below was correct in refusing to allow the defendant's witness to answer what was the estimated cash value put on the lands by the neighborhood generally, because the question was calculated to elicit nothing more, than a second-hand notion of the opinions of others, who could themselves furnish the best evidence of their own opinions, and might have been called as witnesses. *Planters' etc., Bank v. Borland*, 5 Ala. 531." *Powell v. Governor*, 9 Ala. 36, 38.

The notoriety of a sheriff's sale in the neighborhood is nothing more than

hearsay testimony and therefore incompetent, if no special circumstances appear in the case. *Yarborough v. Moss*, 9 Ala. 382.

Ownerships, partnerships, and agency are facts to which witnesses who know their existence may testify, but such facts can not be proved by general reputation. *Central Railroad & Banking Co. v. Smith*, 76 Ala. 572.

A dangerous illness, or the fact that a person is at the point of death, can not be proved by general report in the village. *Mosser v. Mosser's Ex'r*, 32 Ala. 551.

Fact Already Proved to Exist.—It is no departure from the rules of evidence to prove the notoriety in the neighborhood of a fact already proved to exist, to lay the foundation for an inference that the defendants were cognizant of the fact. *Ward v. Herndon*, 5 Port. 382.

§ 236 (2) Possession.

General Reputation of Possession.—One's possession of land can not be proved by general reputation. *Benje v. Creagh*, 21 Ala. 151.

It is not competent to prove by reputation that a party who has been in possession of land occupied it as tenant, and had no title thereto. *Moore v. Jones*, 13 Ala. 296.

Character of Possession.—Where the character of the defendant's possession is in issue, it can not be proved by general reputation, nor by the opinion of witnesses as to the actual condition of the property. *Benje v. Creagh*, 21 Ala. 151.

Evidence in ejectment that, while the person under whom the defendant claimed was in possession of the land in controversy, it was known as such person's land, was admissible upon the issue of whether the possession was adverse, or merely permissive. *Watters v. Brown* (Ala.), 58 So. 291.

"There was evidence tending to show possession of McCurdy and that it was adverse, and it was therefore competent for defendant to show that while he was in possession it was generally known as McCurdy's land. *Owen v. Moxom*, 167 Ala. 615, 52 So. 527." *Watters v. Brown* (Ala.), 58 So. 291, 293.

"If the defendant could have shown

that he or those under whose rights he claimed were in the adverse possession of the land at the time he cut or carried away the timber, this would have been a defense to the action; but this he failed to do." *Williams v. Lyon* (Ala.), 61 So. 299, 301.

"Adverse possession of land can not be shown by hearsay testimony. If the possession and its continuity be otherwise shown the notoriety thereof may be shown by such hearsay testimony; but the possession itself, or its duration, can not be proven by such evidence. *Tennessee Coal, etc., R. Co. v. Linn*, 123 Ala. 112, 26 So. 245. The trial court did not err in its rulings in declining to allow the defendant to prove by the declarations of third parties who was in possession of the land and who was the owner of such land." *Williams v. Lyon* (Ala.), 61 So. 299, 301.

§ 236 (3) Ownership.

Title to Land.—It is not competent to show, by reputation or general understanding in the neighborhood, that plaintiff in ejectment owned or had title to the land. *Owen v. Moxom*, 167 Ala. 615, 52 So. 527.

Reputation as Owner.—On an issue as to the ownership of land, evidence that it is generally known as the property of a certain person is not admissible. *Davis v. Arnold*, 143 Ala. 228, 39 So. 141.

Ownership of Slaves.—On a trial of the right of property in slaves between the plaintiff in execution and the minor children of the defendant, the claimants can not prove that it was a matter of public notoriety in the neighborhood that defendant disclaimed all interest in and ownership over the slaves. *McCoy v. Odom*, 20 Ala. 502.

Ownership in Wife.—Evidence of general rumor of the neighborhood that certain slaves in possession of the defendant in execution were the separate property of his wife is not admissible evidence for the sheriff, either to show an excuse for not levying plaintiff's execution, or as tending "to show a reasonable excuse for not levying within a reasonable time, for making necessary inquiries as to the title of property." *Whitsett v. Slater*, 23 Ala. 626.

Railroad Right of Way.—In an action against a railroad for the conversion of sand taken from certain land, testimony of a witness that he had always heard that the railroad had a right of way through the land was properly excluded as hearsay. *Nashville, C. & St. L. Ry. Co. v. Karthaus*, 150 Ala. 633, 43 So. 791.

Ownership of Dogs.—In trover for the conversion of certain dogs, a question, whether witness had ever heard of either one of the dogs named belonging to plaintiff, was objectionable as immaterial if answered in the negative, and calling for hearsay testimony if answered in the affirmative. *Hooper v. Dorsey*, 5 Ala. App. 463, 58 So. 951.

X. DOCUMENTARY EVIDENCE.

(A) PUBLIC OR OFFICIAL ACTS, PROCEEDINGS, RECORDS, AND CERTIFICATES.

§ 237. Public Records, Documents, and Publications in General.

Census Book.—Where a census book is offered to show that plaintiff made statements to the enumerator contradicting his testimony, only that part based on such statements is admissible. *Battles v. Tallman*, 96 Ala. 403, 11 So. 247.

§ 238. State Papers.

The acts of congress, as published in the pamphlet acts of the session, may be read on a trial without proof of their authenticity, they being presumed to be within the knowledge of the court. *White v. St. Guirons*, Minor 331.

§ 239. Laws.

§ 239½. In General.

"In *Dougherty v. Snyder*, 15 Serg & R. 85 [16 Am. Dec. 520], it is said, by the supreme court of Pennsylvania, that unwritten laws may be proved as well by public history, and decided cases, as by witnesses." *Inge v. Murphy*, 10 Ala. 885, 896.

§ 240. — Ordinances.

Compilation of Ordinances.—City ordinances may be proved by a book containing a compilation thereof, adopted and used by the city, though the city charter

provides a different method of proof. *Mayor v. Tayloe*, 105 Ala. 170, 16 So. 576.

"With respect to statutes of our sister states, many courts, as well as our own, hold these are proven prima facie by the production of the statute book, purporting to be published by authority of the state. See cases cited, *Greenl. Ev.* 489." *Inge v. Murphy*, 10 Ala. 885, 896.

§ 241. — Foreign Laws.

Printed Book of Statutes.—A printed volume purporting to be printed by authority and to contain the laws of another state is admissible. *Cox v. Robinson*, 2 Stew. & P. 91; *Hanrick v. Andrews*, 9 Port. 9; *Smoot v. Fitzhugh*, 9 Port. 72; *Inge v. Murphy*, 10 Ala. 885, cited in note in 25 L. R. A. 456.

"And in *Raynham v. Canton*, 3 Pick. 293, and *McRae v. Mattoon*, 13 Pick. 53, books of reports of a sister state are conceded to be proper evidence. We have looked at the other cases cited, but do not find them to bear on the point, except that in *Lattimer v. Elgin*, 4 Desaus. 26, it seems the chancellor considered the law of Maryland was sufficiently established by a quotation in *Haywood's North Carolina Reports*; nor have we been able to find and express adjudication in which the precise question is decided. But the reasons we have previously stated, lead us to the conclusion that the common law, as modified in a sister state, by judicial decision, may be proved by the production of the reports of adjudged cases, accredited in the particular state." *Inge v. Murphy*, 10 Ala. 885, 896.

"In *Bradley v. Northern Bank*, 60 Ala. 252, the same principle is announced; and in *Bush v. Garner*, 73 Ala. 162, it was held, again, that the statutes of another state may be proved 'by a printed volume purporting on its face to have been printed by authority of such state.' *Falls v. United States, etc., Bldg. Co.*, 97 Ala. 417, 13 So. 25; *Hawes v. State*, 88 Ala. 37, 7 So. 302. The same is true of the act establishing the criminal court of Atlanta." *Compton v. State*, 152 Ala. 68, 44 So. 685, 686.

Under Code 1886, § 2790, providing that the proceedings of any legislative body purporting on the face of the book

to be printed by authority of the state are authority without further proof, a book, whose title page contained the words, "The General Statutes of the State of Minnesota. * * * Prepared by George B. Young,"—immediately followed by a statute of Minnesota, purporting to give George B. Young authority to publish such statutes, was competent evidence, in a court of Alabama, of the statute law of Minnesota. *Falls v. United States*, etc., Bldg. Co., 97 Ala. 417, 13 So. 25.

Code 1896, § 1821, provides that any public or private statutes or the proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government, or state, or territory, are evidence without further proof. Held, that a book purporting to contain the laws of Georgia, on the first page of which was printed: "The Code of the State of Georgia, Adopted December 15th, 1895. Prepared by John L. Hopkins, Clifford Anderson, and Joseph R. Lamar. Vol. III. Atlanta, Georgia: The Foot & Davies Company, Printers & Binders, 1896"—and on the opposite page: "Entered according to the Act of Congress, in 1896, by the State of Georgia, in the office of the Librarian of Congress at Washington"—contains sufficient authenticity to justify its admission as evidence of the Georgia laws. *Compton v. State*, 152 Ala. 68, 44 So. 685, judgment affirmed in *Compton v. State of Alabama*, 29 S. Ct. 605, 214 U. S. 1, 53 L. Ed. 885.

A printed volume, the title page of which recites that it contains the acts passed by the legislature of a foreign state for a certain session, and that it is published by authority, and printed by the state printer, is, under Code 1876, § 3045, evidence of its contents, without further proof. *Bradley v. Northern Bank*, 60 Ala. 252.

Must Purport to Be Official Publication.—To render a book self-proving, and admissible as evidence of foreign statutes, under Code, § 3045, it must purport to be published by authority of the particular government therein specified, and not merely "by authority." *Edmunds v. State*, 79 Ala. 48.

Failure to Show Official Publication.—A volume of the statutes of another state, in no way indicating that it was printed

by the authority of the state, other than by the declaration on the title page that it was "published by authority," is not admissible in evidence. *Johnson v. State*, 73 Ala. 483.

The statute of another state can not be proved by the production of a printed volume purporting to contain it, which does not import on its face to have been printed by the authority of that state; and the mere declaration on the title page of the volume, that it was "published by authority," without indicating the authority, or that it proceeded from any of the recognized departments of the state government, does not render it admissible in evidence under the Alabama statute. (Code of 1876, § 3045.) *Johnson v. State*, 73 Ala. 483.

Civil Code of Louisiana.—"In an action of assumpsit on a written guaranty for the 'ultimate payment' of goods the plaintiffs read in evidence sections of the Civil Code of Louisiana to show the law of that state in relation to such guaranty, the contract of guaranty being consummated in that state; but no evidence of lawyers or persons skilled and instructed in the laws of that state to either interpret the written law, or afford the courts the means of constructing it being given, the court held the question, as to the language of the written law of Louisiana, was settled by the production of that language itself from the Civil Code." *Walker v. Forbes*, 31 Ala. 9, cited in note in 25 L. R. A. 456.

Code of Mississippi.—The Revised Code of another state, purporting on its face to have been published by the authority of the legislature, is competent evidence to prove the statutes therein incorporated. *Clanton v. Barnes*, 50 Ala. 260, cited in note in 25 L. R. A. 456.

"In *Clanton v. Barnes*, 50 Ala. 260, it was held that: 'The Revised Code of Mississippi, purporting on its face to have been published by the authority of the legislature, is competent evidence to prove the statutes therein contained.'" *Compton v. State*, 152 Ala. 68, 44 So. 685, 686.

"The mode in which the defendant sought to make this proof to the court was in conformity with our statute. The law laid down in the Code is the rule that

must govern in such a case. It is this: "Transcripts of acts of congress, or of the statutes of any state or territory of the United States, certified by the secretary of state of this state as being deposited in his office; and public or private statutes, or the proceedings of any legislative body, purporting on the face of the book to be printed by authority of the government, state, or territory, are evidence without further proof." Rev. Code, § 2693. This is a remedial statute, and we feel constrained to make it apply to the Revised Code of Mississippi, as a part of the statutory law of that state. It therefore follows that the evidence was competent, and the mode of proof was lawful. It should have been admitted. The court erred in its rejection." *Clanton v. Barnes*, 50 Ala. 260, 262.

The statutes of New York, published under the public authority of that state, are properly admitted in evidence in this state. *Hanrick v. Andrews*, 9 Port. 9.

To Prove Marriage.—Where the record of a marriage in another state is admitted in evidence, a book admitted to be "the last Code" of that state is admissible to show who is the proper custodian of its marriage records, under Code, § 2790, which provides that the statutes of another state, purporting to be printed by its authority, are evidence, without further proof. *Hawes v. State*, 88 Ala. 37, 7 So. 302, cited in notes in 5 L. R. A., N. S., 942, 67 L. R. A. 923.

Construction of Statutes.—The opinion of the highest court of a foreign state is admissible to show the construction given by such court to statutes of that state. *Beckley v. United States Savings & Loan Co.*, 147 Ala. 195, 40 So. 655.

"This point has been decided adverse to the appellant in the case of *Zenith Association v. Heimbach* (Minn.), 79 N. W. 609, which opinion was introduced in evidence and appears on page 155 of the transcript. The opinion of the court of Minnesota was properly admitted in evidence to show the construction of the statutes governing the case at bar. *Inge v. Murphy*, 10 Ala. 885; *Cubbedge, etc., Co. v. Napier*, 62 Ala. 518; *Walker v. Forbes*, 31 Ala. 9." *Beckley v. United States, etc., Loan Co.*, 147 Ala. 195, 40 So. 655, 656.

The table of rates of interest in other states, printed in the pamphlet acts of the general assembly of Alabama, is admissible in evidence. *Holley v. Coffee*, 123 Ala. 406, 26 So. 239.

Properly Certified Transcript.—A statute of another state may be proved by a transcript or copy properly certified by the secretary of state of this state, as being deposited in his office, or by a printed volume purporting on its face to have been printed by authority of such other state. (Code of 1876, § 3045.) *Bush v. Garner*, 73 Ala. 162.

Reports as Evidence of Statutes.—The official reports of cases decided by the supreme court of another state are not admissible as evidence of the statutes of such state. *Bush v. Garner*, 73 Ala. 162.

Production of Sworn Copy.—The written law of a foreign country is subject to the same rules as all other written instruments of evidence of a public nature, and as the original can not be produced, can only be proved by the production of a sworn copy. *Innerarity v. Mims*, 1 Ala. 660, cited in note in 25 L. R. A. 660.

§ 242. Judicial Acts and Records.

§ 242 (1) In General.

Record of Copy of Administrator's Letters.—Under Civ. Code 1896, § 359, authorizing a foreign administrator to sue to recover property by recording a copy of his letters in the probate judge's office before judgment, such record may be shown by a certified copy thereof, or by the record book, or probably by a copy of the letters, with the probate judge's certificate attached, showing that it was recorded in a certain book in his office on a certain date. *Campbell v. Hughes*, 155 Ala. 591, 47 So. 45.

"Section 359 of our Civil Code of 1896 provides that such an executor or administrator 'may maintain suits and receive or recover property in this state: First, by recording, at any time before judgment, or the receipt of the property, a copy of the letters, duly authenticated according to the laws of the United States in the office of the judge of probate of the county in which such suit is brought or property received; Second, by giving bond,' etc. Section 361 of the Code provides that: 'Before a judgment is ren-

dered in a suit brought by such foreign executor or administrator, the plaintiff must prove that he has complied in all respects with the provisions of section 359, and failing to do so, he can not recover.' It has been held that this proof need not be made, in the absence of a plea of 'ne unques administrator.' *Berlin v. Sheffield Coal, etc., Co.*, 124 Ala. 322, 26 So. 933; *Johnson v. Kyser*, 127 Ala. 309, 27 So. 784. While the denials of the answers may not amount to a technical plea 'ne unques,' they must be held to operate to require proof of the filing of the copy, duly authenticated, before judgment. *Harris v. Moore*, 72 Ala. 507; *Noonman v. Bradley*, 9 Wall. (U. S.) 394, 19 L. Ed. 757." *Campbell v. Hughes*, 155 Ala. 591, 47 So. 45, 46.

Record of Marriage License.—In *Hawes v. State*, 88 Ala. 37, 7 So. 302, cited in note in 5 L. R. A., N. S., 942, it was held that the transcript of a record of a marriage in the state of Mississippi, not certified as required by the act of congress, was admissible in Alabama, where authenticated according to the laws of the latter state.

Reports of Adjudged Cases.—While the reports of adjudged cases of a sister state, published by authority, are competent evidence of the judicial construction placed upon the statutes of that state, and must be received as authoritative in the courts of this state, they can not, when taken alone, be received as legal evidence of the contents or provisions of such statutes. *Bush v. Garner*, 73 Ala. 162.

Record Showing Criminal Prosecution.—In an action for malicious prosecution, entry on the docket of the court of common pleas, to which a warrant for plaintiff's arrest was made returnable, showing that in that court plaintiff waived examination and was bound over to the grand jury of the criminal court of that county, was admissible as evidence of the fact that the charge was carried to the grand jury. *Brown v. Alexander* (Ala.), 60 So. 975.

Where, in an action for malicious prosecution, plaintiff offered in evidence an affidavit made before a judge of the Birmingham court of common pleas, charging plaintiff with perjury, a warrant for plain-

tiff's arrest on that charge, returnable to the judge of that court, and the return showing plaintiff's arrest, an entry on the docket of the court of common pleas, showing that in that court plaintiff waived preliminary hearing in the charge there made against him, and was bound over to the grand jury of the criminal court of the county, was admissible as evidence of the fact which carried the charge before the grand jury for its consideration. *Brown v. Alexander* (Ala.), 60 So. 975.

Original Papers or Docket.—In a civil action, proof of the trial and conviction of one before the mayor of a city should be made by producing the original papers or the mayor's docket. *Cooke v. Loper*, 151 Ala. 546, 44 So. 78.

"The petitioner, on the trial, attempted to show that the board, in refusing his application for license, was actuated by race prejudice; but we are of the opinion, and so hold, that the effort was a failure. Evidence on this point having been admitted, it was competent for the respondent to rebut it with proof that the petitioner, during last year and while holding a license to retail liquors in the city, was tried and convicted before the mayor for selling liquor on Sunday. But this should have been done by producing the original papers or the mayor's docket. *Thompson v. State*, 100 Ark. 70, 14 So. 878. It follows that the petitioner failed to show a clear legal right to have the clerk issue him a license, and the city court erred in rendering judgment for the petitioner, and should have rendered judgment for the respondent." *Cooke v. Loper*, 151 Ala. 546, 44 So. 78, 80.

Record of Replevin.—To prove that a married woman claimed ownership of a stock of goods, by showing that she replevied them from one who attached them, the final record in the attachment suit, and not the original papers in the case, was the legal evidence to establish what the record contained as to the replevin. *Duncan v. Freeman*, 109 Ala. 185, 19 So. 433.

To Show Procuring of Indorsement by Fraud.—In an action to recover money paid defendant on a check payable to plaintiff, the latter claimed that his indorsement was procured by fraud of de-

pendant, while defendant claimed that the check was indorsed to him in payment of services rendered the former in effecting a settlement of litigation between plaintiff and a certain land company, in pursuance of a contract. Held, that the record of the case between plaintiff and such land company was properly admitted in evidence. *Brown v. Prude*, 97 Ala. 639, 11 So. 838.

Record of Previous Suit.—It seems, that in trespass to try titles, the record of a previous suit between the ancestor of the plaintiff, and the defendant, for the same premises, might be good evidence, to show notice to the latter of a paramount title, in order to fix a period from which the plaintiff is entitled to recover damages for the occupancy of the premises. *Kennedy v. M'Cartney*, 4 Port. 141, 142.

§ 242 (3) Matters Included in Record in General.

Confirmation of Report of Sale.—A register's report of a sale of real estate made by him pursuant to a decree was filed by him in the course of his duty as register, reciting the sale and the conditions thereof. Subsequently the court made an order continuing the cause under the former orders of the court, which was a continuance for a resale of the property. Held tantamount to a confirmation of the report of sale, making it a part of the records, and admissible in evidence to prove the recitals contained in the report. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594.

Judgment against Garnishee.—A defendant offered in his defense a record of a judgment against him as garnishee, in which it appeared that he was ordered to deliver over certain executions to the clerk, and that the clerk and plaintiff gave him receipts therefor. Held, that these were not parts of the record, but mere private writings not provable by the clerk's transcript. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

Judgment in Chancery Suit.—Though a judgment in a chancery suit may be admissible in evidence in a suit at law between the same parties, the whole record and proceedings are not admissible, since it would let in the answer of defendant

and the testimony of witnesses, without giving defendant an opportunity for refutation or cross-examination. *Moore v. Leftwitch*, 1 Stew. & P. 254.

§ 242 (3) Pleadings.

Petition to Establish Stock Law.—

Where a petition to establish a stock-law district was shown to have been signed by the persons whose names were attached, the petition itself was admissible to show that its signers were in favor of the proposed district. *Edmondson v. Ledbetter*, 114 Ala. 477, 21 So. 989.

Pleading Written with Pencil.—All pleadings should properly be written with ink, and the court may, in the exercise of its discretionary power, refuse to allow them to be filed, if not so written; yet a demurrer or plea found among the original papers in a cause, and in the handwriting of the defendant's attorney, can not be rejected as evidence, when so offered, because written with a pencil. *Fail's Adm'r v. Presley's Adm'r*, 50 Ala. 342.

A bill for an injunction not filed as an original, the order upon which has never been complied with, can not be considered as a record of court, so as, of itself, to be evidence in a chancery suit between the same parties. *Driver v. Fortner*, 5 Port. 9.

To Show Christian Names of Defendants.—In trespass to try title, where the plaintiff claims under a sheriff's sale, it is competent to give in evidence the papers of the original suit, to show that the Christian names of the defendants, which were omitted in the judgment entry, are the same as in the execution. *Driver v. Spence*, 1 Ala. 540.

§ 242 (4) Writs and Returns Thereon.

Unsigned Execution.—An execution signed, but not certified, by the clerk, with nothing on it to show that it has ever been in the hands of the sheriff, can not be regarded either as the original execution or a certified copy, and is not admissible to prove the amount of the judgment for costs. *Pryor v. Beck*, 21 Ala. 393.

Return to Execution.—The sheriff's return to an execution is a part of the record. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

The return of a sheriff, or other officer,

to an execution, made pursuant to law, is a part of the record of the court, and admissible as evidence in all cases where the record itself could be used. *Creagh v. Savage*, 14 Ala. 454.

A sheriff's return upon an execution, when made in pursuance of law, is matter of record, and, in all cases where the execution is admissible in evidence, the return is also. *Hardy v. Gascoignes*, 6 Port. 447.

"In *Hardy v. Gascoignes*, 6 Port. 447, the court said: 'If the execution be admissible, we can not conceive why the sheriff's return should be excluded; for when made in pursuance of law, it becomes matter of record, and as such, is clearly evidence. The return is a response to the execution. The law requires the officer to make it, and holds him and his sureties liable if he fails to make it conform to the truth of the case. When the execution is returned by the sheriff, it becomes a part of the record of the court, and is admissible in all cases where the record itself can be used. *Harrell v. Martin, etc., Co.*, 6 Ala. 587, and we see no reason why the return of the officer should not be evidence in this case, as showing the levy and sale of the property in suit, and consequent satisfaction of the execution.' See *Smith v. Leavitts*, 10 Ala. 92; *Leavitt v. Smith*, 14 Ala. 279." *Creagh v. Savage*, 14 Ala. 454, 457.

§ 242 (5) Records of Probate Courts.

Administrator's Report.—In an action by one who has purchased land from the vendee at an administrator's sale, to compel the decedent's heirs to convey to him, the administrator's report of such sale, reciting the sale by the vendee to such subpurchaser, is not admissible in evidence, since the administrator had no authority to report that fact in his report of the sale. *Pruitt v. Holly*, 73 Ala. 369.

Appraisement of Estate.—The official appraisement of the property of an estate is not admissible in evidence against the administrator as proof of the value of the property. *Harrison's Adm'r v. Harrison's Distributees*, 39 Ala. 489.

Proceeding to Incorporate Company.—The record of proceedings in the probate court to incorporate a company, includ-

ing the issuance of the final certificate, is admissible to show that a certain party was one of the incorporators, and had had dealings with the company which estopped him to deny its existence. *Curtis v. Parker & Co.*, 136 Ala. 217, 33 So. 935.

Settlement by Administrator.—The record of an annual settlement by an administrator which fails to show notice to the distributees, and the appointment of a guardian ad litem for the infants, is not prima facie evidence against them, and is therefore inadmissible. *McCreeliss' Distributees v. Hinkle*, 17 Ala. 459.

In unlawful detainer by the heirs against one who entered under a lease from the administrator, they may introduce the record of his final settlement, on which they were represented as heirs, to prove heirship. *Lalouette's Heirs v. Lipscomb*, 52 Ala. 570.

Original Record Competent.—Under Code 1896, § 1816, where, defendant specifically waived the objection that a certified copy of the record of a probate court was not offered, it was not error to admit the original record; it being competent evidence. *North Birmingham Lumber Co. v. Sims & White*, 157 Ala. 595, 48 So. 84.

"For the purpose of showing the change in the corporate name of defendant from Mitchell Lumber Company to that of North Birmingham Lumber Company, the plaintiffs offered as evidence the record of the proceedings in the probate court. The defendant in the court below specially waived the point that a certified copy was not offered, but made a general, undefined objection to the record offered. Record of such proceedings is required to be kept in the office of the judge of probate; and a certified transcript having been waived, the record was competent evidence, and the court committed no error in admitting the record offered against the general objection made thereto. Code 1896, §§ 1816, 1819; *Stevenson v. Moody*, 85 Ala. 33, 4 So. 595." *North Birmingham Lumber Co. v. Sims*, 157 Ala. 595, 48 So. 84, 85.

§ 242 (6) Minutes of Proceedings.

Minutes in Trial Docket.—The minutes of a court, in the trial docket, showing the entry of a judgment, are competent evi-

dence to prove the recovery of the judgment. *Gay v. Rogers*, 109 Ala. 624, 20 So. 37.

Memorandum on Docket.—A motion entered on the docket, with the memorandum of the judge written across it, showing his action thereon, though not spread upon the minutes of the court, is quasi a record, and admissible in evidence to prove the facts which it imports. *State v. Bancroft*, 16 Ala. 605.

§ 243. Official Records and Reports.

§ 243 (1) In General.

Entry of Satisfaction of Chattel Mortgages.—It is not the judge of probate's legal duty to make entries of satisfaction in the margin of mortgage records; and, in the absence of proof of authority on his or his clerk's part to make such an entry, the record was inadmissible, in detinue by a chattel mortgagee, to show a prior mortgage had been satisfied. *Wilson v. Johnson*, 152 Ala. 614, 44 So. 539.

Memorandum of Census Enumerators.—In an action against a probate judge to recover the statutory penalty for illegally issuing a license for the marriage of plaintiff's daughter, the memorandum made by a census enumerator, of plaintiff's statement in regard to the daughter's age, is inadmissible, unless the enumerator, after examining it, can not testify to a present recollection of the fact noted. *Battles v. Tallman*, 96 Ala. 403, 11 So. 247, cited in note in 9 L. R. A., N. S., 718.

§ 243 (2) Records of County Officers in General.

Memorandum of Sheriff.—In an action by a sheriff, on a resale of land on execution, against the purchaser at the first sale, for refusing to comply with the terms of sale, a memorandum of such sale made by the sheriff is not admissible as evidence of it, as it is incompetent to establish that fact by the sheriff, he being a party to the record. *Robinson v. Garth*, 6 Ala. 204.

§ 243 (3) Tax Records and Receipts.

Assessment Book.—In an action against a county collector for failure to turn over taxes collected, the book of assessments, corrected and footed up by the assessor, and certified to by the presiding officer of

the board of commissioners as required by Code 1886, § 520 (Code 1896, § 3986), was admissible to show the amount of taxes with which the collector was charged with collecting and accounting for. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 52 L. R. A. 541.

Receipt of Treasurer.—A receipt given by the county treasurer while in office to the tax collector for the county taxes is admissible evidence in itself at all times for the latter, on proof of the signature, and that the maker was county treasurer when it purports to have been made. *Williams v. Fitzpatrick*, 20 Ala. 791.

Treasurer's Record of Receipts.—The book which the county treasurer is required to keep, showing payments made to him by the tax collector on account of county taxes, is admissible in evidence against the collector. *Dudley v. Chilton County*, 66 Ala. 593.

§ 243 (4) Records, Reports, and Returns of Surveyors.

Survey Made by County Surveyor.—Although an ex parte survey made by a county surveyor without order of court may not be of itself evidence, yet he may be examined, and may illustrate his evidence by his own survey, and, when he has sworn to the accuracy of his survey or plan, it may then go to the jury. *Nolin v. Parmer*, 21 Ala. 66.

The parol testimony of the surveyor in such case is admissible, although he testifies that all his knowledge respecting the boundaries of the land was derived from the survey which he had made. *Nolin v. Parmer*, 21 Ala. 66.

"But, it is again contended, that the parol evidence was inadmissible, because the witness said that all the knowledge he had respecting the boundaries of the land was derived from the survey which he had made. But we do not understand from this, that the witness intended to say, that all knowledge was derived from the paper he held in his hand, representing the survey, but, rather, that his knowledge of the boundaries arose from the survey he had made; that is, by going on the ground and running the lines, he was enabled, at the time he was testifying, to describe the land sued for, and to speak of its boundaries. The language of the bill of excep-

tions does not convey the idea, that the witness' knowledge was derived from the figures or representations made by him on paper, but, rather, that his knowledge was derived from the fact that he had surveyed the land." *Nolin v. Parmer*, 21 Ala. 66, 71.

§ 243 (5) Private Books and Memoranda of Officers.

Docket of County Commissioners.—Where an entry is made upon a book which was not the record kept by the court of county commissioners, but is a docket kept by the commissioners themselves for their convenience, and it is not shown that said entry was made by the judge of probate by the order of the court of county commissioners, said entry can not be introduced in evidence or considered as a judgment of the court of county commissioners. *Goggins v. Myrick*, 131 Ala. 286, 31 So. 22.

§ 244. Official Certificates.

See, also, post, "Certificates of Officers," § 245 (3).

§ 244 (1) In General.

Certificate of Secretary of State as to Patent.—Code 1907, § 889, requiring the secretary of state to record all grants and patents, does not authorize the admission of a certificate of the secretary giving abstracted information in regard to a patent copied from "a list of patents issued by the state." *Southern Ry. Co. v. Cleveland*, 169 Ala. 22, 53 So. 767.

"The court erred in admitting, over defendant's objection, the certificate of the secretary of state, giving certain abstracted information with regard to the patent copied from a 'list of patents issued by the state,' purporting to give the name of the patentee, price paid, etc. There is no statute making such a certificate evidence, and it is no more than a memorandum made by a third party, and is not admissible for any purpose. The statute does require the secretary of state to 'record all grants and patents issued by the state' (Code 1867, § 1621; Code 1907, § 889); but this certificate is not a transcript of a recorded patent, has no 'appearance of title,' and is no more admissible to show purchase and payment for the land than a memorandum made by any

other third party. *Nashville, etc., R. Co. v. Mathis*, 109 Ala. 377, 19 So. 384." *Southern R. Co. v. Cleveland*, 169 Ala. 22, 53 So. 767, 768.

Certificate of Notary.—Ex parte certificates by a notary that certain persons made affidavit to him of certain facts are not documentary evidence. *American Freehold Land Mortgage Co. v. Dykes*, 111 Ala. 178, 18 So. 292.

Clerk of Supreme Court.—The certificate of the clerk of the supreme court, showing the action of said court in a particular case, is, under the statute (Code, § 3860, subd. 5), admissible as evidence in any court in this state of the facts set forth in such certificate, as provided by law. *First Nat. Bank v. Lippman*, 129 Ala. 608, 30 So. 19.

§ 245. Grants and Patents for Land, and Proceedings in Land Office.

§ 245 (1) In General.

Patent.—Although a patent is not evidence of title in an action commenced prior to its date, yet it is not error to admit it in evidence to show a confirmation of the inchoate title by certificate, that being an immaterial point. *Bullock v. Wilson*, 5 Port. 338.

"We have been unable to find any statute which makes competent and admissible in evidence the tract book, and entries in the same, offered and admitted in this case. In the absence of any statute rendering the same competent in evidence, it was undoubtedly inadmissible. The original patent, or a certified copy of the same, was the highest and best evidence of the grant from the United States government to the patentee. Code 1896, §§ 1812, 1813; *Tillison v. Ewing*, 91 Ala. 467, 8 So. 404; *Knabe v. Burden*, 88 Ala. 436, 7 So. 92." *Hammond v. Blue*, 132 Ala. 337, 31 So. 357.

§ 245 (2) Surveys and Maps.

A surveyor, or expert, testifying as to the form, configuration, or dimensions of the land in controversy, may introduce a map or diagram, made by himself, to aid in making his testimony intelligible; and such map or diagram may then be submitted to the jury, to aid them in understanding or remembering his testimony. But such map or diagram is not prima

facie or presumptively correct, unless prepared by a county surveyor, after notice to the party in adverse interest, as provided by the statute (Code, § 868); having been so prepared, but made by the witness without having the title papers before him, and admitted by him, on examination of the deeds, to be incorrect, it should not be allowed to go to the jury for any purpose. *Humes v. Bernstein*, 72 Ala. 546.

§ 245 (3) Certificates of Officers.

See, also, ante, "Official Certificates," § 244.

Certificate of Register.—A certificate by the register of a land office which simply states that "the records of such land office show" that on a certain date the person named entered a tract of land, particularly described, is incompetent, in an action in the nature of an ejectment, as a certificate made under authority of an act of congress (Code, § 3043). *Bonner v. Phillips*, 77 Ala. 427.

A certificate of the register of the United States land office which stated that, at a public sale on a certain day, plaintiff and one other purchased certain lands, and that such other person assigned to the plaintiff, was inadmissible as evidence of the assignment in an action of trespass against defendant, as the certificate was extraofficial, not being one of the duties of the office. *Woods v. Nabors*, 1 Stew. 172.

Certificate Made Admissible by Statute.

—Under Code 1896, § 1816, making transcripts of books, etc., required by law to be kept by public officers, proper evidence when certified by the proper custodian, plaintiff in ejectment could offer a certificate of the register of the land office, showing that defendant had made final proof upon the land and was entitled to a patent, as a part of the claim of title relied upon by plaintiff. *Russell v. Holman*, 156 Ala. 432, 47 So. 205.

"The certificate of the register of the land office was not improperly admitted in evidence. As contended by counsel for plaintiff, it was introduced for the purpose of showing that Amos Russell had made final proof and was entitled to his patent, as a part of the claim of title, and the fact to be thereby proved was the

final proof of entry; which certificate, under § 1816 of the Code 1896 was admissible. *Case v. Edgeworth*, 87 Ala. 203, 5 So. 783." *Russell v. Holman*, 156 Ala. 432, 47 So. 205, 206.

Transcript of Records.—A transcript from the records of the land office, certified by the register in the following words, "all of section * * * selected on by R. W. A. Wilder, agent for state, on account of Ala. & Fla. R. R., Act May 17, 1856," is inadmissible in evidence, not being an official entry, within any act of congress or regulation of the general land office, or within Code, § 2782, authorizing official entries in the land-office records to be received in evidence. *Stephenson v. Reeves*, 92 Ala. 582, 8 So. 595.

A transcript of title upon which such certificate is founded, taken from the land office, properly authenticated, and proved to be a true copy, by a competent witness, can not be rejected, as evidence, on the ground that it appears to be a sworn copy of a translation of the original. *Ryder v. Innerarity*, 4 Stew. & P. 14.

A certificate of confirmation issued by the register and receiver of a land office, acting as commissioners, under the act of congress on the eighth day of May, 1862, is competent as evidence in the courts of this state, in trespass to try title, between one claiming under such certificate, and another, claiming by possession. *Ryder v. Innerarity*, 4 Stew. & P. 14.

§ 245 (4) Official Correspondence.

Letter of Commissioner.—A letter written by one professing to be a commissioner in the general land office is not, without further proof, admissible as an instrument of evidence. *Brown v. Chambers*, 12 Ala. 697.

In trespass to try title, a letter from the commissioner of the general land office expressing his opinion as to validity or invalidity of the entry of land, and containing instructions as to what should be done with conflicting entries to the same land, is not competent evidence against a party claiming under one of the entries, to prove that his entry had been canceled in the general land office. *Jeans v. Lawler*, 33 Ala. 340.

§ 246. Records of Conveyances and Other Private Writings.

§ 246 (1) In General.

A record book of mortgages, of the probate court, when properly identified, is competent evidence of facts shown thereby. *Gay v. Rogers*, 109 Ala. 624, 20 So. 37.

Evidence was adduced to show that a private stage line had been stopped by the attachment of its "stock" at the suit of one of the defendants, whereupon that defendant was permitted, upon proof of the loss of the original, to give in evidence "the record of a mortgage" executed to him by one of the alleged proprietors of the line. Held, that it could not be presumed that the mortgage was inadmissible, and the registry in the office of the clerk of the county court was admissible as a copy. *Anderson v. Snow*, 8 Ala. 504.

§ 246 (2) Instruments Improperly Admitted to Record.

Constable's Bond.—The mere recording of a constable's bond, in the absence of statute requiring it, does not make the record competent evidence as a copy. *Martin v. Hall*, 72 Ala. 587.

(B) EXEMPLIFICATIONS, TRANSCRIPTS, AND CERTIFIED COPIES.

§ 247. Necessity and Admissibility in General.

Original Papers as Best Evidence.

Where it does not appear that the final record has been made up, the original papers in the cause are admissible in evidence. *Ansley v. Carlos*, 9 Ala. 973; *Barron v. Tart*, 18 Ala. 668; *Buffington v. Cook*, 39 Ala. 64; *Smith v. McGehee*, 14 Ala. 404, 409.

Whilst the cause is progressing, the papers are quasi records, and until the final record is made, the papers and proceedings in the cause are evidence, and the best evidence of the facts they import. *Ansley v. Carlos*, 9 Ala. 973.

"Whilst the papers and proceedings are in fieri, they are quasi records, and with us, have always been considered the highest evidence of the facts they import. By a statute of Ohio, it is provided: 'That the clerk of each court, shall in vacation,

make a complete record of the writ, recognizance of bail, pleadings, orders, judgments, or decrees, in each case finally determined at the preceding term, in a book provided for that purpose; which record shall be signed by the president, or presiding judge of said court, at the next succeeding term of said court.' This statute has a close resemblance to ours, and in its construction, it has been held, that the record when made, is conclusive, and can not be contradicted by the minutes of the court. *Harvey v. Brown*, 1 Ohio, 268. And that until such final record is made, the minutes of the court and papers in the cause, are legal evidence. *State v. Dawson*, 6 Ohio, 251." *Ansley v. Carlos*, 9 Ala. 973, 979.

Executor's Settlement.—Where the final record of an executor's settlement has not been made, the original papers are competent evidence. *Wharton v. Thomason*, 78 Ala. 45.

Record of Declarations of Exemptions.

—Where defendant in ejectment claims under an alleged agreement for partition with plaintiff, the original record of declarations of exemptions required by Code 1886, §§ 2515, 2516, containing such declaration of plaintiff, is admissible, equally with a certified copy of the record, to show that plaintiff acted on such agreement. *Stevenson v. Moody*, 85 Ala. 33, 4 So. 595, reversing 83 Ala. 418, 3 So. 695.

After Making Up of Final Record.

The original papers in a cause are not admissible evidence, if the final record has been made up as required by the statute. *Brown v. Isbell*, 11 Ala. 1009.

§ 248. Statutory Provisions.

Passage of Curative Statute.—Where, between the time an objection was made to the introduction in evidence of a government patent to swamp lands and the time the court was required to rule thereon, Acts 1911, p. 192, was passed, curing the objection, it was properly overruled. *Brue v. McMillan*, 175 Ala. 416, 57 So. 486.

Defendant offered as evidence of title a patent, dated February 20, 1872, purporting to have been executed by L., governor, by C., secretary, and containing certain recitals of payment for the lands as swamp lands, and a conveyance thereof by the governor. Plaintiff objected, on

the ground that the patent had not been executed by the governor, and was not sealed with the great seal of the state. The court took the objections under advisement, and proceeded with the hearing. Before the objection had been ruled on, Act April 4, 1911 (Acts 1911, p. 192) was passed, authorizing the introduction in evidence of documents executed prior to February 12, 1879, by the governor in person, or in his name by his secretary, purporting to convey state lands, but ineffective as conveyances, and declaring that certified copies of the record of any such documents which had been recorded for more than twenty years should be admissible. Held that, though the objection was well founded when taken, the court was bound to apply the law as it existed at the time the ruling was made, and the defects having been cured by the statute, which went into effect from the moment of its approval, the objection was properly overruled. *Brue v. McMillan*, 175 Ala. 416, 57 So. 486.

"Objections taken and elaborately argued against the constitutional validity of the act of February 12, 1879, entitled 'An act to further regulate the securing, preservation and sales of the swamp and overflowed lands of the state' (Acts 1878-79, p. 198), and the act of April 4, 1911, entitled 'An act to authorize the introduction in evidence of documents executed prior to February 12th, 1879, by the governor in person or in his name by his secretary, purporting to convey any of the state's lands, but ineffective as conveyances, and certified copies of the record of any such documents which have been recorded for as much as twenty years, and to prescribe the probative effect of such documents and copies.' (Gen. Acts 1911, p. 192), have been recently considered at length by this court, as to the first named act, in *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415; as to the second, in *Brannan v. Henry*, 175 Ala. 454, 57 So. 967. We find no occasion for a repetition of what was said in those cases." *Brue v. McMillan*, 175 Ala. 416, 57 So. 486, 487.

§ 249. Judicial Records and Proceedings.

See, also, ante, "Judicial Acts and Records," § 242; post, "Judicial Acts and Records," § 273 (3).

§ 249 (1) In General.

Minute Entry on Record of Commissioner's Court.—The minute entry on the record of the commissioners' court, purporting to give the result of a settlement made with the county treasurer, and containing an itemized account of different classes and amounts of funds purported to have been received by him, is inadmissible to charge the treasurer, without proof that it is a correct copy of the account of a settlement made with him. *Monroe v. State*, 111 Ala. 15, 20 So. 634.

Exemplification of Bill in Chancery.—Before the completion of the final record, an exemplification of a bill in chancery may be offered in evidence in all cases where the original would be evidence. *Smith v. McGehee*, 14 Ala. 404.

Copy of Writ of Execution.—A writ of execution, when returned to the court from which it issued, becomes a record of the court, and a copy thereof may be certified to be used in evidence as other parts of the record. *Woodward v. Harbin*, 1 Ala. 104.

Under the law authorizing executions to be forwarded to other counties, and providing that the sheriff must deposit a copy of the execution in the clerk's office of the county to which it is sent, and indorse on it a copy of the return made by him on the original, an examined or sworn copy is admissible to prove such copy of the execution. *Bettis v. Taylor*, 8 Port. 564.

§ 249 (2) Of Federal Courts in State Courts.

Bankruptcy Court.—Under Code 1907, §§ 3983, 3986, providing that transcripts of books required by law to be kept in the office of any public officer, when certified, shall be received in evidence, a copy of a discharge in bankruptcy, certified as a true copy by the clerk of the bankrupt court, together with the seal of the court, is properly received in evidence. *Jim Pearce & Co. v. Fisher*, 170 Ala. 456, 54 So. 164.

§ 249 (3) Of Probate Courts.

Record of Adoption of Child.—Where a judgment debtor has absconded, and certain land attached to secure the judgment is claimed as exempt by his adopted child, a certified transcript of the pro-

ceedings for adoption in the probate court is admissible to show such adoption, as are the original minute entries of such proceeding. *Cofer v. Scroggins*, 98 Ala. 342, 13 So. 115.

Copy of Appraisement of Decedent's Estate.—Under the Code, a certified copy of an appraisement of a decedent's estate is admissible in evidence, with the same effect as the original, as the appraisement is returned to the probate court, and there recorded and kept on file. *Glover v. Hill*, 85 Ala. 41, 4 So. 613.

Copy of Will and Probate.—Where a court of probate has both a judge and a clerk, and the authentication is within the letter of the act of congress, a transcript of a will and its probate is admissible. *Lee v. Hamilton*, 3 Ala. 529, cited in note in 5 L. R. A., N. S., 940.

§ 249 (4) Of Justices of the Peace.

Copy of Proceedings.—Sworn copies of proceedings before a justice of the peace, made by a competent person, are admissible in evidence, and the originals need not be presented. *Jones v. Davis*, 2 Ala. 730.

Transcript of Judgment of Criminal Conviction.—Since Code, § 3634, making a certified statement of a justice's docket presumptive evidence of the fact, does not apply to judgments of conviction in criminal cases, but only to civil proceedings, a justice's transcript of a judgment of conviction in a criminal case is inadmissible, as such judgment can only be proved by the production of the original papers and docket, sustained by competent evidence of identity, or by sworn copies prepared by a competent witness. *Burns v. Campbell*, 71 Ala. 271, cited in note in 23 L. R. A., N. S., 369.

§ 249 (5) Copy of Transcript.

Transcript of Chancery Record to Prove Record of County Court.—A record of the county court can not be proved by the transcript of the record of a chancery suit in which the record of the county court is an exhibit, as that is but the copy of a copy. *Garrett v. Ricketts*, 9 Ala. 529.

To Prove Record of Will.—If an authenticated copy of a will from the court of another state is recorded in the county

court of Alabama, but without any view to its execution in the latter state, an authenticated transcript from the records of the county court is inadmissible in evidence. *Huff v. Cox*, 2 Ala. 310, cited in note in 5 L. R. A., N. S., 967.

§ 250. Official Documents, Records, and Proceedings in General.

Public Writings Exception to General Rule.—"An exception to the general rule, that the best evidence must be produced, obtains in the case of public writings, as it would be improper to permit them to be transported from place to place. 1 Phillips Ev. 428. In England, it has been held, that the books of the East India Company, and the Bank of England are, for some purposes considered as public writings, from the interest the public have in them, and so far as the books themselves would be evidence, if produced, sworn copies may be admitted in evidence." *Crawford v. Branch Bank*, 8 Ala. 79, 80.

Code Provisions.—Under Code 1907, §§ 3986, 3995, authorizing the admission of copies of official papers and transcripts from official records and of transcribed records, the execution docket is properly received in evidence to prove an execution, which could not be found, and the proceedings thereon. *Williams v. Lyon* (Ala.), 61 So. 299.

Under Code 1907, § 3983, providing that books required to be kept in the office of a public officer, when certified by the proper custodian thereof, shall be received in evidence, copies of the requisition of the governor of a sister state, with a copy of an indictment duly authenticated by him, certified by the secretary of state of Alabama in his official capacity, under seal of the state, are admissible in evidence; the requisition, with the copy of the indictment, being required to be kept in the office of the secretary of state, who is the proper custodian thereof. *Law v. State*, 2 Ala. App. 257, 56 So. 79.

Books of State Bank.—The bank of the state of Alabama and its branches being public property, its books are public writings; and when the books themselves would be evidence, if produced, sworn copies are admissible in evidence. *Craw-*

ford v. Branch Bank, 8 Ala. 79, cited in note in 52 L. R. A. 604, 608.

Copy of Municipal Charter.—Where a municipal charter made no provision for the custody of papers relating to election contests, but they were deposited with the clerk of a court for safe-keeping, held, that they did not become thereby court records, which the clerk could certify, and make a copy competent evidence. *Davidson v. State*, 68 Ala. 356.

Transcript of Constable's Bond.—Where a constable's bond was made payable to the state, as required by Code 1896, § 3070, and was approved by the judge of probate, and recorded in his office, as required by § 974, a transcript of the bond duly certified by the probate judge, as required by § 1816, was admissible in evidence in an action thereon against the constable for a wrongful levy. *Burton v. Dangerfield*, 141 Ala. 285, 37 So. 350.

Copy of Sheriff's Bond.—Under Aik. Dig., 1833, p. 101, § 16, requiring official bonds to be recorded with the clerk of the court of the proper county, and directing that the record of any such bond may be proceeded on in the same manner as the original, under the certificate of the clerk of its being a true copy, the bond of a sheriff may be exemplified under the certificate of the proper officer, and the copy is as competent as the original, to show that the sheriff was in office when he received the money sued for. *Brazeal v. Smith*, 5 Ala. 206.

A certified copy of the sheriff's bond is sufficient, unless the authority of the bond is questioned by plea, when it would be proper for the court to require the production of the original. *Casky v. Nitche*, 8 Ala. 622.

Guardian's Bond.—A guardian's bond is not prima facie matter of record, and can not, in the absence of statutory provisions, be certified under the act of congress of 1790. If a certified copy of it is admissible at all, the certificates must conform to the requirements of St. 1804. *Carlisle v. Tuttle*, 30 Ala. 613, cited in note in 5 L. R. A., N. S., 955.

Administration Bond.—An administration bond is an official document appertaining to the administration, and can not be removed from the office of the clerk without a breach of official duty;

and a copy, therefore, certified by the proper officer, is admissible in evidence. *Miller v. Gee*, 4 Ala. 359.

The books of a notary public, in which he keeps the minutes of his official proceedings, being regarded as public records, a certified copy of the protest of a foreign bill of exchange registered therein is admissible in an action on such bill. *Phillips v. Poindexter*, 18 Ala. 579.

§ 251. Records and Proceedings in Land Office.

Documents of General Land Office.—A certified transcript of papers on file in the general land office is admissible in evidence for the purpose of proving the contents of such instruments. *Sprayberry v. State*, 62 Ala. 459.

A transcript from the books or papers on file in the general land office, or in the Indian bureau of the department of the interior, if properly certified, under the seal of the department, by the "acting commissioner," is admissible in evidence. *Stephens v. Westwood*, 25 Ala. 716.

A transcript from the books or papers on file in the general land office, or to the Indian bureau of the department of the interior, if properly certified under the seal of the department by the "acting commissioner," is admissible in evidence, *Stephens v. Westwood*, 25 Ala. 716; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349, cited in note in 14 L. R. A., N. S., 291.

Duplicate Patent.—The record of a patent issued by authority of the United States is a public act, and a second or duplicate patent issuing thereon is of as high authority as evidence as the original. *Hines v. Greenlee*, 3 Ala. 73.

A copy of a patent, certified by the commissioner of the general land office under the seal of such office, is admissible in evidence without accounting for the original. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349; *Ross v. Goodwin*, 88 Ala. 390, 6 So. 682; *Beasley v. Clark*, 102 Ala. 254, 14 So. 744, cited in note in 14 L. R. A., N. S., 291.

Cancellation of Homestead.—A duly certified copy of the official letter of the assistant commissioner of the general land office, canceling a homestead entry, is by express terms of Code, § 2787, made

competent evidence of the cancellation. *Holmes v. State*, 108 Ala. 24, 18 So. 529.

"The duly certified copy of the official letter of cancellation of the homestead entry of Mack Holmes, which was commuted to a cash entry, was, by the express terms of § 2787 of the Code, admissible in evidence. *Beasley v. Clark*, 102 Ala. 254, 14 So. 744; *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349; *Stephens v. Westwood*, 25 Ala. 716; *Hines v. Greenlee*, 3 Ala. 73. It appears from said letter, exemplified from the records of the general land office, that said entries were thereby canceled by the assistant commissioner, and action in the case thereby closed, on August 18, 1888. This furnished sufficient proof of the cancellation by the land department of the entries upon which appellant relies; and whether the indorsements on certain other papers, to which he objected, were competent or not, he was in no way injuriously affected by their admission in evidence." *Holmes v. State*, 108 Ala. 24, 18 So. 529, 530.

Copy of Map.—In a suit to quiet title, a certified copy of the map on file in the office of the state land agent, the original bearing date in 1871, was admissible to locate the land. *Brue v. McMillan*, 175 Ala. 416, 57 So. 486.

"A certified copy of a map on file in the office of the state land agent, the original bearing date in 1871, was introduced in evidence for the purpose, perhaps, of locating the land in controversy. In this there was no error. *Barker v. Mobile Elect. Co.*, 173 Ala. 28, 55 So. 364." *Brue v. McMillan*, 175 Ala. 416, 57 So. 486, 488.

Copy of Official Letter.—A copy of the official letter of the assistant-commissioner, exemplified from the records of the general land office, canceling a homestead entry and changing it to a cash entry, is proof of the cancellation of such entry. *Holmes v. State*, 108 Ala. 24, 18 So. 529.

A transcript of a deed from the general land office of the United States to a patentee is not admissible when the absence of the original patent is not accounted for. *Jones v. Walker*, 47 Ala. 175.

A copy of a foreign grant, or of a conveyance under it, from the land office register, or original entries thereof, to be

admissible in evidence in place of the originals, must be a full transcript of the record, and not a mere abstract. *Hallet v. Eslava's Heirs*, 3 Stew. & P. 105.

Abstracts of Commissioners.—The abstracts which the commissioners were directed to make and transmit to congress under Act 1812, appointing commissioners to investigate and report on the titles to land in Louisiana, that the titles thereto might be confirmed by congress, are admissible only to identify the land by showing on what the confirmation of congress operated, and are not evidence of the facts recited therein. *Innerarity v. Mims*, 1 Ala. 660, cited in note in 25 L. R. A. 452, 460.

§ 252. Records of Conveyances and Other Private Writings.

§ 252 (1) In General.

Necessity That Deed Be Recorded.—To make the record of a deed or a certified copy of such record admissible in evidence, under Rev. Code, § 1544, without further proof, it must have been recorded within one year of its execution. *Keller v. Moore*, 51 Ala. 340.

Defective Copy.—When the clerk's certificate that a deed was properly recorded misdescribes the name of the grantor, by substituting another name (as *McRinnie* for *McKeuin*), it is not sufficient to prove a compliance with the registration acts, and to render the record admissible in evidence. *Jones v. Parks*, 22 Ala. 446.

Effect of Defective Acknowledgment.—Under Code, § 2154, authorizing certified copies of conveyances to be received in evidence without further proof, when acknowledged or proved according to law, and recorded within twelve months from their date, where the certificate of probate or acknowledgment is substantially defective, a certified copy is not admissible without further proof. *England v. Hatch*, 80 Ala. 247.

"The transcript was offered in evidence under § 2154 of the Code. The deed was recorded within less than twelve months from its date, and the loss of the original conveyance was sufficiently proved; but the probate does not substantially conform to the requirements of the statute. To be sufficient, the substantial facts as declared in the statutory form of probate

of conveyance, must be expressed in the certificate. The certificate does not show that the grantors voluntarily executed the conveyance, nor that the probating witness attested it in their presence. And it appears, that the probating witness was not sworn, and did not depose, but merely acknowledged the facts stated in the certificate. *McCaskle v. Amarine*, 12 Ala. 17; *Sharpe v. Orme*, 61 Ala. 263; *Boykin v. Smith*, 65 Ala. 294." *England v. Hatch*, 80 Ala. 247, 249.

§ 252 (2) Deeds and Contracts of Sale in General.

Must Account for Absence of Original.

—Copies of recorded deeds are not admissible in evidence without first accounting for the absence of the originals. *Sommerville v. Stephenson*, 3 Stew. 271; *Fryer v. Dennis*, 2 Ala. 144; *Smith v. Armistead's Ex'rs*, 7 Ala. 698; *Thompson v. Ives*, 11 Ala. 239; *Hines v. Chancey*, 47 Ala. 637.

A certified copy of a deed is evidence of the contents of the original. *Smoot v. Fitzhugh*, 9 Port. 72.

In *Mitchell v. Mitchell*, 3 Stew. & P. 81, cited in note in 5 L. R. A., N. S., 976, it was held that, to authorize the introduction of a copy of a deed recorded in another state, it must be shown by the laws of that state that such conveyances were required to be recorded; and, as a consequence thereof, that the clerk recording them or copying the record had authority to certify copies. If the recording was an extra-official act, the clerk had no authority to certify the copy as evidence. The legality of the procedure was not to be presumed, as it is not the course of the common law.

Original in Possession of Adverse Party.—Under Code 1886, § 1798, providing that, where a party has not the custody or control of an original conveyance, a certified transcript may be offered in place of the original, a certified copy of a conveyance is admissible where the original is in possession of the adverse party, and they have been notified to produce it, and that in the event of their refusal to do so a copy will be introduced. *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1.

Deed in Custody of Grantee.—Since a deed is presumed to remain in the custody

of the grantee until the contrary is shown, a third person may, without accounting for the original deed, offer a certified copy in evidence, under Code 1886, § 1798, providing that, if a party offering in evidence a transcript of a certified and recorded deed has not the custody or control of the original, the court must receive the transcript. *Florence Land, Mining & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384.

Lost Deed.—The existence and loss of a deed having been established, a certified copy from the records is admissible in evidence. *Arthur v. Gayle*, 38 Ala. 259.

Deed Recorded on Day of Date.—A certified copy of a deed made in 1831, and recorded on the day of its date, is admissible in evidence, the presumption being that it was properly acknowledged or proved, with a proper certificate, and that the subscribing witnesses are dead; and the original grantees being dead, and the plaintiffs being their successors, there is no presumption that they have the original deed, and they need not account for the loss before introducing the copy. *Allison v. Little*, 85 Ala. 512, 5 So. 221, cited in note in 19 L. R. A., N. S., 440.

Consent to Execution of Deed.—When a married woman's consent to the execution of a deed by her husband as trustee for her and her children is indorsed on the deed after its execution, and is acknowledged by her before a proper officer, it becomes a part of the deed, as if incorporated in it; and the deed and consent, each properly acknowledged and certified, being duly recorded within twelve months (Code, § 2154), a certified copy is competent and sufficient evidence of the indorsed consent as well as of the deed. *March v. England*, 65 Ala. 275.

§ 252 (3) Mortgages and Assignments.

Mortgages.—Code, § 992, provides that conveyances of property acknowledged or proved and executed within twelve months from date shall be received in evidence by transcript if the original has been lost. Held that, in a suit to foreclose a mortgage, the original being lost, a certified copy of the mortgage from the probate court was properly admitted. *Scott v. Brassell*, 132 Ala. 660, 32 So. 694.

In an action to recover the statutory

penalty imposed on any mortgagee who fails for thirty days after written request by the mortgagor to enter on the margin of the record the date and amount of partial payments, it is not error to admit in evidence a transcript from the record of the mortgage, and the certificate thereto. *Loeb v. Huddleston*, 105 Ala. 257, 16 So. 714.

§ 252 (4) Articles of Incorporation.

Copy of Final Certificate.—Under Code, § 1578, requiring the secretary of state to record certificates of incorporation, and § 2785, providing that certified transcripts of all papers required by law to be kept in the office of secretary of state must be received in evidence in all courts, a certified copy of a final certificate of incorporation is admissible to prove incorporation. *Willingham v. State*, 104 Ala. 59, 16 So. 116.

§ 252 (5) Effect of Statutes Requiring Record.

Consent of Husband That Wife Engage in Business.—The husband's written consent that his wife shall engage in business as a feme sole, required by Code, § 2350, to be filed and recorded in the office of the probate judge, is a paper kept by a sworn officer, and transcribed on his records, under Code, § 2788, so as to admit said officer's certified copy of it as evidence, unless the court, on motion, require production of the original. *Schwarz v. Baird*, 100 Ala. 154, 13 So. 947.

§ 252 (6) Instruments Not Required or Authorized to Be Recorded.

Deed of Gift.—A certified copy of a deed of gift acknowledged before the clerk of the county court since deceased, and by him recorded without authority of law, is not admissible merely on proof that the grantor once admitted that he had executed a similar deed. *Hatcher v. Clifton*, 35 Ala. 275.

§ 252 (7) Execution and Proof of Original.

Recorded More than Twenty Years.

—Where a deed has been recorded in the proper office for more than twenty years, it will be presumed that its execution was legally proved or acknowledged. *England v. Hatch*, 80 Ala. 247.

In an action by church trustees to re-

cover a penalty for cutting trees upon church property, a certified transcript of the deed conveying the property to the trustees is admissible in evidence where the original deed is more than twenty years old and is of record in the proper office as of the day of its date, as, from the lapse of time, it will be presumed that the original deed was lawfully proved or acknowledged, and properly certified, and the subscribing witnesses are dead. *Alison v. Little*, 85 Ala. 512, 5 So. 221, cited in note in 19 L. R. A., N. S., 440.

§ 253. Municipal Records.

In General—City Ordinance.—The record copy of a city ordinance is admissible to prove the contents of the original. *Selma Street & Suburban Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598.

"The court properly received the ordinance of the city council of Selma. *Boones v. Common Council*, 89 Ala. 602, 7 So. 437, and authorities there cited. The book offered was a record copy of the ordinance, and of the signatures which had been appended by the mayor and clerk to the original; and, of course, the fact that these names on the record were not in the handwriting of those officers in no wise impugned the integrity of the record." *Selma St., etc., R. Co. v. Owen*, 132 Ala. 420, 31 So. 598, 601.

The fact that the signatures of the mayor and clerk to the record copy of an ordinance are not in their handwriting does not impugn the integrity of the record. *Selma Street & Suburban Ry. Co. v. Owen*, 132 Ala. 420, 31 So. 598.

Certificate of County Commissioner.

The certificate required to be made by Code 1886, § 520 (Code 1896, § 3986), by the presiding officer of the board of commissioners, as to the amounts of taxes levied, is evidence of the amount with which the collector is to be charged in an action against him for failure to turn over taxes collected. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 53 L. R. A. 541.

§ 254. Requisites of Exemplification or Certificate.

§ 254 (1) In General.

Certificate of Classification of Convicts.

—Where a contract with a county, se-

cured by bond, for hiring convicts provides different rates of hire for different classes of convicts, in an action on the bond for its breach, by failure to pay installments of hire when due, a certificate of classification of convicts signed and sworn to by a member of the board of inspectors of convicts is not admissible unless such member is the legal custodian of the records of the board of inspectors. *Sloss Iron & Steel Co. v. Macon County*, 111 Ala. 554, 20 So. 400.

Appointment of Agent.—An agent of a bank being required to produce a sworn copy of his appointment, if of record on the books of the bank, does so by annexing what purports to be a copy from the books and swearing to it, although he does not expressly state that he compared it with the original. *Henderson v. Bank of Montgomery*, 11 Ala. 855.

Act of Secretary of Treasury.—The seal of the treasury department of the United States, and the signature of the secretary, are sufficient evidence to authenticate the official acts of the secretary, in a state court. *White v. St. Guirons*, Minor 331.

Final Certificate of Land.—A copy of the final certificate of lands granted to a patentee by the United States, and of an assignment thereof indorsed thereon by the patentee, certified by a justice of the peace, who is certified to be such by the register of the land office, is not admissible in evidence. *Scott v. Hancock*, 3 Stew. & P. 44.

Assignment of Indian Lands.—A copy of an assignment of lands by the Creek tribe of Indians to other Creeks under the treaty of 1812 is properly authenticated by the certificate of the commissioner of Indian affairs, accompanied by the seal of the war department. *Johnson v. McGehee*, 1 Ala. 186.

Record Composed of Different Papers.—Where a record is composed of several distinct papers, they should be attached, that the court may be enabled to see that the clerk's certificate applies to all of them. But, if this is not done, whether it is competent to establish the genuineness and authenticity of the transcript by showing that it is a sworn or examined copy, *quære*. *Herndon v. Givens*, 16 Ala. 261.

Certificate of Registration of Deed.—

When a certificate that a deed is duly recorded misdescribes the name of the grantor, by substituting another name, the certificate is of no value, as it does not correspond with the deed; and that although the terms "the foregoing deed" are used. *Dubose v. Young*, 10 Ala. 365.

Failure to Attach Seal to Instrument.—Under Rev. Code, § 2691, providing that a transcript of any official document in any land office in this state, duly certified by the register, shall be admissible in evidence, a transcript authenticated by the signature of the register, though without seal and without date, is admissible in evidence. *Stewart v. Trier*, 49 Ala. 492.

§ 254 (2) Judicial Acts, Records, and Proceedings.

Attestation of Judge and Clerk.—Where the same person is judge and clerk of a court, it is competent for him to attest and certify the records and proceedings of his own court. *Dozier v. Joyce*, 8 Port. 303; *Huff v. Cox*, 2 Ala. 310, cited in note in 5 L. R. A., N. S., 967.

Organization of Court Must Appear.—Where, from the organization of a court, no one of the judges has precedence over the rest, from the necessity of the case either of the judges has power to make the certificate required by the act of congress for the authentication of records. But in such a case it must be shown that such is the organization of the court. *Woodley v. Findlay*, 9 Ala. 716.

Certificate of Register of Chancery Court.—A certificate by the register of the chancery court that "the foregoing pages from one to thirty-seven, inclusive, contain a full, true, and correct transcript of said papers in the cause of [giving the title] in said chancery court, and of the proceedings of said court upon the same," sufficiently shows the transcript to contain all the proceedings had in the case to authorize its admission in evidence thereof. *Cofer v. Schening*, 98 Ala. 338, 13 So. 123.

Uncertified Decree of Probate Court.—In an action to set aside a conveyance of land to a wife as in fraud of her husband's creditors, where the husband has testified that the conveyance was made to pay the wife for money loaned by her,

which she had derived from her mother's estate, an instrument purporting to be a copy of the decree of the probate court settling the mother's estate is not admissible to contradict the husband as to the amount of the debt when its genuineness is neither proved nor vouched for by any certificate whatever. *Kilgore v. Stoner* (Ala.), 12 So. 60.

Certificate of Clerk as to Affirmance of Judgment.—The only competent evidence of the affirmance of a judgment is a certified or exemplified transcript of the record, and it was error to admit the certificate of the clerk of court to such fact. *Miller v. Vaughan*, 78 Ala. 323.

Incomplete Certification.—A certificate signed by the clerk of the United States district court officially, with the seal of the court affixed, which stated "that the foregoing pages, numbered from 1 to —, both inclusive, contain a full, true, and complete transcript of all the proceedings in the matter of A. B., bankrupt, as the same appears of record and on file in my office," not describing or identifying the papers included in the transcript, held fatally defective, since, on account of the blank, the court could not tell what entries and papers were intended to be certified. *Clements v. Taylor*, 65 Ala. 363.

Transcript Certified by Clerk of Federal Court.—A transcript of a judgment rendered in the federal court, and certified by the clerk thereof, is admissible in the courts of the same state in which such judgment was rendered, though not certified by the presiding judge of the federal court. *Allison v. Robinson*, 136 Ala. 434, 34 So. 966.

A copy of a writ of error from the United States circuit court was sufficiently authenticated to be admissible as evidence, where the seal was attached to the certificate, which was signed, "C. J. Allison, Clerk of the U. S. Circuit Court, per Ina Allison, Deputy Clerk;" *Rev. St. U. S. 905 [U. S. Comp. St. 1901, p. 677]*, providing records and judicial proceedings of the courts of any state, etc., shall be proved or admitted in any other court within the United States by the attestation of the clerk, etc., being inapplicable to the authentication of federal court proceedings. *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101.

"But the decisions are that the act of congress does not apply to the authentication of the proceedings of the federal courts. *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Adams v. Way*, 33 Conn. 419; *Williams et al. v. Wilkes*, 14 Pa. 228; *McGregor v. Hampton*, 70 Mo. App. 98; 2 *Elliott on Ev.*, § 1368; 3 *Wigmore on Ev.*, § 2164; *Allison v. Robinson*, 136 Ala. 434, 34 So. 966." *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101, 103.

"According to all of these decisions, the question as to how the proceedings of the federal courts are to be authenticated depends upon whether or not they are foreign tribunals; and it is held that neither as to federal courts in other districts nor as to state courts are they foreign tribunals; the general result being that a transcript from a federal court, certified by its clerk, with the seal of the court, is admissible in any court, state or federal. It was held at an early day by our own court that the courts of the United States are not foreign tribunals, and that their proceedings, certified by their clerk and authenticated by their seal, will be recognized by the courts of this state. *Womack v. Dearman*, 7 Port. 513. It is the seal which is recognized, and not the signature of the clerk, although the signature of the clerk is necessary; and, when he who is known to be the custodian of the seal of the court signs his name and affixes the seal, his signature is presumed to be genuine and the seal properly affixed. 2 *Elliott on Ev.*, § 1376." *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101, 103.

"But other elements must be taken into consideration in determining the validity of the authentication in this case. 'The affixing of a seal, in the authentication of records, is regarded as the highest evidence of the authenticity of the records so certified.' 2 *Elliott on Evidence*, p. 611, § 1376. When the seal is attached, and the certificate 'purports to be executed by an officer,' 'the official character of the person thus purporting to act as officer will also be presumed.' 3 *Wigmore on Ev.*, p. 2947, § 2168; 2 *Elliott on Evidence*, p. 617, § 1382." *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101, 103.

The certificate of the clerk of an appellate court that the judgment of the court

below has been affirmed is *prima facie* evidence of that fact. *McCollum v. Hubbert*, 13 Ala. 282.

"On the last trial—the one from which the present appeal is taken—objection was made to the introduction in evidence of the judgment of the federal court of the northern district of Alabama, on the ground that the judgment was not properly certified in accordance with the act of congress. This objection was without merit. The judgment of the federal court of Alabama is not required by the act of congress to be certified by the presiding judge, when used as evidence in a court of the state of Alabama. *Womack v. Dearman*, 7 Port. 513; *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437; *Freeman on Judgments* (2d Ed.) § 411. In *Robinson v. Allison*, 124 Ala. 325, 27 So. 461, when this case was last here on appeal, it was said by this court, speaking through Sharpe, J.: 'We need not state any affirmative rule as to what, on the part of the widow having such rule as to what, on the part of the widow having such right [quarantine], will convert her presumptively subordinate possession into one adverse to the title.' *Allison v. Robinson*, 136 Ala. 434, 34 So. 966, 967.

Necessity for Clerk's Seal.—A certified transcript, although not under the court's seal, of a debtor's exemption claim filed in the probate judge's office, is admissible in evidence. *Weis v. Levy*, 69 Ala. 209.

Papers Included in Transcript.—In making out a transcript to be used as evidence in another court, a register in chancery should include not only the entries and proceedings which constitute the final record of the cause (Code, §§ 637, 638), but also all the papers in the cause which he is required to file and preserve; but when his certificate, appended to a transcript, states that it contains, "a full, true, and complete transcript of the record and proceedings in the cause," though informal, it will be held to include the papers on file. *Cargile v. Ragan*, 65 Ala. 287.

Judgment of Justice of the Peace.—A certified statement of a judgment rendered by a justice of the peace is inadmissible in evidence unless it sets forth a statement of the judgment, taken from the docket, with a copy of the execution

and return thereon, and they are certified to be correct copies. *City Council of Eufaula v. Hickman*, 57 Ala. 338.

Proceeding of County Court.—A transcript of the proceedings of the county court of Mobile in 1840 is properly certified by the clerk of the circuit court of Mobile county. *Jones v. Walker*, 47 Ala. 175.

Record of Courts During Late Rebellion.—The records of the courts of Alabama during the late rebellion may be authenticated in the same manner as the records of the present courts, by the corresponding officers of the courts, not then existing, into whose hands such records have passed. *Sugg's Adm'r v. Winston's Adm'r*, 49 Ala. 586.

Certificate under Seal.—A transcript of the judicial proceedings of a court of record in Alabama is sufficiently authenticated to be admissible in evidence in any other court of the state when certified by the proper officer under the seal of the court. *Cockran v. State*, 46 Ala. 714.

Transcript Containing Superfluous Matter.—That the transcript contains things not belonging to the record is no ground for a motion to exclude the whole. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

Certificate Detached from Transcript.—The certificate of the probate judge, unless as appended to a transcript from the records, is inadmissible to show the appointment of a guardian. *Peebles v. Tomlinson*, 33 Ala. 336.

Private Seal of Clerk.—A copy of a record certified by the clerk of the court under his private seal (the court having no seal) is admissible in evidence. *Torbert v. Wilson*, 1 Stew. & P. 200.

Showing Loss of Public Seal.—The authentication of a copy by a clerk through his deputy, under his private seal, affirming that the public seal is lost, is sufficient. *Godbold v. Planters' & Merchants' Bank*, 4 Ala. 516.

Admission of Will to Probate.—An exemplification of a record, stating that the within will was proved in open court, and describing particularly the manner of proof, accompanied by a certificate of the succeeding clerk, that the above and the copy of the will were true copies from the records of his office, and by a certificate

of the chairman of the court that he was clerk, the certificates being in due form, show that the will was admitted to probate. *Lee v. Hamilton*, 3 Ala. 529, cited in note in 5 L. R. A., N. S., 949.

One Certificate to Two Records.—

Where the transcript of the record of an original suit and a supplementary garnishment proceeding was certified under one set of certificates as a single record, it was held sufficient. The court said that this really amounted to two certificates, each attesting a different record, with the common seal applicable to both. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

§ 255. Acts, Records, and Judicial Proceedings of Other States.

§ 256. — In General.

Authority to Record Instrument Must Be Shown.—A certified copy of the record of a deed, from the court of another state, is not admissible as secondary evidence unless it be first shown that the deed was registered by authority of law. *Powell v. Knox*, 16 Ala. 364, cited in note in 5 L. R. A., N. S., 976.

A duly authenticated copy of a record of a deed from another state is not admissible in evidence in the absence of all proof that such instruments are authorized by the laws of such state to be recorded. Until then the act of congress does not apply. *Powell v. Knox*, 16 Ala. 364, cited in note in 5 L. R. A., N. S., 976.

It must appear that the laws of a state where an instrument is recorded require such registry, before an office copy thereof can be admitted in evidence in the courts of another state. *Mitchell v. Mitchell*, 3 Stew. & P. 81, cited in note in 5 L. R. A., N. S., 976.

A certified copy of a deed to lands in Georgia, though authenticated as required by act of congress, is not admissible in Alabama without proof of the loss or destruction of the original, as under the statutes of Georgia providing that, if a recorded deed be lost, a copy is admissible if the court be satisfied of the loss, it would not be admissible in that state without such proof. *Whaun v. Atkinson*, 84 Ala. 592, 4 So. 681, cited in note in 5 L. R. A., N. S., 976.

"The bond given by David Todd and

Samuel McCullough, preparatory to obtaining license, is relevant and legal proof, but was improperly admitted on the trial in this case, because the certificates were insufficient. It does not purport to be a record, and no law was introduced showing that by the laws of Georgia, it was required to be recorded. This is necessary. *Mitchell v. Mitchell*, 3 Stew. & P. 81; *White v. Strother*, 11 Ala. 720, 723. When this proof is made, the act of congress of 1804 (see Clay's Dig., 619) prescribes the manner of authenticating the exemplification of it." *Martin v. Martin*, 22 Ala. 86, 103.

To authorize the proof that a deed was registered in another state, by the production of a certified copy, it must appear that by the law of such state such deeds required to be recorded. *Lee v. Mathews*, 10 Ala. 682, cited in notes in 25 L. R. A. 456, 5 L. R. A., N. S., 976.

In *Lee v. Mathews*, 10 Ala. 682, cited in note in 5 L. R. A., N. S., 976, it was held that, to authorize a copy of a deed of marriage settlement, certified by the public register of North Carolina, to be read in evidence in Alabama, the law of the former state, that such instruments were required to be recorded, should have been proved.

In *Swift v. Fitzhugh*, 9 Port. 39, cited in note in 5 L. R. A., N. S., 976, the law of Virginia authorizing the proof and registration of deeds was offered in evidence, providing that certified copies should be received in evidence in that state with the same effect as the original; after which a duly authenticated transcript of the record of a deed from the book of records of that state was held properly received in evidence in Alabama.

"By the law of Virginia, a copy of which is found in the record, it appears that such instruments as we are now examining, are by law required to be recorded 'and any conveyance so recorded,' the act proceeds to say, 'shall have the same legal validity, in all respects, as if it were proved in open court.' It is most manifest, then, that in Virginia (the act of the legislature having been complied with), the original deed would have been evidence, without further proof of its execution, than was offered by the certificates of the several officers, of its ac-

knowledge and registration. What effect is to him, when offered in evidence to the courts of this state, on the same proof? The act of congress, in pursuance to which this copy is authenticated, provides that 'the said records and exemplifications shall have such faith and credit given them, in every court and office within the United States, as they have by law or usage, in the courts or offices of the state from whence the same are or shall be taken.' So that were the original deed here, no further proof would be required of its execution." *Swift v. Fitzhugh*, 9 Port. 39, 55.

In *Tatum v. Young*, 1 Port. 298, cited in note in 5 L. R. A., N. S., 976, it was held that, although a copy of a deed recorded in another state was authenticated according to the requirements of the act of congress, that fact, at most, entitled it to only such faith and credit, where offered in evidence, as it would have had by the laws and usage of the state from which it was taken.

"An authenticated copy of a record of a bond would not be admissible unless it was shown by the law of the state in which it was recorded that it was required to be recorded. When this proof is made the act of congress of 1804 prescribes the mode of proving it." *Martin v. Martin*, 22 Ala. 86, cited in note in 5 L. R. A., N. S., 976.

In *Whaun v. Atkinson*, 84 Ala. 592, 4 So. 681, cited in note in 5 L. R. A., N. S., 976, it was held that, since the statutes of Georgia provided that a certified copy of a recorded deed could be admitted in evidence in that state only when the loss of the original was shown, an authenticated copy of such a deed was not admissible in Alabama, where there was no attempt to show the loss or destruction of the original.

In order that the copy of a bond given preparatory to taking out a marriage license in another state may be admitted in evidence, the law of that state should be proved, showing that the bond is required to be recorded, as it does not purport to be a record. *Martin v. Martin*, 22 Ala. 86, cited in note in 5 L. R. A., N. S., 976.

Extracts from Bench Docket.—Extracts from the bench docket and the opinion

of the judge in a court of another state are not parts of the record, and should have been excluded when offered in evidence with it. *Gunn v. Howell*, 35 Ala. 144, cited in note in 5 L. R. A., N. S., 974.

Indorsement on Deed of Gift.—The indorsement on a deed of gift of personal property that it was acknowledged and recorded, purporting to be made by the clerk of a court of another state, is not such evidence of the fact of registration as the courts of Alabama will recognize. To authorize the admission of such evidence, the deed should be authenticated as the act of congress requires, and it should also appear that the law of the sister state required or authorized the registration of such a deed. *Gamble v. Gamble's Adm'r*, 11 Ala. 966.

Copy of Corporate Charter.—A copy of what purports to be a corporate charter granted in another state, authenticated, as required by congress, by a certificate of the clerk of the house of delegates and keeper of the rolls, and also of the governor as to the official character of the clerk, is admissible to prove the fact of incorporation, although not contained in a book purporting to be published by authority of such state, and although the clerk's certificate does not state that it is a full, complete, and correct copy of the act. *McClerkin v. State*, 105 Ala. 107, 17 So. 123.

Record of Bond to Obtain Marriage License.—A copy of the record of a bond given in another state to obtain a marriage license is admissible in evidence only where it is shown that by the laws of such state the instrument was required to be recorded, and when the copy is duly authenticated in accordance with the act of congress. *Martin's Heirs and Adm'rs v. Martin*, 22 Ala. 86, cited in notes in 5 L. R. A., N. S., 976, 32 L. R. A. 639.

Oath of Witness Insufficient to Establish Judgment.—Judgments and the proceedings in the causes in which they were rendered can only be proved by the production of the record itself, or by a certified or examined copy by the clerk of the court. They are not sufficiently verified by the oath of a witness that he was at one time clerk of the court, and that certain papers exhibited to him as records of the court were issued and filed

by him when he was clerk of the court, and are in his handwriting and that of his deputies, and he believes they are the records of the court, and of another witness that he received the records from the clerk of the court, as the records of the suits to which they relate. *Lyon v. Bolling*, 14 Ala. 753.

Act of Incorporation.—A copy of an act of incorporation was certified to as follows: "A true copy. Witness the seal of commonwealth of Massachusetts. [Signed] Henry B. Price, Secretary of the Commonwealth," with the seal affixed. Held properly received in evidence. *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

§ 257. — Requisites of Exemplification of Certificate.

§ 257 (1) In General.

Construction of Term "In Due Form."—The terms "in due form," as used in the act of congress of May, 1790, which provides for the authentication of the records and judicial proceedings of the courts of sister states, merely mean that the attestation of the clerk shall be according to the form prescribed for the court where the proceedings were had; and the certificate of the presiding judge is made the only evidence that such form has been observed. *McRae v. Stokes*, 3 Ala. 401.

The term "in due form" does not mean that the attestation of the clerk shall be according to the form used in the state where the record is offered in evidence, or to any other form generally observed, but according to the form prescribed for the court where the proceeding was had; and the certificate of the presiding judge is made the only evidence that such form has been complied with. *McRae v. Stokes*, 3 Ala. 401; *Andrews v. Flack*, 88 Ala. 294, 6 So. 907, cited in note in 5 L. R. A., N. S., 967.

Certificate in Due Form.—In the attestation of the clerk it was affirmed, that the records of another court lately existing in the town in which his court was holden (and in which late court the judgment was rendered), had the law been there transferred; the presiding judge certifying that the attestation was "in due form," it was held, that the transcript was sufficiently authenticated, without the production of the law by which the trans-

fer was made. *McRae v. Stokes*, 3 Ala. 401.

Where the records of one court have been transferred to another, the law by which the transfer was made need not be shown, as this fact may appear in the certificate of the clerk. *McRae v. Stokes*, 3 Ala. 401, cited in note in 5 L. R. A., N. S., 982. The court also said that, had the clerk in his attestation omitted to state that the record had been transferred to his office by law, the inference would have been that it was legally there, and that he was the proper officer to attest it.

Act of Congress Does Not Prescribe Exclusive Mode.—The act of congress, of May, seventeen hundred and ninety, does not exclude other modes of authenticating the acts of the legislature of a sister state. *Hanrick v. Andrews*, 9 Port. 9.

Necessity for Particular Form.—The act of congress relating to the authentication of foreign judgments only requires that the attestation of the clerk shall be in the form prescribed for the court in which the judgment was rendered, and the certificate of the judge that the clerk's attestation is in due form is conclusive. *Andrews v. Flack*, 88 Ala. 294, 6 So. 907, cited in note in 5 L. R. A. 961, 967.

Form Immaterial.—An exemplification of a foreign judgment is sufficiently authenticated, if the presiding magistrate of the court certify that it is in due form of law, the form of attestation of the clerk is immaterial. *Crawford v. Simonton's Ex'rs*, 7 Port. 110, cited in note in 5 L. R. A., N. S., 955.

Certificate as to Official Character of Clerk.—Although a judge does not certify in so many words to the official character of the clerk, where he affirms the latter's attestation to be in due form this is enough. *Linch v. McLemore*, 15 Ala. 632, cited in note in 5 L. R. A., N. S., 967.

Power of Attorney Certified by Justice of the Peace.—A power of attorney, acknowledged before one professing to be a justice of the peace in Arkansas, with a certificate of the clerk of the probate court of the county as to the official character of the justice of the peace, and of the acknowledgment and registration of the power of attorney, is not sufficiently authenticated, either at common law, or

under the act of congress. *Key v. Vaughn*, 15 Ala. 497.

Exemplification of Statutes.—Under Code 1876, § 3045, a certified transcript of the statutes of a foreign state as deposited in the office of its secretary, or a printed form purporting on its face to be issued by its authority, is sufficient proof of the existence of the statute. *Cubhedge v. Napier*, 62 Ala. 518.

Exemplification under Great Seal of State.—A statute of one state may be proved in another by an exemplification under the great seal of the state, affixed by the person to whom the custody or use of it has been legally confided, and accompanied by a certificate of the object for which it is used. *Wilson v. Walker*, 3 Stew. 211.

§ 257 (2) Judicial Acts, Records, and Proceedings.

Certificate Must Be Made by Chief Justice.—The certificate to the record of a judgment rendered in one state, to be used in another, by the first justice, is not sufficient, under the act of congress, unless it appear that the first justice is the chief justice or presiding magistrate. *Hudson v. Daily*, 13 Ala. 722, cited in notes in 21 L. R. A. 471, 5 L. R. A., N. S., 962.

By statute, a record of another state must be authenticated by the judge, chief justice, or presiding magistrate of the court. A record authenticated by "one of the judges," there being no chief justice by law of the state, is admissible in evidence. *Huff v. Campbell*, 1 Stew. 543, cited in note in 5 L. R. A., N. S., 961.

"When, by the organization of the court, there is no chief justice, one of the justices, from the necessity of the case, has authority to make the requisite certificate; and this is a substantial compliance with the act of congress. *Woodley v. Findlay*, 9 Ala. 716. The certificate by the governor is unnecessary and superfluous." *Andrews v. Flack*, 88 Ala. 294, 6 So. 907, 908.

In *Womack v. Dearman*, 7 Port. 513, cited in note in 5 L. R. A., N. S., 948, it was held that the United States courts in the territories of the United States were to be considered as domestic tribunals, the proceedings of which all other

courts of the country were bound to receive and respect when exemplified under the seal of such courts, and other courts were presumed to know such seal, in the same manner as each court within a state was presumed to know and recognize the seal of any other court within the state. In this case the record was certified by the clerk of the court with the seal of the court annexed, to which was appended the certificate, under seal, of the judge of the court that the attestation of the clerk was in due form.

In *Hughes v. Harris*, 2 Ala. 269, cited in note in 5 L. R. A., N. S., 980, the question was raised whether it was necessary to show, by evidence other than that which the exemplification itself afforded, that the court which rendered the judgment was a court of record. It was held that the transcript, being attested by the clerk and certified by the presiding justice, was prima facie evidence sufficient to authorize the influence that the court was a court of record, especially when the form of the proceeding was such as would not have been had in a court whose proceedings and judgments were not dignified as records. In this case whether the court was a court of record was not put in issue, the plea denying only the existence of such a record.

When Records of Other States Admissible.—"The records and judicial proceedings of the courts of any state or territory, or of any country subject to the jurisdiction of the United States, are required to be admitted in evidence in any court within the United States, when such records and judicial proceedings are attested by the clerk, and the seal of the court annexed, if there be any seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the attestation is in due form. Federal Statutes Annotated, vol. 3, p. 37, § 905 (U. S. Comp. St. 1901, p. 677). 'A copy of a judgment of a state court certified by the clerk alone, without the certificate of a judge, chief justice, or presiding magistrate, that the attestation was in due form of law, can not be admitted in evidence.' *Northwestern Mut. Life Ins. Co. v. Stevens*, 71 Fed. 258, 18 C. C. A. 107." *Ex parte Felder*, 3 Ala. App. 231, 58 So. 94.

Exemplification of Probate of Will.

The probate of a will in one state will be admitted in the courts of another, without proof of the statute which gives the foreign court jurisdiction, upon the proceedings being authenticated pursuant to the act of congress. *Puryear v. Beard*, 14 Ala. 121, cited in note in 5 L. R. A., N. S., 980.

To let in the exemplification of the probate of a will under the act of congress, no particular form of certificate is necessary. If the record is attested by the clerk, and his attestation is certified by the presiding judge to be in due form, it is immaterial how the attestation is made. *White v. Strother*, 11 Ala. 720.

The probate of a will in Georgia is shown by a transcript of a court of ordinary which contains an affidavit by one of the subscribing witnesses, that "he believes that he assigned his name at the last part of the within instrument of writing," taken before "J. Thigpen, J. P.," and an entry that the executors were sworn, and which shows that the executors discharged several of their duties, and were recognized as executors by the court. *Jemison v. Smith*, 37 Ala. 185, cited in note in 5 L. R. A., N. S., 971.

In *Dozier v. Joyce*, 8 Port. 303, cited in note in 5 L. R. A., N. S., 967, a transcript of a will, certified by an ordinary of a court or probate of another state acting as both judge and clerk of his court, was held sufficient. The court said the act of congress of 1790 must be held to reach such a case or it was not provided for, as the act of 1804 did not apply; that the decision on the probate of a will was a judicial proceeding, and the court in which it was registered a court of record; and that, if the presiding judge was also clerk of the court, he must have authority to attest the records of his court in both capacities. To the same effect is *Huff v. Cox*, 2 Ala. 310, cited in note in 5 L. R. A., N. S., 967.

Where a court of probate has both a judge and a clerk, and the authentication is within the letter of the act of congress, a transcript of a will and its probate is admissible. *Lee v. Hamilton*, 3 Ala. 529, cited in note in 5 L. R. A., N. S., 949.

Affidavit Certified by County Judge.—Under Code 1876, § 550, providing that

affidavits required in judicial proceedings, taken without the state, must be made by commissioners appointed by the governor of the state or by any judge or clerk of the federal court, or any judge of a court of record, or a notary public, who shall certify the same under their hands and seals of office, if any, the certificate of a county judge to an affidavit in which it does not appear that his court is a court of record is insufficient to render such affidavit admissible in evidence. *Holly v. Bass' Adm'r*, 68 Ala. 206.

Must Be Certified by Judge of Court.

—A transcript from a court in another state can not be admitted in evidence when it fails to show that the person certifying was judge of the particular court from the records of which the transcript was taken. *Brown v. Johnson*, 42 Ala. 208, cited in note in 5 L. R. A., N. S., 963.

Where the certificate of a judge stated that he was the presiding judge of a certain district which was said to include the county from which the transcript of the record of a judgment was taken, it was held sufficient. The court said this excluded any idea other than that he was the judge of the court the record of which was certified. *Geron v. Felder*, 15 Ala. 304, cited in note in 5 L. R. A., N. S., 964.

Certificate of Chancellor.—A certificate to a transcript of a record of a sister state, "I, J. J., one of the chancellors of the state of said state, and in turn presiding chancellor for said district, do," etc., appears to be good. *Taylor v. Kilgore*, 33 Ala. 214, cited in note in 5 L. R. A., N. S., 964.

Where the judge described himself as one of the chancellors of the state, and "in turn presiding chancellor" of the district from which the record came, it was held sufficient. The court understood the chancellor thus to assert that he was one of the chancellors of the state, and was in his turn the presiding chancellor of the particular district at the date of his certificate. *Taylor v. Kilgore*, 33 Ala. 214, cited in note in 5 L. R. A., N. S., 964.

In *Lehman v. Glenn*, 87 Ala. 618, 6 So. 44, cited in note in 5 L. R. A., N. S., 948, a decree of a chancery court in Virginia,

duly certified according to the act of congress, was held admissible.

A certificate of "the chairman and presiding justice of the court of pleas and quarter sessions" of a specified county in North Carolina, appended to a transcript which purports to contain "certain entries upon the minutes of said court concerning the probate" of a will, to the effect that the clerk, "whose name appears to the foregoing certificate, was at the time of signing such certificate, and still is, the true and lawful clerk of said court, duly elected, appointed, and qualified; that his signature is genuine, and his certificate in proper form; and that the above is a true impression of the seal of said court,"—is a substantial compliance with the requisitions of the act of congress respecting the authentication of foreign transcripts. *Thrasher v. Ingram*, 32 Ala. 645, cited in note in 5 L. R. A., N. S., 961, 968.

Certificate of First Judge.—And in *Hudson v. Daily*, 13 Ala. 722, cited in note in 5 L. R. A., N. S., 962, a judge described himself as "first judge," and this was held not to be in compliance with the requirement of the act of the congress, because the term was ambiguous and might imply a different meaning from the terms "chief justice" or "presiding magistrate." In the absence of proof as to what the law of the state was on this subject, the certificate was held defective.

"The act of congress of May, 1790, provides, that the records and judicial proceedings of the courts of any state, shall be proved, or admitted, in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be one, together with the certificate of the judge, chief justice, or presiding magistrate, that the attestation of the clerk is in due form. The language in this certificate is 'I, Abram Keen, first justice,' etc. We do not think this certificate is in conformity with the requisitions of the act alluded to. The language of the act, is judge, chief justice, or presiding magistrate. We do not wish to be understood as laying down the rule, that the certificate of the judge must use the precise words of the statute, but when there is a departure from the statute, in the language of the certifi-

cate, the words, or language adopted must not be equivocal, or capable of conveying any other idea than that of judge, chief justice, or presiding magistrate. Here, the term first, justice, is used. Is he the presiding magistrate, or chief justice? Or is he the first that was commissioned? Or is it meant that his commission is older than either of the other justices? His commission may be the oldest, and yet it would not follow, from this, that he would be the chief justice, or the presiding magistrate unless by statute the date of the commission would give him this position. But the bill of exceptions does not show, what the statute law of Virginia is, on this subject, or whether there is any. As the term used in the certificate may imply a different meaning than the terms chief justice, judge, or presiding magistrate, the certificate does not conform to the act of congress, and therefore the judgment is reversed, and in cause remanded." *Hudson v. Daily*, 13 Ala. 722, 727, cited in note in 5 L. R. A., N. S., 949.

Proof of Existence of Court.—In *Thrasher v. Ingram*, 32 Ala. 645, cited in note in 5 L. R. A., N. S., 980, the transcript of a record of the court of appeals and court of sessions of a certain county of North Carolina was objected to because there was no evidence that there was such a court in that state, or that it was a court of record; but the transcript was held admissible.

Presumption as to Jurisdiction of Court.—In *Slaughter v. Cunningham*, 24 Ala. 260, cited in note in 5 L. R. A., N. S., 980, it was held that, where the copy of a record of a court of another state was duly authenticated, the courts of the state where the transcript was offered were bound to presume that the court of the sister state had jurisdiction over the subject matter upon which it professed to adjudicate, until the contrary appeared.

Record of Board of Supervisors.—Under U. S. Comp. St. 1901, p. 677, § 905, which provides that the records and judicial proceedings of courts shall be admitted in evidence in any other court upon their attestation by the clerk, annexation of the court's seal, if any, and the certificate of the judge, chief justice, or presiding magistrate that the attesta-

tion is in due form, the record of the proceedings of the board of supervisors of a Mississippi county, if such board is considered a court, was not admissible in Alabama as such a record, where the attestation of the clerk was accompanied by no certificate of the presiding officer. *Ex parte Felder*, 3 Ala. App. 231, 58 So. 94.

Under U. S. Comp. St. 1901, §§ 677, 906, which provides that all records in a public office of any state or territory not pertaining to a court shall be proved by the attestation of their keeper and the seal of his office, if there be a seal, together with the certificate of the presiding justice of the court or county, etc., or of the governor, or secretary of state, the chancellor or keeper of the great seal, etc., that the said attestation is in due form and by the proper officers, a record of the proceedings of a board of supervisors of a Mississippi county was inadmissible in evidence in an action in Alabama, where merely authenticated by the clerk of the chancery court of the county in question. *Ex parte Felder*, 3 Ala. App. 231, 58 So. 94.

Record Not Properly Certified.—A record of a suit or judicial proceeding in another state, not certified by the judge of the court in which the proceedings were had, as required by the act of congress, is inadmissible in evidence. *Holly v. Flournoy*, 54 Ala. 99, cited in note in 5 L. R. A., N. S., 959.

Examples of Sufficient Authentication.—**Certificate of Appellate Judge.**—A certificate by an associate judge is not sufficient to authenticate the record of another state. *Johnson v. Howe's Adm'r's*, 2 Stew. 27.

Must Be Clerk at Date of Certificate.—It must appear from the certificate of the judge that the clerk certifying a copy of record was clerk at the date of his certificate. *Johnson v. Howe's Adm'r's*, 2 Stew. 27.

In the exemplification of a record of a foreign state, the certificate of the judge that the attesting clerk was clerk at the date of the certificate, and that the attestation was in proper form, is sufficient, although it does not find that the clerk was such at the time of attestation. *Merrivether v. Garvin*, 2 Port. 199.

Attestation in Proper Form.—The certificate to an exemplified copy of the record of a court, by a judge thereof, "that the attestation of the clerk of the court is in proper form," is sufficient to make such copy admissible evidence in the courts of another state. *Brown v. Adair*, 1 Stew. & P. 49, cited in note in 5 L. R. A., N. S., 960.

"We are aware that in this adjudication, we are overruling a principle of decision settled in the case of *Johnson v. Howe*, 2 Stew. 27. In that case the judgment of affirmance was predicated on two grounds. First, that it did not appear from the judge's certificate that he was presiding judge or magistrate of the court from which the exemplification was taken, and second, that he did not certify that the clerk was clerk at the date of his attestation." *Brown v. Adair*, 1 Stew. & P. 49, 50.

Judgment of Court of Record.—Where the proceedings and judgment of a court in a sister state are certified by the clerk and attested by the judge, and the proceedings are in form like those of a court of record, and the declaration such as is usual in such case, it will be intended, without further proof, that the judgment was rendered by a court of record. *Hughes v. Harris*, 2 Ala. 269, cited in note in 5 L. R. A., N. S., 980.

Certificates Showing Complete Authentication.—Where the genuineness of a copy of the proceedings of the probate court of a sister state is authenticated by the attestation of its clerk, the certificate of the judge to the official character of the clerk, and the formality of his attestation, and the additional certificate of the clerk in the terms of the law to the official qualification of the judge, its authentication is complete, under the act of congress of 1804, amendatory of the act of 1790. *Kennedy v. Kennedy's Adm'r*, 8 Ala. 391.

Sufficient Certification of Clerk's Authority.—The certificate of a judge to the exemplification of a record of another state that the attestation of the clerk "is in due form" is sufficient to admit such exemplification in evidence, notwithstanding the judge may not certify, in so many words, to the official character of the clerk. *Linch v. McLemore*, 15 Ala.

632, cited in note in 5 L. R. A., N. S., 967.

Sufficient Attestation.—Where the judicial certificate to an exemplification of a judgment rendered in the circuit court of Noxubee County in the state of Mississippi, recites, "I, A. B. D., presiding judge of the Fourth judicial district of the state of Mississippi, which said district includes the county of Noxubee," do certify, etc., it is a sufficient compliance with the act of congress to admit the transcript in evidence. *Geron v. Felder*, 15 Ala. 304, cited in note in 5 L. R. A., N. S., 964.

Insufficient Attestation.—In an action brought on a decree of another state, a certificate by the clerk of the county in which the decree was taken that "I do hereby certify that the foregoing is a true copy taken from the records of the clerk's office," etc., is insufficient to give authenticity to the record. *Allen v. Allen*, Minor 249, cited in note in 5 L. R. A., N. S., 971.

Proof of Court of Record.—"In *Hughes v. Harris*, 2 Ala. 269, cited in note in 5 L. R. A., N. S., 980, the question was raised whether it was necessary to show, by evidence other than that which the exemplification itself afforded, that the court which rendered the judgment was a court of record. It was held that the transcript, being attested by the clerk and certified by the presiding justice, was prima facie evidence sufficient to authorize the inference that the court was a court of record—especially when the form of the proceeding was such as would not have been had in a court whose proceedings and judgments were not dignified as records. In this case whether the court was a court of record was not put in issue, the plea denying only the existence of such a record.

Proceedings before Justice of the Peace.—Sworn copies of proceedings, in a suit had before a justice of the peace in another state, are admissible as evidence of such proceeding, in the absence of any statute mode of proof of such proceedings by the former state. *McGee v. Sheffield*, 3 Stew. & P. 351, cited in note in 5 L. R. A., N. S., 950.

In *McGee v. Sheffield*, 3 Stew. & P. 351, cited in note in 5 L. R. A., N. S., 950, it was held proper for a justice of the

peace of another state to prove copies of proceedings before him resulting in a judgment. The court said that proceedings before the justice were not of the dignity of records, and that, if it were not competent to prove them by sworn copies, proof would be wholly impossible.

Failure to Show County within Judge's Jurisdiction.—Where it is not made to appear by the certificate either of the clerk or judge in a sister state that the county in which the proceedings were had is included in the judicial circuit within which the judge presides, the authentication is insufficient to admit the record in evidence. *Elliott v. McClelland*, 17 Ala. 206, cited in note in 5 L. R. A., N. S., 963.

§ 258. Acts, Records, and Judicial Proceedings of Foreign Countries.

Records of Foreign Courts.—A transcript from the records of a foreign court, whether of general or special and limited jurisdiction, is admissible evidence in the courts of this state, if properly authenticated; and our courts are bound to presume that the foreign court had jurisdiction of the subject matter upon which it professes to adjudicate, until the contrary appears. *Slaughter v. Cunningham*, 24 Ala. 260, cited in note in 5 L. R. A., N. S., 980.

Spanish Records.—The acts of 1803, 1816, and 1818 in respect to the keeping and translating of the Spanish records make duly authenticated copies of such records evidence, and dispense with the production of the originals. *Farmer's Heirs v. Eslava*, 11 Ala. 1028.

Petition to Spanish Governor.—A petition addressed to the Spanish governor of Louisiana during the time the country was in the possession of Spain, asking the grant of a tract of land, and the order of the governor thereon, was prima facie deposited, if not registered, in a public office, and became a public archive of the province. Consequently, a copy of such a document is admissible evidence. *Farmer's Heirs v. Eslava*, 11 Ala. 1028.

(C) PRIVATE WRITINGS AND PUBLICATIONS.

§ 259. Unofficial Writings in General.

Ex Parte Affidavit of Agreement.—An

agreement between parties to a suit as to time of bringing suit, waiver of service and notice of issue, and as to time for hearing, was not competent as evidence, under Code 1896, § 1792, providing that testimony must be given in open court under oath of witness, where the only proof of its execution was an *ex parte* affidavit, made out of court before the bill was filed. *Durr v. Hanover Nat. Bank*, 148 Ala. 363, 42 So. 599.

§ 260. Unofficial Records.

The "commercial rating" of an assignor for benefit of creditors is not competent to show that he has not embraced all his property in the assignment, and that it is therefore void, since it is no more than the estimate of third persons as to a man's solvency, and the amount of credit which, in the opinion of such persons, may be safely given him. *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. 283, cited in note in 23 L. R. A., N. S., 368, 372.

Minutes of Church Conference.—The minutes of a quarterly conference of the Methodist Episcopal Church South are admissible to prove who are the trustees of a church building within the conference. *Rayburn v. Elrod*, 43 Ala. 700.

§ 261. Corporate Records and Proceedings.

§ 261 (1) In General.

The minutes of a corporation are *prima facie* evidence of the preliminary proceedings for its incorporation. *Semple v. Glenn*, 91 Ala. 245, 9 So. 265, reversing 6 So. 46.

The minutes of the meetings of a corporation, is identified, or shown to be correct or authoritatively made, are *prima facie* evidence of the preliminary proceedings for its incorporation, and are admissible to show that in the subsequent incorporation of a company of another name under a modified charter, to take the place of the original company, there was no change or departure from the original charter and purposes of such company. *Semple v. Glenn*, 91 Ala. 245, 9 So. 265.

§ 261 (2) Parties against Whom Admissible.

Member of Corporation.—As against a member of a corporation, the minutes of a corporate meeting which he attended

are admissible to show what was done at such meeting. *Booth v. Dexter Steam Fire-Engine Co. No. 1 of Montgomery*, 118 Ala. 369, 24 So. 405.

Employee of Corporation.—In a suit by the bank against the cashier, on his bond, to recover damages because he had failed to protest a bill of exchange left with the bank for collection, it was proved that it was the duty of the cashier to attend to this department, but that, the directors having passed a resolution requiring the cashier to regulate the duties of the officers of the bank so as to give a certain other officer the necessary assistance in his department, a memorandum arranging the duties of the several officers, and giving to the second bookkeeper the charge of the collecting department, was drawn up, signed by all the officers except two, and laid before the board of directors when in session, but it was not shown that it was read or acted on. Held, that the memorandum was properly admitted in evidence to show that the default was not defendant's, but that of the second bookkeeper. *Bank v. Comegys*, 12 Ala. 772.

Third Persons.—The books of a corporation are inadmissible to establish a right in its favor against third persons. *City of Tuscaloosa v. Wright*, 2 Port. 230; *Jones v. Florence Wesleyan University*, 46 Ala. 626, cited in note in 53 L. R. A. 522, 523.

Entries in corporate books of matters relative to any property or right claimed by them can never be evidence for a corporation against third parties, unless made so by act of the legislature. *Jones v. Trustees Florence Wesleyan Univ.*, 46 Ala. 626, cited in note in 53 L. R. A. 535.

The books of a university are not admissible in evidence in an action by it against a third person for an alleged breach of an agreement to pay a designated sum in stock as an endowment to the university. *Jones v. Trustees Florence Wesleyan Univ.*, 46 Ala. 626, cited in note in 53 L. R. A. 522.

§ 261 (3) Names of Subscribers and Amount of Subscription.

To Prove Subscription.—The subscription books of a corporation are *prima fa-*

cie evidence of the fact of the subscription of those appearing thereon as stockholders. *Semple v. Glenn*, 91 Ala. 245, 9 So. 265.

§ 262. Conveyances, Contracts, and Other Instruments.

§ 262 (1) Purpose and Use as Evidence in General.

Order of Assignment of Wages.—In an action on assignments of wages, where plaintiff testified that defendant's superintendent had agreed to turn over to him the wages of defendant's employees, if plaintiff would feed them and procure written orders from the employees, the written orders procured were properly admitted in evidence. *Alabama Iron Co. v. Smith*, 155 Ala. 287, 46 So. 475, cited in note in 36 L. R. A., N. S., 902.

Duplicate Contract.—If, at the time of the making of a contract, a party make a duplicate as a mere memorandum, and did not give a copy to the other, the duplicate is admissible, where he testifies to its making. *Columbia Mill & Elevator Co. v. Bingham*, 169 Ala. 554, 53 So. 995.

Tax Deed.—When lands are sold for unpaid taxes, the deed to the purchaser, though it may be invalid as a conveyance of the title, is color of title, when possession has been taken and held under it; and is admissible as evidence for the grantee, or one holding under him, to show the extent of the possession according to the boundaries therein described. *Stovall v. Fowler*, 72 Ala. 77.

Receipt of Attorney.—The receipt of an attorney at law, acknowledging that he had received certain securities for the payment of money, which he was to sue for in the United States circuit court, collect, and account for, is prima facie evidence of the genuineness and justness of the securities described in the receipt. *Hair v. Glover*, 14 Ala. 500.

Statement Showing Loan of Slave.—A statement in writing, not under seal, or proved or recorded, setting out the loan of a slave by B. to A., is not competent testimony in a controversy between B. and a creditor of A., without proof that the slave was delivered to A. simultaneously with the execution of the instrument. *Beall v. Ledlow*, 14 Ala. 523.

Receipt of Creditor.—A creditor's re-

ceipt, made at the time of the payment of an account, stating that a third person paid the same, is admissible to show that fact as against the debtor. *Harrison v. Harrison*, 9 Ala. 73.

A bill of sale of an automobile, manufactured by a corporation authorized to manufacture automobiles, executed in the name of the corporation by its president and general manager, having the general control and supervision of the business affairs of the corporation, is sufficiently executed to render it admissible in evidence. *Burgin v. Marx*, 158 Ala. 633, 48 So. 348.

Mortgage.—"There was no merit in the objections raised to the introduction in evidence of defendant's mortgage. It recited a debt due from the mortgagor to him, which was sufficient evidence of the debt. *O'Conner v. Nadel*, 117 Ala. 595, 23 So. 532." *Bufford v. Raney*, 122 Ala. 565, 26 So. 120, 122.

Receipt of Husband to Wife.—A receipt given by a husband to his wife, acknowledging that he received from her a certain sum of money for investment with a like amount of his own, in exchange purchased by him, and that she is entitled to one-half the proceeds, and liable for one-half the loss, on sale of the exchange, is an admission by him that the money rightfully belonged to her, and, after his death, prima facie entitles her to recover the amount from his estate. *Haynie v. Miller*, 61 Ala. 62.

§ 262 (2) Relation to Matters in Controversy in General.

Bond and Note Referring to Same Transaction.—B., being sued upon a promissory note, pleaded want of consideration, etc., and offered in evidence a bond executed by the payee, conditioned to make title to a tract of land, and proposed to show that the note was given for the payment of part of the purchase money, and that it was the same note to which the condition of the bond referred, though its date was not truly recited therein. Held, that the bond should be permitted to go in evidence to the jury. *Bates v. Terrell*, 7 Ala. 129.

Bill of Sale Not Conveying Goods in Question.—Where the title to goods is in controversy, bills of sale which are not

shown in any way to convey the goods in question should be excluded. *Appel v. Crane*, 83 Ala. 312, 3 So. 863.

Receipt Not Showing Relation to Account.—W. sent a telegraphic dispatch to an infirmary where a patient was, requesting that every attention be shown to him, and promising to pay the expenses, and authorizing the employment of a physician not connected with the infirmary. In an action by the physician against W. to recover for his services, it was held that the receipt of the infirmary showing that W. had paid his account with them, but not showing that the plaintiff's debt was embraced in the account, was not admissible in evidence on the part of the defendant, it being irrelevant. *White v. Mastin*, 38 Ala. 147.

Note Not Properly Identified.—Notes not shown to be in the handwriting of the purchaser, and not identified as those given for the purchase money of land, are not competent evidence to show payment of the purchase money, on the testimony of the deceased purchaser's wife that he delivered the notes to her after taking them up; her knowledge as to their payment being derived from hearsay. *McRae's Adm'r v. McDonald*, 57 Ala. 423.

§ 262 (3) Recitals of Fact in General.

Do Not Bind Stranger to Instrument.—A recital in an instrument executed by the beneficiary in a trust deed, substituting a trustee, to the effect that the trustee named in the deed has become disqualified under the terms of the deed, is not evidence of that fact as against a stranger to the instrument. *Leech v. Karthaus*, 141 Ala. 509, 37 So. 696.

"There was no evidence of the happening of either of those contingencies, other than in the recital of the instrument made by the building and loan association, purporting to substitute Cooper; and those recitals were not binding upon or evidence against the defendants, they being strangers to that instrument. As a general rule, recitals of a private writing are treated as *res inter alios acta*, and are evidence only against the parties thereto and their privies. *Wood v. Lake*, 62 Ala. 489. We do not say this rule is applicable to recitals made in the execution of a naked power of sale, such as were involved in *Naugher v. Sparkes*, 110 Ala.

572, 18 So. 45." *Leech v. Karthaus*, 141 Ala. 509, 37 So. 696, 697.

Recitals in Deed.—Where, in an action to recover the penalty imposed by Code, § 4137, for unlawfully cutting trees on the land of another, plaintiff claims ownership under a deed from a grantee of defendant, the recital in the deed to plaintiff of value paid for the trees was not evidence of such payment against defendant, who was not a party or privy to the deed. *Shelby Iron Co. v. Ridley*, 135 Ala. 513, 33 So. 331.

Recitals in Attachment Bond.—Where money is received by one from a sheriff, to which another is entitled, but the person receiving it gives a bond of indemnity to the sheriff, reciting the attachment of the money, and providing for the repayment unless the money is determined to belong to the person receiving it, these recitals are not evidence of the existence of the attachment, in a suit by the person entitled against the one receiving it. *Oliver v. Ellzy*, 11 Ala. 632.

Instrument Inoperative for Want of Seal.—In an action on a special contract whereby defendant promised to pay in consideration that plaintiff, as agent and attorney in fact of another, would make him a good title to his principal's interest in a certain tract of land, plaintiff having proved that he afterwards delivered a deed for the land to the clerk for registration, it is competent for the defendant to show that the deed was in fact executed by the principal and delivered to the plaintiff for the defendant long before the making of the contract declared on, and had been wrongfully withheld and concealed by the plaintiff until after the making of the contract; and an instrument previously executed by the principal and attested by the plaintiff, in form a deed, but inoperative as a conveyance for want of a seal, was not wholly irrelevant. *Adams v. Adams*, 29 Ala. 433.

§ 262 (4) Admissions in General.

Deed as Admission.—In ejectment against A. and S., his wife, to recover an undivided one-half interest in a tract of land, S. set up title to the whole tract by adverse possession, and that she had paid M., her father, who was also plaintiff's grantee, for the whole tract; that she had

held it adversely for the statutory period of limitation. Held, that a deed conveying a part of such tract, executed by S. and her father during the time that plaintiff asserted title, was competent as being an admission that she claimed only a half interest in the land. *Steed v. Knowles*, 97 Ala. 573, 12 So. 75.

§ 262 (5) Consideration.

Recital of Debt.—A chattel mortgage reciting a debt is competent evidence thereof. *Bufford v. Raney*, 122 Ala. 565, 26 So. 120.

Proof of Consideration in Deed.—In the case of a claim to property taken on execution, by deed from the defendant in execution, a consideration for the deed must be proved by extrinsic evidence to support it. It is not proved by the recital in the deed. *Branch Bank v. Kinsey*, 5 Ala. 9, cited in note in 20 L. R. A. 111.

Statement in Deed as to Amount of Purchase Money.—Where the vendee of the land pays to the vendor the purchase money, or a part of it, and receives from the latter a deed of conveyance, the deed is admissible, in a controversy between the parties, as prima facie evidence of the amount of the purchase money. *Fitzpatrick's Adm'r v. Harris*, 8 Ala. 32.

Against Antecedent Creditors.—Recitals in a deed do not constitute evidence of a consideration between those claiming under it and a pre-existing creditor, when it is impeached for fraud or want of consideration by such creditor. *Pool v. Cummings*, 20 Ala. 563.

"As a general rule, it is true that the recitals in a deed are not evidence of a consideration, in a controversy between those claiming under it and a pre-existing creditor, when it is impeached for fraud, or want of consideration, by such creditor. The case of *Falkner v. Leith*, 15 Ala. 9, 12, and the cases cited in the opinion in that case, show the extent to which this doctrine has been carried by this court. We are not in the least disposed to trench upon the law as it has previously been settled, and, without questioning the correctness of these cases, we are of opinion they do not affect the case before us." *Pool v. Cummings & Co.*, 20 Ala. 563, 572.

As against antecedent creditors, the re-

cital in a deed of payment of a consideration is not evidence of that fact. *Tutwiler v. Munford*, 68 Ala. 124; *Branch Bank v. Kinsey*, 5 Ala. 9, cited in note in 20 L. R. A. 111.

§ 262 (6) Nature of Instrument in General.

Account Stated.—An account stated between the parties after an action is commenced is admissible in evidence. *Stowe v. Sewall*, 3 Stew. & P. 67.

§ 262 (7) Form and Validity in General.

Omission of Description in Deed.—Where a power of attorney authorized the making of a deed of certain described lands, which were a portion of the land in controversy, and of certain other lands, the description of which was omitted, it was not rendered inadmissible by reason of such omission. *Potts v. Coleman*, 86 Ala. 94, 5 So. 780.

Mistake in Description.—A deed of a vendor of land, containing covenants to a third person, given in compliance with a title bond, and at the request of the purchaser, conveying a part of the land included in the bond, is admissible in an action on the bond for a failure to convey, although there is a mistake in the description of the land. *Bedell's Adm'r v. Smith*, 37 Ala. 619.

Signature by Mark of Consignee's Agent.—A receipt, signed by the consignee's agent by his mark, admitting receipt of the goods, is valid, though not attested and acknowledged, and its effect can not be limited in an action against the carrier for failure to deliver the same goods receipted for. *Louisville & N. R. Co. v. Price*, 159 Ala. 213, 48 So. 814.

"There was no error in the court's overruling the objection of the defendant to the question, propounded to the plaintiff, as to what freight charges he paid on the goods. This, if not a proper element of damages, was admissible and relevant for other purposes. But the court was clearly in error as to the limitation placed upon the receipt offered in evidence—the restriction of its use for any purpose, except as a mere memorandum to refresh the memory of the witness—as well as in the charge to the jury to the effect that the receipt offered was.

not a valid receipt. It was not necessary that the signature to this receipt should have been attested. It was clearly not within the provision of the Code, and if the party who signed it had the authority to receive the goods and to receipt for the same, and did sign it by mark and deliver it to the agent of the defendant company, it was as valid as a receipt as if it had been attested or acknowledged." *Louisville, etc., R. Co. v. Price*, 159 Ala. 213, 48 So. 814, 816.

§ 262 (8) Execution and Proof.

Deed Neither Acknowledged Nor Recorded.—A deed, signed by the two grantors by their mark, and attested by one witness only, and not acknowledged or recorded, is admissible in evidence as against the objection that it was not properly executed. *Gay v. Hester*, 164 Ala. 651, 51 So. 329.

Deed Unattested and Unrecorded.—A deed signed by the grantor and acknowledged before a justice of the peace though unattested and not recorded within twelve months from its date, is admissible, on showing that the officer is without the jurisdiction of the court, by proving his handwriting. *Sharpe v. Orme*, 61 Ala. 263.

§ 262 (9) Record.

Unrecorded Deed.—A deed executed by the defendant in execution to the claimant is admissible, on the trial of the right of property against the plaintiff in execution, although it was not recorded within the time prescribed by law. *Wallis v. Rhea*, 10 Ala. 451.

A deed, though not recorded or attested by a subscribing witness, may, on proof aliunde of its execution, be read in evidence. *Robertson v. Kennedy*, 1 Stew. 245.

Failure to Record within a Year.—Under Code 1886, § 1798, providing that a conveyance duly acknowledged and recorded within twelve months shall be admissible without further proof, a deed not recorded within a year of its execution is not admissible to prove ownership or color of title, without evidence of possession and claim of title under the deed. *Postal Tel. Cable Co. v. Brantley*, 107 Ala. 683, 18 So. 321.

Must Be Recorded in Proper County.—

Under Code, § 1798, providing that conveyances acknowledged or proved according to law, and recorded within twelve months from their date, are admissible in evidence without further proof; and § 1806, declaring that conveyances of personalty to secure debts or provide indemnity must be recorded in the county in which the grantor resides, and also in the county where the property is at the date of the conveyance, and if, before the lien is satisfied, the property is removed to another county, the conveyance must be again recorded, within six months of the removal, in the county to which removal is made—a recorded chattel mortgage is not admissible in evidence as self proving, unless it be shown, on the face of the instrument or by extrinsic evidence, that it is recorded in the proper county or counties. *Jones v. State*, 113 Ala. 95, 21 So. 229.

§ 262 (10) Void Instruments.

Mortgage for Uncertainty.—Where plaintiff claimed title under foreclosure of a mortgage in which the description of the land was void for uncertainty, the introduction of such mortgage was admissible, in connection with other evidence that at the time defendant executed such mortgage he lived on the lands sued for, and owned no others in the county. *Buchanan v. Larkin*, 116 Ala. 431, 22 So. 543.

Void Lease.—A lease, though void under the statute of frauds, is admissible to show the character of the occupation of the premises, and the amount agreed to be paid for rent. *Crawford v. Jones*, 54 Ala. 459.

§ 262 (11) Instruments Showing Only Part of Transaction or Agreement.

Memorandum of Parol Contract.—A writing drawn up after a contract is concluded by parol, intended merely as a memorandum, may be given in evidence concurrently with oral proof of the additional facts necessary to constitute a contract. *Mobile Marine Dock & Mut. Ins. Co. v. McMillan*, 31 Ala. 711.

§ 263. Books of Account.

See, also, post, "Books of Account," § 283.

§ 263 (1) Books of Particular Persons in General.

The partnership books are admissible in evidence on the statement of an account between partners by the register to whom the cause is referred under a general order of reference. *Powers v. Dickie*, 49 Ala. 81, cited in note in 52 L. R. A. 842.

The general rule is that entries made in the books of a partnership during the continuance of the copartnership are evidence for and against the different members of the firm in a subsequent adjustment of their accounts between themselves. *Powers v. Dickie*, 49 Ala. 81; *Desha v. Smith*, 20 Ala. 747; *Routen v. Bostwick*, 59 Ala. 360, cited in note in 52 L. R. A. 842.

In a suit for the settlement of partnership accounts, the register on a reference should receive such books as evidence for and against all the partners. *Routen v. Bostwick*, 59 Ala. 360, cited in note in 52 L. R. A. 842.

"Under these conditions, we think the book should not have been excluded by the register, but that it should have been accepted as evidence and treated as being prima facie correct. *Kirkman v. Vanlier*, 7 Ala. 217; *Routen v. Bostwick*, 59 Ala. 360; *Powers v. Dickie*, 49 Ala. 81; *First Nat. Bank v. Allen*, 101 Ala. 476, 14 So. 335; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59; *Paulling v. Creagh*, 54 Ala. 646, 653." *McGarth v. Stein*, 148 Ala. 370, 42 So. 454, 456.

A private memorandum book kept by one of the partners, who was treasurer of the company, and to which other partners did not have access, is not evidence for the party keeping it. *Turnipseed v. Goodwin*, 9 Ala. 372, cited in note in 52 L. R. A. 845.

The books of a firm, to which all the partners have had free access, are evidence for and against each partner, in settling the partnership accounts, and the entries therein must be considered at least prima facie correct. *Desha v. Smith*, 20 Ala. 747, cited in note in 52 L. R. A. 842.

"It is a well established principle, that entries in the books of a firm, to which all the members have had free access, are evidence for and against each other in

settling the partnership accounts; such entries, at the least, must be considered as prima facie correct. *Heartt v. Croning*, 3 Paige 566; *Caldwell v. Leiber*, 7 Paige 483; *Allen v. Coit*, 6 Hill 318; *Millauden & Son v. Sylvester*, 8 La. 262-268; 11 Con. En. Ch. R. 269; Coll. on Partnership, Perkins' Ed., Note 1. But when the accounts between the partners have been made out and settled after full deliberation, they become much more stringent proof of their correctness; for the settlement shows the assent of the mind, after an examination of the accounts, that they are correct, and consequently that there is no false or erroneous charge contained in them; and it requires clear and convincing proof of error, and further that this error was unknown to the party at time of the settlement, to induce a court of equity to open the account thus settled. All the authorities agree, that the burden of proof lies on him who complains of errors in a stated account, and errors which he does not clearly establish can not be presumed to exist." *Desha v. Smith*, 20 Ala. 747, 752.

Books of Municipal Waterworks.—In a suit for partition of property constituting a municipal waterworks system, a decree directed that, for the purpose of an accounting, S., one of the defendants, who was in charge of the property, should deliver to the register all books and accounts belonging to the waterworks, and on appeal by S. the decree was affirmed in its entirety. Thereafter S. delivered to the register a number of books, including a certain book of accounts, which was made in part from entries in other books, but which appeared to be a book from which all the annual statements of receipts and disbursements had been made. It was shown that the statements, when made out, were forwarded to the respective owners of the property, and that all such annual statements had been accepted for a long series of years. It further appeared that the entries in the book were correct, and that the books were accessible to all the parties, and that on two occasions complainant's agent had inspected the particular book in question and made no objection thereto. Held, that it was error on the reference to exclude such

book, but it should have been treated as prima facie correct. *McGarth v. Stein*, 148 Ala. 370, 42 So. 454.

To Prove Financial Condition of Partnership.—So, in testing the bona fides of a sale made by a partnership it is competent for an attachment creditor to show the insolvency or embarrassed condition financially of the partnership debtor, and for this purpose the books of the partnership may contain competent evidence, and if furnished to the creditor may be introduced in evidence by him, and upon failure after legal notice to produce such books he may introduce evidence of their contents. *Smith v. Collins*, 94 Ala. 394, 10 So. 334, cited in note in 52 L. R. A. 839.

Books of Steamboat.—So, in *Kirkman v. Vanlier*, 7 Ala. 217, cited in note in 52 L. R. A. 839, which was an action in equity against proprietors and part owners of a steamboat, brought for the purpose of subjecting earnings in the hands of a resident part owner, belonging to a nonresident part owner, to the payment of the plaintiff's claim, the books of the proprietors of the steamboat for the season and witnesses in aid and explanation thereof were examined by the registrar. But it seems to have been done without objection, the case turning upon the question whether the registrar should have reported the evidence or merely his conclusions.

Books of Bank.—A book of original entries, made by the deceased teller of a bank, is inadmissible in evidence to prove payments made to a depositor, where the custom of the bank is to pay money to depositors only on checks. *Bank of Montgomery v. Plannett's Adm'r*, 37 Ala. 222, cited in note in 52 L. R. A. 565, 566.

Books of Physician.—The original entries in the books of a physician, which are declared by the Code (§ 2298) to be "evidence for him, in actions for recovery of his medical services, that the service was rendered," are evidence of the items of his account for medicines administered and furnished to his patients in the course of his practice; but the value of the medicines, as well as of the active services rendered, must be other-

wise proved. *Richardson v. Dorman*, 28 Ala. 679, cited in note in 52 L. R. A. 556.

§ 263 (2) Character of Books in General.

Journal and Cash Book.—Where the journal and the cash book were kept in the regular course of business, and the journal entries were transferred daily from the blotters, upon which the original entries of advances made were made contemporaneously therewith by persons having knowledge of the transactions, the journal entries were admissible in evidence in an action for the advances, when properly authenticated, though not accompanied by the blotters. *Donaldson v. Wilkerson*, 170 Ala. 507, 54 So. 234, cited in note in 36 L. R. A., N. S., 899.

§ 263 (3) Diaries and Memoranda of Accounts.

Blotters upon which advances made were at once entered in the regular course of business, and from which the entries were transferred to the journal, were admissible in evidence if properly authenticated, though the entries were also transferred to the journal. *Donaldson v. Wilkerson*, 170 Ala. 507, 54 So. 234, cited in note in 36 L. R. A., N. S., 899.

A memorandum taken from the books of accounts of a witness, not claimed to be a copy of the original in the books, but merely a summary or addition of the amounts as entered therein, can not be used to refresh the memory of the witness, nor used in argument to the jury, nor should the jury be allowed to take it with them in their retirement. An instruction to the jury not to consider it as evidence does not cure the error; for, if not evidence, it was improper to let it go before the jury. *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857.

"When the purpose is to have a memorandum admitted in evidence, the witness must be able to testify that he knew its contents when it was made, and knew them to be true. The original must be produced, and must have been made at or near the time of the occurrence of the transaction. A copy of the entries in a book is not admissible, unless the absence of the original is satisfactorily accounted for. When the purpose is to refresh the memory of the witness by reference to a memorandum, it must have

been made at or near the time of the occurrence to which it relates; the witness must know it to be correct; and, after refreshing his memory, must testify from independent recollection. In such case the memorandum is not admissible, nor should its contents be made known to the jury, unless called for by the adverse party. A witness may refresh his memory by reference to a copy, though the original is not produced, if he can state that the original entry was, when made, a true statement of the facts, and that the memorandum used is a correct copy of the original entries. This rule is founded on convenience and necessity, and is not applicable when the original is in court. *Calloway v. Varner*, 77 Ala. 541; *Acklen v. Hickman*, 63 Ala. 494." *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857, 858.

And an account book of a vendor is admissible in evidence as part of the res gestæ on an issue as to the bona fides of a debt, which formed the consideration for the sale. *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137, cited in note in 53 L. R. A. 523.

§ 263 (4) Ledgers.

When Admissible.—A "ledger book," kept by defendant, containing various accounts, as distinguished from a particular account or items in the book relating to the transaction in controversy, is inadmissible. *Armour Packing Co. of Louisiana v. Vieth-Young Produce Co. (Ala.)*, 39 So. 680.

When Inadmissible.—Ledger accounts and testimony in relation thereto are inadmissible when the accounts do not appear prima facie, and are not shown to have been the original entries made contemporaneously with the sales and payments noted therein. *First Nat. Bank v. Chaffin*, 118 Ala. 246, 24 So. 80, cited in note in 52 L. R. A. 583.

And ledger accounts testified to be in the handwriting of a decedent, or of his bookkeeper who lived without the state, are inadmissible in evidence, where they do not appear prima facie, and are not shown to have been the original entries made contemporaneously with the original sales and payments noted in them.

First Nat. Bank v. Chaffin, 118 Ala. 246, 24 So. 80, cited in note in 52 L. R. A. 583.

Discount Register of Bank.—In an action by a bank on a note dated on Sunday, its "discount register" is not admissible in evidence to show that the note in suit was a renewal of a note which matured on Sunday, and that the renewal note was made on a certain week day after its date, and dated back to the date of the maturity of the first note, according to the custom of the bank. *Hauerwas v. Goodloe*, 101 Ala. 162, 13 So. 567.

§ 263 (5) Passbooks.

As Showing Deposit.—"The direct question presented by this record has been many times considered. A passbook issued by a savings bank, it is held, rests on a peculiar footing. Such book is the record of the customer's account, and its production authorizes control of the deposit. Like the key of a locked box, its delivery is treated as a delivery of all it contains. It follows that the delivery in this case, accompanied by the declared intention to give, if the deposit had been in a savings bank, would have been a valid gift mortis causa of the money on deposit, of which it was the evidence. It would furnish the key to the locked contents. 8 Amer. & Eng. Enc. Law, 1324, 1325; *Pierce v. Bank*, 129 Mass. 425; *Curtis v. Bank*, 77 Me. 151; *Hill v. Stevenson*, 63 Me. 364; *Camp's Appeal*, 36 Conn. 88." *Jones v. Weakley*, 99 Ala. 441, 12 So. 420, 421.

When Admissible.—"Mr. Wharton says: 'Bankbooks are admissible as showing a prima facie case against the bank by whom the entries are made, and a party dealing with the bank, so far as he has made the person making the entries his agent. Entries made by strangers, however, without the knowledge of the litigants, can not be received as against either of the litigants. Ordinarily, bankbooks are not evidence in suits to which the bank is not a party, without proving such books, by the clerk who made the entry, if within process, or proving his handwriting, if he is outside of process.' 2 Whart. Ev., § 1131. At common law, the admissibility of the books of the corporation depended upon the nature of the acts recorded. If they were obviously

of a public character, and the entries made by a proper officer, they will be received in evidence for or against the corporation. *Taylor, Ev.*, § 1781. But the author does not extend the rule to acts of a private character, where the corporation is not a party. In *Mor. Priv. Corp.*, § 40, it is said that the books of a corporation are admissible against the company and its members only on the principle that they are admissions; they are not evidence against strangers. The same author declares that it is well settled that the stockbooks are admissible as independent evidence to show who are the stockholders of a company; although, he adds, 'it is difficult to support it by any principle of common law.' *Id.*, §§ 75, 76. The stock exchange is a private corporation, and the entries in its books, as independent evidence against persons, must stand upon the same footing as entries made in the books of companies, partnerships, and individuals." *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, 302.

To Show Financial Standing.—In an action on an insurance contract, on an issue whether plaintiff owned the insured property, her handbook, showing deposits in bank at the time of her alleged purchase of goods, is proper evidence, as going to show her means of purchasing, and the bona fides of the transfer to her. *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, cited in notes in 52 L. R. A. 719, 53 L. R. A. 529.

§ 263 (6) Stubs of Check and Receipt Books.

Mere Private Memorandum.—Where the giving of a check by defendant to plaintiff is admitted, an entry made on the stub of the check by defendant, stating the purpose for which it was given, is a mere private memorandum, and not admissible against plaintiff. *Carter v. Fischer*, 28 So. 376, 127 Ala. 52, cited in note in 42 L. R. A., N. S., 728.

In *Carter v. Fischer*, 127 Ala. 52, 28 So. 376, cited in note in 42 L. R. A., N. S., 728, where the plaintiff's evidence showed that a check given by the defendant was on account of the claim in suit, the defendant was not permitted to put in evidence his check book, showing on the stub of the check the word "borrowed,"

as indicating a loan, and not a payment. The court said: "The giving of a check by defendant to the plaintiff was admitted, and the entry made by defendant on the stub of the check, of the purpose for which it was given, was but the defendant's secret declaration, and as such was not evidence against the plaintiff. The stub was properly excluded from the evidence and the defendant was not injured by its being detached from his deposition."

§ 263 (7) Matters Proper for Book Entries.

Value of Services of Physician.—Code, § 2298, declares that the original entries in the books of a physician shall be evidence for him that the service was rendered; but the value of the medicines, as well as of the active services rendered, must be otherwise proved. *Richardson v. Dorman's Ex'x*, 28 Ala. 679, cited in note in 52 L. R. A. 556.

Price of Mantels.—In an action for the price of mantels purchased by defendant's alleged agent, original entries in plaintiff's book of account concerning them were admissible. *Childress v. Smith-Echols-Burnett Hardware Co.*, 162 Ala. 371, 50 So. 322.

§ 263 (8) Form, Regularity, and Sufficiency of Entries in General.

Personal Knowledge of Property Represented by Items.—Where it appears that some of the items charged on an account book were not personally sold by plaintiff, or the entries therein made by him, but by his wife, and he did not have personal knowledge of the sales or the charges, the book was inadmissible. *Davie v. Roland*, 3 Ala. App. 567, 57 So. 1034.

In an action on a contract for sale of lumber, where it appeared that defendant was receiving lumber from others than plaintiff, and it did not appear that a person in defendant's employ, alleged to have entered in a book lumber received from plaintiff, knew where the lumber came from, nor that the entries in the book were correct, nor that the one making the entries was dead, insane, or beyond the jurisdiction of the court, the book was properly excluded as evidence.

North Birmingham Lumber Co. v. Sims & White, 157 Ala. 595, 48 So. 84.

"Even granting that the book kept by 'Jack' was a book of original entry, kept by him in the usual course of business, yet the evidence shows that the defendant was receiving lumber from other parties than the plaintiffs; and it was not shown that 'Jack' knew where the lumber came from, nor was there any evidence tending to show that the entries made in the book were correct. 'Jack' was not shown to be dead nor insane, nor beyond the jurisdiction of the court. On the authority of the case of *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, it must be held that the book was properly excluded." *North Birmingham Lumber Co. v. Sims*, 157 Ala. 595, 48 So. 84, 85.

To Show Payment.—An account book is not admissible to show payment, unless the items are shown to have been entered at or about the times the payments were made, and the person making the entries knew them to be correct when made. *Lane v. May & Thomas Hardware Co.*, 121 Ala. 296, 25 So. 809, cited in note in 52 L. R. A. 583.

§ 263 (9) By Whom Entries Are Made.

See, also, post, "Entries by Decedents in General," § 263 (17).

Entry of Bookkeeper by Direction of Deceased Employer.—Accordingly, an entry in a blotter book, made under the direction of a deceased employer, by a bookkeeper who has no personal knowledge of the transaction to which it relates, and would not know the significance of the entry except from his knowledge of bookkeeping, is not evidence against one who was not present when the entry was made. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41, cited in note in 52 L. R. A. 595.

Person Having Knowledge of Correctness of Entries.—In an action on assignments of wages, evidence of accounts due plaintiff for merchandise from the assignors was admissible, where the person who made the entry testified to the correctness of the items sold by him, and that the other items were charged by him, as he was instructed by plaintiff, who sold the other goods, and plaintiff testified that he instructed the other at the time

of the sale to charge the goods as he sold them. *Alabama Iron Co. v. Smith*, 155 Ala. 287, 46 So. 475, cited in note in 36 L. R. A., N. S., 902.

Entries on Partnership Books.—"An account book containing entries made by two persons sued as partners, has been held admissible, as evidence of partnership. *Champlin v. Tilley*, 3 Day, 306 [Fed. Cas. No. 2,586]." *McNeil v. Reynolds*, 9 Ala. 313, 316.

And while the entries in the books of a partnership to which the members have access are prima facie correct, and evidence against the partners on a bill for the settlement of the accounts of a partnership and for the application of any balance found due to one of them to the payment of a note secured by mortgage given for her interest, it may be shown that the books do not contain a full statement of the partnership transactions, and that there were expenses incurred and paid which did not appear on the books. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251, cited in note in 52 L. R. A. 844.

And such entries, where the partners have equal access, are prima facie correct. *Glover v. Hembree*, 82 Ala. 324, 8 So. 251, cited in note in 52 L. R. A. 833.

So, the manner in which a supposed firm made out their accounts and kept their books may be shown in an action upon a note, purporting to have been made by the firm to prove the existence of a partnership; but it must appear that the party against whom such proof was offered had some agency in such acts, or impliedly sanctioned or expressly approved them. *McNeil v. Reynolds*, 9 Ala. 313, cited in note in 52 L. R. A., 835.

§ 263 (10) Delay in Making Entries.

No Precise Time Laid Down by Law.—"There is nothing in our decisions contrary to the general principles laid down, to wit, that, while the entries must be made at or near the time of the transaction, yet no precise time is fixed by law when they should be made. The entry need not be made exactly at the time of the occurrence; but it is sufficient if it be made within a reasonable time. In this particular every case must be made to depend upon its own peculiar circumstances, having regard to the situation of

the parties, the kind of business, the mode of conducting it, and the time and manner of making the entries. An entry once a week has been held to be sufficient. *Yearsley's Appeal*, 48 Pa. 531, note to *Post v. Kenerson*, 52 L. R. A. 583; *McKelry on Evidence*, pp. 251, 252, § 175." *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, 1033.

§ 263 (11) Entries Made from Memoranda or Other Information.

Entries Based upon Daily Memoranda.

—Books of account kept in the regular course of business, and which are the first permanent record of the matters therein contained, although the entries therein were transferred daily from blotters, where they were made contemporaneously with the transactions to which they relate, by persons having knowledge of the facts, which blotters were mere memoranda, not presumed to have been preserved, are, if properly kept and authenticated, admissible in evidence to establish the facts therein recorded. *Donaldson v. Wilkerson*, 170 Ala. 507, 54 So. 234, cited in note in 36 L. R. A., N. S., 899.

Memorandum of Weights.—In an action on an account, an itemized statement of cotton shipped by defendant to plaintiffs, on which he claims a balance due, as furnished by him to them, and retained by them without objection as to the weights therein specified, can not, upon his pleading it as a set-off, be excluded on motion, on the ground that defendant testifies that he did not himself weigh the cotton, but that the weights were furnished by the public weigher. *Sloan v. Guice*, 77 Ala. 394.

Memorandum of Executory Contract.—

When the entry of a memorandum of an executory contract for the delivery of goods in the future is made by a bookkeeper in accordance with the seller's instruction, at a time when the buyer was not present, and it is shown that the bookkeeper had no knowledge of the contract, or of the truthfulness of the memorandum, such entry is not admissible in evidence against the buyer. *J. Snow Hardware Co. v. Loveman*, 131 Ala. 221, 31 So. 19, cited in note in 36 L. R. A., N. S., 902.

Memoranda Kept by Servant or Employee.—"Entries made by a party from a data furnished, or memoranda kept by an employee to assist his memory in making a report or return will be admissible, if supplemented by the oath of the party and the testimony of the servant making the memoranda or furnishing the information." *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, 1032.

Verbal Report of Engineer.—An owner of a steam hoister rented it to another for a specified sum per day, under a contract binding the latter to give a statement each Saturday night as to how much the hoister had worked during the week. The latter failed to make any reports; but the owner's employee in charge of the hoister made weekly reports of the number of days the hoister had worked during the week. It appeared that the employee reported the hoister as working on days when he had steam up all day though no actual work was done. Held, that the entries were admissible in evidence, notwithstanding the objection that they might contain charges of days to which the owner was not entitled to compensation; it being for the court to decide whether the hoister, when the employee had steam up waiting for directions to use it, was in service within the contract, and, if it was not, other testimony might be introduced, from which the jury could ascertain what should be deducted from the amount shown by the entries. *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, cited in note in 36 L. R. A., N. S., 902.

An owner of a steam hoister rented the same to another at a specified sum per day, under a contract binding the latter to give to the owner a statement each Saturday night as to how much the hoister had worked during the week. The latter failed to make statements; but the owner's employee in charge of the hoister made reports every Saturday night as to the number of days that the hoister had been worked during the week. The owner entered such reports in a book kept for the purpose. Held, that the book was admissible as against the objection that the entries were not made contemporaneous with the transaction; they being made within a reasonable time, un-

der the circumstances. *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, cited in note in 36 L. R. A., N. S., 902.

The owner of a steam hoister, renting it to another at a specified sum per day, made entries in a book kept for that purpose of the number of days the hoister worked each week, based on reports made to him at the end of each week by an employee in charge of the hoister. Held, that the entries were admissible, as against the objection that the book was not regularly kept in the usual course of business. *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031, cited in note in 36 L. R. A., N. S., 902.

§ 263 (12) Extracts from Account and Transcribed Entries.

Transcript of Books.—The fact that an account is proven to be a correct transcript of a litigant's books is not alone sufficient to make it admissible in evidence. *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425.

"In *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435, we said, 'Memoranda of this character, prepared by the party for the purposes, or in the course of the trial, is not a species of evidence to be encouraged; and if admitted, to avoid misleading the jury, would necessitate very careful, precise instructions, that they were not in themselves evidence, and that they must not be so regarded, or looked to for any other purpose than reference to the items, and the comparison of them with the evidence having a tendency to support them; they are not of themselves distinct, independent evidence. *Robinson v. Allison*, 36 Ala. 525.' *Foster v. Smith*, 104 Ala. 248, 16 So. 61; *Snodgrass v. Coulson*, 90 Ala. 348, 7 So. 736; *Mooney v. Hough*, 84 Ala. 80, 4 So. 19." *Baird Lumber Co. v. Devlin*, 124 Ala. 245, 27 So. 425, 428.

Personal Knowledge of Entries.—It is not permissible to prove an account by showing that a copy offered in evidence was transcribed from a book of original entries, unless the witness can testify as to the correctness of its items from personal knowledge. *Holmes v. Gayle*, 1 Ala. 517.

Itemized Statement of Account.—Where defendant employed an agent as mana-

ger of a newspaper with authority to buy supplies to run the business, an itemized account for goods purchased by the agent for use in the business and shown to be correct was admissible against defendant. *Western Newspaper Union v. Judson*, 1 Ala. App. 615, 53 So. 1026.

§ 263 (13) Mutilated and Shopworn Books.

Page of Book.—A book which is a copy of a destroyed book of original entries is not, as a book, admissible in evidence, but a page of such book is admissible against a person who either admitted its correctness or raised no objection to it when it was exhibited to him. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834, cited in note in 52 L. R. A. 598.

§ 263 (14) Purposes of Proof in General.

Admissible as Admission.—In an action on an account, a copy of the last page from the book of original entries, containing the footing of the entire account, to the correctness of which the debtor did not object on its exhibition to him, is admissible in evidence as an admission by him, though it is incompetent as an original entry. *Snodgrass v. Caldwell*, 90 Ala. 319, 7 So. 834, cited in note in 52 L. R. A. 598.

Physician's Account for Treatment of Slave.—In an action for damages for the breach of a warranty of a slave's soundness, a physician's account for the treatment of the slave while in the vendee's possession can not be admitted until it is proved that the services were rendered as charged; that the charges were correct, and were for the treatment of a disease which the slave had at the time of the sale. *Stone v. Watson*, 37 Ala. 279, cited in notes in 53 L. R. A. 541, 24 L. R. A., N. S., 254.

To Prove Physician's Pecuniary Condition.—A physician's books of account, if proved to be correctly kept, are admissible in evidence in his favor, in an action on an attachment bond, to rebut evidence of his pecuniary embarrassment by proof of subsisting accounts due to him as a physician. *Lockhart v. Woods*, 38 Ala. 631, cited in note in 52 L. R. A. 719.

To Show Indebtedness.—The books of debtors are competent evidence, as part of the *res gestæ*, to show their indebtedness; but anything suspicious in them is

not evidence against the creditor, unless there is proof connecting him with it. *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137, cited in note in 53 L. R. A. 523, 534.

Admissible to Show Sale and Delivery of Goods.—Entries on a merchant's book in the handwriting of a clerk, since deceased, were evidence only of the truth of the entries of the sale and delivery of the goods at the times and prices charged, and were properly refused when offered to show that the goods sold formed the consideration of the note, or that they were necessities suitable to the condition in life of the purchaser. *Davis v. Tarter*, 65 Ala. 98, cited in notes in 38 L. R. A. 729, 39 L. R. A. 306, 52 L. R. A. 696.

Books of Defendant in Attachment.—And the books of the defendant in an attachment suit are admissible in evidence against the attaching creditor in favor of a claimant of the property attached deriving title to the goods through the defendant, at least to show what other persons were creditors of the defendant, and in what amounts they were creditors. *Smith v. Collins*, 94 Ala. 394, 10 So. 334, cited in note in 53 L. R. A. 534.

§ 263 (15) Persons Bound in General.

Customer.—An entry which a merchant caused his bookkeeper to make on his books is inadmissible to show that checks deposited by a customer were received to be collected and placed to his credit, where the terms on which the checks were received are a material issue, and no showing is made of the customer's consent to such entry or his knowledge of its existence. *Jeffries v. Castleman*, 68 Ala. 432, cited in note in 52 L. R. A. 711.

The memorandum on defendant's books that a check received from plaintiff's husband was to be placed to his credit, the question being whether it was for collection or in payment, held not admissible unless it appeared that the husband had assented thereto. *Jeffries v. Castleman*, 68 Ala. 432, cited in note in 52 L. R. A. 711.

Vendee.—On an issue as to the bona fides of a sale, entries made by the vendor before sale, showing the payments on his purchase of the goods from his predecessor, are not admissible to affect the

vendee's title. *Teague v. Lindsey*, 106 Ala. 266, 17 So. 538, cited in note in 53 L. R. A. 540.

Not Made in Presence of Person Charged.—Entries made by a bookkeeper, by direction of his employer, not in the presence of the person against whom they are offered as evidence, and as to which the bookkeeper has no personal knowledge or remembrance of the facts, are not admissible as evidence against that person. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41, cited in note in 52 L. R. A. 595.

To Charge Bankrupt or Insolvent.—A bankrupt's or insolvent's books are evidence of fraud as against himself, in an action by a creditor in which the fairness of a purchase by an intervening party is at issue. *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137, cited in note in 53 L. R. A. 534.

§ 263 (16) Evidence for Party in General.

Formerly it was the rule in Alabama that entries made by a tradesman in his book of accounts were not admissible in his favor, although it was shown by the testimony of other witnesses that his books were correctly and accurately kept. *Nolley v. Holmes*, 3 Ala. 642, following the rule as it had been previously so laid down in *Moore v. Andrews*, 5 Port. 107, cited in note in 52 L. R. A. 549.

And evidence that plaintiff and defendant resided in the same village; that plaintiff kept the only mercantile house in that village; that defendant was frequently seen to make purchases of plaintiff; and that the articles charged were such as, and not more than, would have been used by defendant and his family during the time the account purports to have been running, was held, not to be competent proof to establish the account, and not to be aided by evidence that the plaintiff and his clerk kept correct books, and promptly charged all articles sold. *Grant v. Cole & Co.*, 8 Ala. 519, cited in note in 52 L. R. A. 549.

Thus, it was held that in assumpsit on an open account, the "account," or the paper on which the items composing the account were stated, is inadmissible, being the mere written declarations of the party himself. *Grant v. Cole*, 8 Ala. 519, cited in notes in 52 L. R. A. 566, 593.

And *Godbold v. Blair*, 27 Ala. 592, cited in note in 52 L. R. A. 549, held that a merchant's books of account were not admissible in his favor except by the defendant's consent; and that, even conceding their admissibility, they constituted no higher evidence of sale and delivery of the goods than the positive proof of a witness who testified to their sale or delivery.

So, a book by an overseer, professedly indicating the state of accounts between himself and his employer, and in which there were some pencil figures in the latter's handwriting, was held, to be no evidence in favor of the overseer as against the employer's personal representatives, further than to establish the facts indicated by the pencil entries, and that it was error to suffer the book to go to the jury unless so restricted. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

And it was held that in an action to recover the value of medical services rendered by a deceased physician, if the original entries in his books are offered in evidence by the plaintiff (Rev. Code, § 2700), and their correctness is denied on oath by the defendant, they are to be rejected, and excluded from the jury; and after this has been done the defendant has no right to testify in his own behalf, as to which of the entries are correct, and which are incorrect. *Weaver v. Morgan*, 49 Ala. 142.

"The accounts against Levy, produced by the plaintiff Steiner, should not have been received as evidence. In *Grant v. Cole*, 8 Ala. 519, an action upon an open account for goods sold and delivered, the trial court permitted the account, the list of items, to go in evidence. This court said: 'The account, by which we understand the paper upon which the items composing the account were stated, was not testimony for the jury for any purpose, as it is the mere written declaration of the party himself.' Memoranda of this character, prepared by a party for the purposes or in the course of a trial, is not a species of evidence to be encouraged, and if admitted, to avoid misleading the jury, would necessitate very careful, precise instructions that they were not in themselves evidence, and

that they must not be so regarded, or looked to for any other purpose than reference to the items, and the comparison of them with the evidence having a tendency to support them. *Robinson v. Allison*, 36 Ala. 525." *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435, 437.

But in *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, the rule in *Moore v. Andrews*, 5 Port. 107, and *Nolley v. Holmes*, 3 Ala. 642, that entries made by a tradesman in his book, stating the delivery of goods, were not in evidence in his favor, was declared to be against the weight of authority, and was regarded as overruled; and the court held the books admissible within the rules above stated. See, also, *Dismukes v. Tolson*, 67 Ala. 386; *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919, cited in note in 52 L. R. A. 549.

"We must treat the question as presented in the bill of exceptions. The rule declared in *Moore v. Andrews*, 5 Port. 107, and afterwards followed in *Nolley v. Holmes*, 3 Ala. 642, 'that entries made by a tradesman in his book, stating the delivery of goods, are not evidence in his favor,' has been declared to be against the weight of authority, and may be regarded as overruled. *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919. The rule as settled is that a witness may refresh his memory by reference to a memorandum made by himself, or one known to him to state the facts truly. In such case the memorandum is not evidence. The witness testifies to the facts independent of the memorandum. Its only purpose in such a case is to refresh his memory." *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, cited in note in 52 L. R. A. 549, 564, 565, 594.

Original Entries of Party.—Original entries made by a party in his shop book are admissible in his favor if made in the ordinary course of business, contemporaneously with the facts to which they relate, and by one having personal knowledge thereof, corroborated by his testimony if living, or by proof of his handwriting if dead or insane or beyond the jurisdiction of the court trying the case in which they are offered in evidence. *Dismukes v. Tolson*, 67 Ala. 386, cited in note in 52 L. R. A. 548, 549, 576, 583, 591, 595.

Written Declarations of Party—Entries Corroborated by Party Making Them.—Original entries made in the ordinary course of business, and contemporaneously with the transactions to which they relate, are admissible in evidence, such entries being corroborated by the party who made them, or, in case of his death, or indefinite absence from the state, proof of his handwriting being given. *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919, cited in note in 52 L. R. A. 549, 549, 595.

Essentials to Admissibility of Entries.—As a general rule, although there are cases holding otherwise, it is essential to the admissibility of entries made by a living witness that he shall be able to state that at or about the time the entries were made he knew their contents and knew them to be true, so that the entries and the testimony of the witness concurrently shall be equivalent to a present affirmation of the truth of their contents. *Dismukes v. Tolson*, 67 Ala. 386; *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919, cited in note in 52 L. R. A. 595.

Necessity for Being against Interest.—The early cases tended in the direction of regarding no entries in books of account as admissible in evidence on issues between third parties, unless they were against the interest of the party making them, or such as to constitute part of the *res gestæ*. But the tendency of the later cases, particularly in America, has been to eliminate the condition that the entry should be against interest; and the more modern rule would seem to be that entries and memoranda made by a person in the ordinary course of his business, of acts or matters which his duty in such business requires him to do for others, are, in case of his death, admissible evidence of the acts and matters so done. *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281, cited in note in 53 L. R. A. 526.

§ 263 (17) Entries by Decedents in General.

Books Kept by Deceased Clerk.—A book of accounts in the handwriting of, and kept by, a clerk since deceased, is proper evidence, on those facts being proved. *Batre v. Simpson*, 4 Ala. 305; *Davis v. Tarver*, 65 Ala. 98, cited in note

in 52 L. R. A. 565, 605, 607; *Grant v. Cole & Co.*, 8 Ala. 519, cited in note in 52 L. R. A. 593.

"The doctrine is settled in this state, 'that books of accounts, kept by a deceased clerk, and all other entries or memoranda made in the course of business or duty, by any one would at the time have been a competent witness to the fact which he registers, are admissible evidence.' *Batre v. Simpson*, 4 Ala. 305; *Everly v. Bradford*, 4 Ala. 371; *Clemens v. Patton, etc., Co.*, 9 Port. 289. This evidence is received on what is considered the moral necessity of the case. *Phil. Ev. (Cow. & Hill's Notes by Van Cott)*, 1 pt. 305, et seq; 1 *Greenl. Ev.*, §§ 115, 120." *Bank v. Plannett*, 37 Ala. 222, 226.

Books of account kept by a deceased clerk, and all other entries or memoranda made in the course of business or duty by one who would at the time have been a competent witness to the facts which he registers, are admissible evidence. *Bank of Montgomery v. Plannett's Adm'r*, 37 Ala. 222, cited in note in 52 L. R. A. 565, 566.

"These preliminary facts being established, the evidence was clearly admissible. The principle is now too firmly settled to require argument or illustration, that books of accounts kept by deceased clerk, and all other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence. 2 *Phil. Ev.*, C. & H. ed. 675, et post. Where the book or memoranda containing the original entry is lost, then the rule which declares that the next best evidence attainable shall be received makes the transcript from the book, supported as it was by the oath of the witness who transcribed it clearly admissible." *Batre v. Simpson*, 4 Ala. 305, 312.

Evidence to Establish Account.—The correctness of an account is not established by an affidavit that it was made out by a bookkeeper since deceased, where it does not appear that the entries on the book were made out at or near the time of the transactions, or that they were made in a book giving an account of the daily transactions of the clerk, or that

they were charged on the book by the clerk since deceased. *Pearson v. Darlington*, 32 Ala. 227, cited in note in 52 L. R. A. 595.

In Handwriting of Deceased Witness.—Entries in the handwriting of a deceased witness, made in the usual course of business, at the time of the transactions, are admissible to prove such transactions. *Elliott v. Dycke*, 78 Ala. 150, cited in notes in 35 L. R. A. 339, 52 L. R. A. 585.

Books of account or written entries made in the usual course of business by a decedent are admissible in evidence if in his handwriting and made about the time of the alleged transaction. *Thompson v. Cole*, 6 Ala. App. 208, 60 So. 556.

"If so, the book could properly be looked to for such other entries, as they were admissible in evidence under the rule that 'books of account, or written entries made in the usual course of business by a witness who is shown to be dead, or beyond the jurisdiction of the court, are admissible in evidence when shown to be in the handwriting of such deceased or absent witness, and purport or are shown to have been made at or about the time of the alleged transaction.' *Sands v. Hammell*, 108 Ala. 624, 18 So. 489; *Elliott v. Dycke*, 78 Ala. 150." *Thompson v. Cole*, 6 Ala. App. 208, 60 So. 556.

Time within Which Transaction Must Be Recorded.—To be admissible an entry made by a decedent in an account book need only be made within a reasonable time of the transaction which they record; what is a reasonable time depending upon the particular circumstances, having regard to the situation of the parties, the nature of the business, and the time and manner of making the entries. *Thompson v. Cole*, 6 Ala. App. 208, 60 So. 556.

Memorandum of Decedent.—In *assumpsit* by husband and wife against the executors of the wife's father, on an alleged indebtedness of the deceased to the wife, it was held that a memorandum book in the handwriting of the deceased, containing entries made by him a few days before his death, and purporting to give a list of all the debts owing by him, is not admissible evidence for the defend-

ants. *Harrison's Ex'rs v. Cordle*, 22 Ala. 457.

To Show Payment of Note Surety.—The payment by a surety of the debtor's obligation may, for the purpose of showing indebtedness of the deceased debtor to the surety, be proven by entries on the books of the creditor in his handwriting, he being dead. *Sands v. Hammell*, 108 Ala. 624, 18 So. 489, cited in notes in 53 L. R. A. 520, 3 L. R. A., N. S., 950.

Books of Assignor of Insurance Policy.—And where the proceeds of a life insurance policy are sought to be recovered on the ground that they had been assigned to the defendant in trust, and that the trust had been violated, the defendant denying the trust and alleging that the policy was assigned as collateral security for a debt due on account of a payment to a third person of a claim against the assignor, the books of such third person in his handwriting, are admissible in evidence after his decease to establish the defense. *Sands v. Hammell*, 108 Ala. 624, 18 So. 489, cited in note in 53 L. R. A. 520.

§ 263 (18) Death of Party Charged.

Transactions with Deceased.—When the seller of goods dies, and his personal representative brings an action against the buyer for the price, the latter can not read in evidence original entries made in his own shop books in the usual course of trade, showing payment. Such entries are merely written, contemporaneous declarations of the party, and are properly excluded, under Code, § 3058, as part of a transaction with the deceased. *Dismukes v. Tolson*, 67 Ala. 386, cited in note in 52 L. R. A. 548, 549, 576, 583, 591, 595.

§ 263 (19) Entries against Interest in General.

Entry by Agent of Carrier.—Entries on the books of a carrier, made by his authorized agent in the regular course of business, at the time goods are received, are admissible as part of the *res gestæ* to prove receipt of the goods. *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395.

"The book entries were also admissible to show the fact of the receipt of the merchandise. They were made by the

authorized agent of the railroad company, or under his direction, in due course of his agency, and the correctness of the entries was proved by the agent himself. This constituted such entries written admissions which formed a part of the *res gestæ* of the fact of delivery itself. *Danner, etc., Lumber Co. v. Stonewall Ins. Co.*, 77 Ala. 184; 1 Green. Ev., § 113; 2 Whart. Ev., § 1131." *Louisville, etc., R. Co. v. McGuire & Co.*, 79 Ala. 395, 398.

§ 263 (20) Books of Third Persons.

Books of Garnishee.—In garnishment for salary of an employee, it having been shown when the employment began, and evidence having been introduced tending to show that the garnishee's books would disclose the payments made to defendant, plaintiff is entitled to have the books in evidence covering the entire time of his employment. *Gray v. Perry Hardware Co.*, 111 Ala. 532, 20 So. 368, cited in note in 53 L. R. A. 533.

So, where a judgment is obtained against a debtor, and the employer of the debtor is summoned as garnishee, and the garnishee claims payment in full of the employee's salary, and it appears that the garnishee's books would disclose payments made to the debtor, such books, covering the entire time of the defendant's services, are admissible in evidence in a contest on the answer of the garnishee. *Gray v. Perry Hardware Co.*, 111 Ala. 532, 20 So. 368, cited in note in 53 L. R. A. 533.

§ 264. Private Memoranda and Statements in General.

§ 264 (1) In General.

An unsworn memorandum, not coupled in evidence with any admission express or implied on the part of defendant or any alleged partner that a firm was indebted on account of the particular items set out in the memorandum, is inadmissible to show the firm's indebtedness. *Brandon v. Progress Distilling Co.*, 167 Ala. 365, 52 So. 640.

Memorandum of Insurance Adjuster.

In an action to recover insurance on merchandise, a memorandum taken by an insurance adjuster from the books of the insured, was admissible to show at what point he ceased making investiga-

tions and taking notes, though not admissible as proof of the correctness of his itemization. *Chamberlain v. Shawnee Fire Ins. Co. (Ala.)*, 58 So. 267.

To Prove Time of Payment.—A memorandum, "Guarantied against our own decline," given by one at the time of making a sale, does not reserve to the purchaser the right to rescind the contract of will. Such a memorandum is admissible, in connection with testimony on the part of the purchaser that it contains the only conditions on which the sale was made, to disprove a claim of the seller that payment was to be made in advance. *Buist v. Eufaula Drug Co.*, 96 Ala. 292, 11 So. 301.

Mutilated Memorandum Book.—In *Lunsford v. Butler*, 102 Ala. 403, 15 So. 239, cited in note in 52 L. R. A. 575, a memorandum book with several leaves torn out, with nothing to show that the book was torn after the entries were made, was admitted in evidence over an objection that the book was mutilated, and the rulings of the trial court no evidence were assigned as error, but the judgment was affirmed by the supreme court, with no reference in the opinion to this objection.

Report of Railroad Employee.—In an action against a railway company for damages sustained in a road crossing accident, a question asked by plaintiff of the engineer of the colliding train on his cross-examination, calling for the contents of a written report made by witness to the company, was properly excluded. *Wells v. Louisville, etc., R. Co.*, 5 Ala. App. 579, 59 So. 343.

"The defendant answered that the engineer and section foreman (giving their names) made unsworn reports of the injury to the deceased, in accordance with the rules of the company, but such reports were made for the private information of the company, were its private property, and the defendant declined to attach the same to its deposition." *Culver v. Alabama Mid. R. Co.*, 108 Ala. 330, 18 So. 827, 830.

Memorandum of Intestate.—An entry in a memorandum book kept by the plaintiff's intestate, and concerning which a conversation was had between plaintiff and defendant, though competent evi-

dence as explaining the conversation, is not admissible as a memorandum made by the intestate, and can not be proved to be in his handwriting, when it does not appear that the handwriting was mentioned during the conversation. *Tamplin v. Still*, 77 Ala. 374.

Memorandum of Purchaser's Agent.—

In an action for breach of a contract to sell goods, a memorandum given to the purchaser by the seller's alleged agent, the proof of whose authority rests in parol, is properly submitted to the jury, with other testimony showing the fact and extent of the agency. *Buist v. Eu-faula Drug Co.*, 96 Ala. 292, 11 So. 301.

§ 264 (2) Statements of Account.

Statement Does Not Prove Account.—

A statement of account is not admissible as substantive evidence of the items thereof. *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435.

Account Admittedly Correct.—Where an account is shown to be a correct transcript from the books of plaintiff, coupled with evidence that it had been presented to defendant before suit and admitted to be correct, and that the identical account offered in evidence was the one admitted by defendant to be correct, entitles it to admission in evidence. *Byrd v. Beall*, 161 Ala. 594, 50 So. 53.

Correctness Admitted.—Where the correctness of a memorandum account had been testified to without challenge, the court properly admitted it to aid the memory of the jurors as to the testimony of the witnesses. *Mann Lumber Co. v. Bailey Iron Works Co.*, 156 Ala. 598, 47 So. 325.

"The memorandum account admitted in evidence against defendants objection was properly admitted to aid the memory of the jurors as to the testimony of the witnesses. Its correctness had been testified to without challenge. *Hirschfelder v. Levy & Co.*, 69 Ala. 351; *Roswald v. Hobbie*, 85 Ala. 73, 4 So. 177; *Mooney v. Hough*, 84 Ala. 80, 4 So. 19; *Foster v. Smith*, 104 Ala. 248, 16 So. 61." *Mann Lumber Co. v. Bailey Iron Works Co.*, 156 Ala. 598, 47 So. 325, 326.

Bank Statement.—And a statement taken by a cashier from the books of a bank is inadmissible against a customer

in an action to which the bank is not a party, where the only evidence of its correctness was the testimony of the cashier, who did not keep the books or receive deposits or pay out money, that the account as shown by the statement appeared on the books of the bank, and he presumed it was correct. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 53 L. R. A. 541.

§ 264 (3) Items of Property and Value Thereof.

Memoranda of Damage to Crops.—

Where memoranda of the amount of damages to crops by trespassing stock were not made at the time of the examination of the crops, and the witnesses did not make the necessary statements to render the memoranda themselves admissible, nor state that they had an independent knowledge of the matters therein contained, they were inadmissible as estimates of the damages. *Atlanta & B. Air Line Ry. v. Brown*, 158 Ala. 607, 48 So. 73.

"The court erred in admitting the estimates of damages, made in writing by several parties, and the error was apparent, because; first, said papers were admitted as evidence, and not merely to be referred to by the witness as a memorandum to refresh his own memory, and such ex parte papers are not admissible; second, the questions and answers, in connection with the admission of said papers, called for the opinion of the witness as to the amount of damage, which, we have seen, was improper; third, even as memoranda they were not shown to have been made at the time of the examination of the crops; and fourth, the witness did not make the necessary statement to render the papers themselves admissible, nor did he state that he had an independent knowledge of the matters therein contained to make them admissible as memoranda. *Battles v. Tallman*, 96 Ala. 403, 11 So. 247. That part of the oral charge of the court, referred to by the appellee, did not cure this error, but merely stated that the memoranda were not conclusive evidence." *Atlanta, etc., Railway v. Brown*, 158 Ala. 607, 48 So. 73, 76.

Destruction of Property by Fire.—In an action to recover for the loss of prop-

erty by fire negligently set, a memorandum made by plaintiff, after the fire, showing an estimate of the articles destroyed and their values, is not admissible, without proof of the actual correctness of the various items. *Louisville & N. R. Co. v. Cassibry*, 109 Ala. 697, 19 So. 900.

"Therefore, if the memorandum would have been admissible, had its correctness throughout been testified to, it was not admissible under the testimony adduced in reference to it. On the general subject, see *Grant v. Cole & Co.*, 8 Ala. 519; *Acklen v. Hickman*, 63 Ala. 494; *Minniece v. Jeter*, 65 Ala. 222; *Hirschfelder v. Levy & Co.*, 69 Ala. 351; *Stoudenmire v. Harper*, 81 Ala. 242, 1 So. 857. The case does not come within the influence of *Foster v. Smith*, 104 Ala. 248, 16 So. 61." *Louisville, etc., R. Co. v. Cassibry*, 109 Ala. 697, 19 So. 900.

Unauthorized Valuation.—The mere fact that certain persons valued property, the subject of the contract, will not make their written valuation evidence, unless it was authorized to be made or assented to by the parties. *Pharr v. Bachelor*, 3 Ala. 237.

"It was also argued, that the best and only evidence (if it be attainable), of the value of the furniture, etc., is the written estimate of those who were appointed to value it. This objection is founded upon the supposition, that the evidence offered was not the best of which the fact is susceptible. True, where there is written evidence, which is itself admissible, it must be in general be adduced, or its absence accounted for, in order to let in proof of an inferior grade; but the rule requiring the best evidence, does not operate to exclude proof, because it is not all, or the most satisfactory which might be adduced, where the evidence offered, and that which is withheld, is all of the same general quality: but in such case, it in general, goes no farther than to forbid that evidence, which is in its nature, merely circumstantial, shall be received, when direct and conclusive evidence may be had. In the case before us, the written valuation would not be legal evidence; it had not been made by the direction of the parties; it does not appear that it had been assented to by them, or com-

municated to them, and if there is such a paper, it can only be regarded as a mere memoranda of the persons valuing the property, to aid their memory, or to be handed to the parties to indicate what had been done, and to enable them to settle." *Pharr v. Bachelor*, 3 Ala. 237, 248.

§ 264 (4) Admissibility in Connection with Oral Testimony.

Scaling Book of Lumber Man.—In an action for the conversion of lumber, defendant's scaling book, produced by one of its employees, should have been excluded, since he stated he did not know where the timber came from that was entered therein, except by letters placed on the timber by other employees; the testimony of such employees not sufficiently identifying the timber and marks to constitute proof as to the accuracy of the items. *C. W. Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533.

§ 264 (5) Memory as to Fact Recorded.

Facts Proved by Oral Testimony.—Records made by a witness were not admissible where the facts were proved by the witness himself from direct personal knowledge, and the records were not offered for the purpose of refreshing his memory. *Nashville, C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 So. 323.

Report of Engineer.—Where a witness, who had as engineer taken out the engine with the alleged defective lubricator, on the day before plaintiff's injury, testified of his own knowledge and recollection, and without the need of refreshment, that at the time of a report made by him on his return from a trip the water valve on the lubricator was not leaking, the condition of the lubricator or its water valve being the only item of proper inquiry, a memorandum, consisting of the report merely showing in a negative way that the lubricator or its water valve was in good repair at that time, was improperly admitted in evidence. *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52.

"Buckpitt, a witness for defendant, and an engineer in its employment, testified that he had taken the same engine out on a trip on the day previous to that on which plaintiff was alleged to have been injured. Thereupon the defendant offered

to read in evidence a paper writing containing a report made by him (Buckpitt) on his return from that trip as to the condition of the engine. The report showed 'valves O. K.,' but nothing as to the lubricator or its water valve specifically. The witness, speaking of his own knowledge and recollection, and without the need of refreshment, testified that at the time of the report the water valve on the lubricator was not leaking. Doubtless the report was allowed to go to the jury on the authority of *Foster v. Smith*, 104 Ala. 248, 16 So. 61; *Mooney v. Hough*, 84 Ala. 80, 4 So. 19, and *Hirschfelder v. Levy & Co.*, 69 Ala. 351. Certainly it was not competent within the rule laid down in *Acklen v. Hickman*, 63 Ala. 494. We think it can hardly be said that the case is brought within the reason of *Foster v. Smith* and that line of cases. The rule there established is a rule of convenience rather than a rule of evidence, and has been applied in cases where, a witness having testified out of his own independent recollection to a considerable number of items, a memorandum of them is permitted to go to the jury lest they forget. But here there was but one item of proper inquiry, i. e., the condition of the lubricator or its water valve. The witness needed no memorandum to refresh his memory, nor did the jury. The memorandum was understood, it seems, to show in a negative way only that the lubricator or its water valve was in good repair when the engine left the hands of the witness. We do not think it proper that it should go to the jury, though we do not affirm reversible error of the action of the court in that regard, for doubtless it had no prejudicial effect upon plaintiff's case." *Pace v. Louisville, etc., R. Co.*, 166 Ala. 519, 52 So. 52, 56.

§ 264 (6) Death or Absence of Person Making Memoranda or Statement.

Memorandum of Decedent.—Entries in a memorandum book of a deceased party are not competent evidence until shown to have been made by him in the course of business as to which, if living, he would be competent to testify under the issue on trial. *Avery v. Avery*, 49 Ala. 193, cited in note in 52 L. R. A., 558.

But a book of entries kept by a testa-

tor is not admissible in favor of his executors, unless it contains the registration of some fact which is relevant to the issues on trial, made by him in the course of his business or duty and as to which he would at the time have been a competent witness. *Avery v. Avery*, 49 Ala. 193, cited in note in 52 L. R. A. 558.

Proof of Indebtedness.—Entries in a person's books involving a transaction with another, made in his own handwriting, are after his death admissible in evidence. *Burton v. Phillips*, 161 Ala. 664, 49 So. 848.

"The defendant's contention was that the money that she may have gotten from 'Squire Wright before his death was not upon the mortgage indebtedness, but went to pay an individual indebtedness from him to her, and she was permitted to prove that he was indebted to her; and the plaintiffs had the right to controvert this fact, and to introduce the entries in 'Squire Wright's books on the subject, as he was dead and they were shown to be in his handwriting. *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919, and cases cited." *Burton v. Phillips*, 161 Ala. 664, 49 So. 848, 849.

§ 265. Letters, Telegrams, and Other Correspondence.

Correspondence between Plaintiff and Defendant.—In a suit to recover for printing an advertisement, a letter sent by the defendant to the plaintiff and another, requesting them to print the advertisement, is admissible in evidence as tending to show that the writer procured the publication in his own name, although the plaintiff alone advertised as requested, where the only objection that the defendant ever made to paying the bill was that it should have been charged to a third party. *Strong v. Catlin's Adm'r*, 37 Ala. 706.

Plaintiff was authorized to sell land by the owners thereof, and agreed to divide the commissions with defendant, if the latter would find a purchaser. Defendant recovered of the owners the commission on sale of the land, but refused to pay plaintiff his share. Held that, in an action by plaintiff to recover his share of the commissions, correspondence between plaintiff and defendant, both be-

fore and after the sale, was admissible. *Wefel v. Stillman*, 151 Ala. 249, 44 So. 203.

Letter from Defendant to Plaintiff's Attorney.—In an action against a corporation for medical services rendered to one of its servants who was injured while in its employ, a letter from the president to plaintiff's attorney, purporting to be a reply to a letter received from him, which is not produced, and referring to plaintiff's account, is prima facie irrelevant and inadmissible, when without date, and offered without any evidence identifying the account. *Mobile & M. Ry. Co. v. Jay*, 65 Ala. 113.

Correspondence between Principal and Agent.—When the hirer of a slave is sued individually for the hire, and he defends on the ground that the contract was made with him as agent of another, a letter from his principal to the defendant, written after the contract was made, and showing a ratification of it by the principal, is admissible evidence for the defendant. *Waring v. Moseley*, 22 Ala. 667.

Letters of Third Persons.—Letters written by third persons at the instance or request of the defendant are not admissible in evidence to rebut the presumptions arising from letters proved to be in his own handwriting. *Lewis v. Post*, 1 Ala. 65.

Agent's Letter.—Letters received by plaintiff through the mail were not admissible against the purported writer's principal, without proof of their genuineness or a showing that they were written in response to a letter from plaintiff. *Louisville, etc., R. Co. v. Britton*, 149 Ala. 552, 43 So. 108.

Portions of a letter containing expressions of opinion by an agent, which throw no light on the issue, are not admissible against the principal if specially objected to. *Home Protection v. Whidden*, 103 Ala. 203, 15 So. 567.

Genuineness of Letter Must Be Proved.—Though it was competent for defendant to show that he notified plaintiff of a certain matter, yet he can not do this by letters purporting to be from plaintiff, without proving their genuineness; they being objected to on this ground. *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71.

Letter Written by Attorney to Sheriff.

—A letter written by plaintiff's attorney to the sheriff, warning him not to discharge the levy, is inadmissible in evidence. *Kennedy v. Smith*, 99 Ala. 83, 11 So. 665.

Letter of Defendant to Third Person.

—In an action for divorce for the wife's adultery, a letter written to her by her alleged paramour on August 28, 1899, prior to her marriage on the succeeding fourteenth day of September, was admissible, in connection with evidence of similar acts during the marriage, to prove the illicit intercourse charged. *Bickley v. Bickley*, 136 Ala. 548, 34 So. 946.

Letter of Plaintiff.—The admission in evidence of a letter written by plaintiff before the contract was made, proposing to do the work on certain terms and conditions, was error, but without prejudice. *Gerald v. Tunstall*, 109 Ala. 567, 20 So. 43.

§ 266. Maps, Plats, and Diagrams.

Unofficial Map.—A map, not made under the authority of the state or of the United States, although "generally received as a correct representation of what purports to be shown or described therein," is not admissible evidence. *Stein v. Ashby*, 24 Ala. 521.

Copies of maps of original surveys, might be legal evidence to establish circumstances, going to show, that a stream was navigable. *State v. Bell*, 5 Port. 365.

Plat of Timber Land.—Where a plat of certain timber land was not offered in evidence as an official survey, it was not objectionable on the ground that it was not made by the county surveyor, as required by Code, 1896, § 3893. *Garrison v. Glass*, 139 Ala. 512, 36 So. 725.

Plan of Surveyor.—A plan used by a surveyor in making his testimony intelligible may be submitted to the jury, but it is not prima facie evidence, unless prepared by the county surveyor on notice to the adverse party, as required by Code 1876, § 868. *Humes v. Bernstein*, 72 Ala. 546.

§ 267. Photographs and Other Pictures.

§ 267 (1) Physical Appearance and Identity of Persons.

"In *Barnes v. Ingalls*, 39 Ala. 193, cited in note in 5 L. R. A. 802, photographs appear to have been put in evidence for

the purpose of determining the merits of a photograph painter who executed them, but the questions in dispute were in respect to the testimony offered in respect to the photographs, such as the opinions of witnesses as to their being good likenesses or otherwise, rather than as to the admissibility of the photographs themselves."

§ 267 (2) Condition of Premises.

A photograph of a trestle and wrecked train taken about two hours after the wreck, verified by the testimony of the photographer, is admissible in evidence to aid the jury in properly understanding the case. *Kansas City, M. & B. R. Co. v. Smith*, 90 Ala. 25, 8 So. 43, cited in note in 35 L. R. A. 802, 803.

"A photograph was received in evidence, against the objection and exception of defendant. That photograph was material evidence only on the postulate that it furnished some aid in determining the grade of Milner street at the point of its eastern approach to the bridge. The photographer was not examined as a witness, and there is no positive proof of the position he occupied when the picture was taken. Lane and other witnesses familiar with the locality state it is not a correct representation of the place, and some of them say they would not have recognized it from the picture. No witness testified it was a correct representation. Is it not true that the correctness of such a picture, as an aid in determining the grade of the street, must depend largely on the position and elevation of the camera, at the time it is taken? Can such picture give a correct impression of grade, if taken longitudinally with the street, or at an acute angle? To be at all reliable on the inquiry of the grade, should not the camera be placed at a right angle with the street? But the court is not agreed on the question of its admissibility, and we therefore hold that it was admissible for what it was worth." *Louisville, etc., R. Co. v. Hall*, 91 Ala. 112, 8 So. 371, 374, cited in note in 35 L. R. A. 803.

§ 268. Books and Other Printed Publications.

§ 269. — In General.

Almanac.—It is competent to prove

the time of rising and phase of the moon at a particular time by the introduction of an almanac. *Mobile & B. R. Co. v. Ladd*, 92 Ala. 287, 9 So. 169, cited in note in 40 L. R. A. 561.

And while it may be that the time at which the moon rose on the night in question, if material in an action for damages, was a matter of judicial knowledge, and that the presiding judge informing himself by reference to standard almanacs should have charged the jury of that fact, the introduction of the almanac before the jury can not be deemed injurious to the defendant, since the presumption is that the time of the rise of the moon was correctly stated therein and that the jury found accordingly. *Mobile, etc., R. Co. v. Ladd*, 92 Ala. 287, 9 So. 168, cited in note in 40 L. R. A. 561.

Printed Rules.—A rule from defendant's [a railroad company] book of rules, providing that "a lamp swung across the track is the signal to stop," was competent evidence on the question of negligence on the part of the engineer. *Helton v. Alabama Mid. R. Co.*, 97 Ala. 275, 12 So. 276.

§ 270. — Statutes, Law Reports, and Legal Textbooks.

Statutes.—Under Code 1907, § 3988, providing that statutes printed in a book, purporting on the face thereof to have been printed by the authority of any state, are evidence without further proof, the statutes of a sister state printed in a book, purporting on its face to have been printed under the authority of such state, are admissible in evidence without further proof as to their authenticity. *Law v. State*, 2 Ala. App. 257, 56 So. 79.

"If the statute laws of a sister state may be thus proved, we can not perceive a sound reason why the common law, as modified by the decisions of the state courts, may not be proved by the production of the accredited reports of these decisions. We every day elucidate our own common law by referring to these reports, and it would seem a singular anomaly if they can not be admitted as evidence to show to what extent the local decisions of a particular state, of which they are the accredited exponents, have modified the common law. For ac-

curacy of information, such reports seem equal at least to the testimony of witnesses, which, however respectable the individuals may be, must chiefly, if not entirely, be founded on information derived from the same sources." *Inge v. Murphy*, 10 Ala. 885, 896.

Reports of Adjudged Cases.—To show a modification of the common law in another state by the decisions of its courts, those decisions may be proved by the production of the reports of adjudged cases accredited in that state. *Inge v. Murphy*, 10 Ala. 885, cited in note in 25 L. R. A. 449, 451, 452, 456.

Digest.—A digest of the laws of a state which does not appear to have been published by authority of law is inadmissible as evidence to establish the rate of interest of such state. *Geron v. Felder*, 15 Ala. 304, cited in note in 5 L. R. A., N. S., 964.

And courts will take judicial notice of the coincidence of the days of the month with those of the week as shown by the almanac. *Sprowl v. Lawrence*, 33 Ala. 674; *Allman v. Owen*, 31 Ala. 167.

§ 271. — Scientific and Technical Works.

Dictionary.—In a prosecution for selling oleomargarine in violation of Acts 1894-95, p. 777, § 1, Webster's International Dictionary was admissible to prove the definition of the word "oleomargarine," and other words pertaining to such definition. *Cook v. State*, 110 Ala. 40, 20 So. 360.

"There was no error in the admission of Webster's International Dictionary. The courts are expected to know and take knowledge of the meaning of any vernacular word which may be ascertained by reference to any standard authority. The offering in evidence of such standard authority may be superfluous, but is not injurious error. We know, or can ascertain by reference to the International Dictionary or the Century Dictionary, that oleomargarine is a 'product or compound made wholly or partly out of any fat, oil, or oleaginous substances.' *Adler v. State*, 55 Ala. 16; *Haygood v. State*, 98 Ala. 61, 13 So. 325, 12 Am. & Eng. Enc. Law, p. 150; 1 Greenl. Ev., § 5." *Cook v. State*, 110 Ala. 40, 20 So. 360, 362.

Medical works by authors who are admitted or proven to be standard with that profession are admissible as evidence, with proper explanation of technicalities or phrases not generally understood. *Stoudenmeier v. Williamson*, 29 Ala. 558, cited in note in 40 L. R. A. 566; *Merkle v. State*, 37 Ala. 139.

And may be read to the jury. *Merkle v. State*, 37 Ala. 139, cited in note in 40 L. R. A. 566.

And that standard medical works are admissible as evidence of the author's opinion upon questions of medical skill or practice involved in a trial. *Merkle v. State*, 37 Ala. 139; *Bales v. State*, 63 Ala. 30; *Stoudenmeier v. Williamson*, 29 Ala. 558, cited in note in 40 L. R. A. 566.

Where a person received injuries which she claimed produced appendicitis, it was competent to introduce as evidence parts of standard medical books which related to the disease. *Birmingham Ry., Light & Power Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

§ 272. — Mortality Tables and Tables of Expectancy of Life.

See, also, ante, "Scientific Facts and Principles," § 6; "Statistical Facts," § 9.

To Show Length of Life.—The American mortality tables are admissible to show the probable length of life. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886; *Mary Lee Coal & Ry. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897; *Richmond & D. R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209, cited in note in 40 L. R. A. 556; *Louisville & N. R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130; *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232; *McDonnell v. Alabama Gold Life Ins. Co.*, 85 Ala. 401, 5 So. 120, cited in note in 40 L. R. A. 558; *Louisville, etc., R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714.

And that tables of life expectancies are admissible in evidence in an action for a personal injury on the question of damages, though death did not result. *Richmond, etc., R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209; *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34, 13 So. 130, cited in note in 40 L. R. A. 556.

Judicial Notice of Tables.—There is no way in which the value of the wife's inchoate or contingent right of dower in

her husband's lands can be proved, with any degree of accuracy, except by a calculation based on what are commonly called annuity tables, the American table of mortality being now regarded as the orthodox standard throughout the United States; judicial notice of which table may be taken by the chancellor, or by the register on a reference. *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232.

Carlisle Tables.—The American table of mortality has superseded the Carlisle tables in America, and should be resorted to by the courts as a basis for the calculation of annuities dependent upon the probability of human life. *Gordon, etc., Co. v. Tweedy*, 74 Ala. 232, cited in note in 40 L. R. A. 554.

Tables Used by Life Insurance Companies.—It is proper to permit a witness to testify that he is well acquainted with tables used by life insurance companies in estimating the probable duration of life at any given age, and that the American table of mortality is used for that purpose by nearly all the companies in the United States. *Mary Lee Coal & Ry. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897, cited in note in 40 L. R. A. 560.

Injuries to Railroad Employee.—In an action by an employee of a railroad company for personal injuries, the American tables of mortality, when identified, are properly admitted. *Richmond, etc., R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209, cited in note in 40 L. R. A. 556; *Mary Lee, etc., R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897, cited in note in 40 L. R. A. 560.

Person Engaged in Hazardous Employment.—The court properly admitted the American mortality tables to show plaintiff's probable length of life, although plaintiff was engaged in a more hazardous employment than persons with reference to whom the tables were made up. And although when injured he was engaged in a more hazardous employment than persons with reference to whom the tables were compiled, that being merely a circumstance to be considered by the jury as tending to show that his expectancy of life was less than the tables indicate for one of his age. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 185, 11 So. 886, cited in note in 40 L. R. A. 557.

Weight and Sufficiency.—In an action against a railroad company by an employee for injuries resulting from a defective switch, where plaintiff alleges that the defect arose from, or had not been discovered or remedied by reason of, the negligence of defendant, it is not necessary to aver affirmatively that plaintiff exercised due care. In such case it is proper to admit American tables of mortality as evidence, but they are not conclusive upon the question of the duration of life. *Mary Lee, etc., R. Co. v. Chambliss*, 97 Ala. 171, 11 So. 897, cited in note in 40 L. R. A. 560.

(D) PRODUCTION, AUTHENTICATION, AND EFFECT.

§ 273. Public Documents, Records, Exemplifications, or Official Copies.

§ 273 (1) In General.

Code of Municipal Ordinances.—Where a code of municipal ordinances purported on its face to be a code or ordinances of by-laws of such municipal corporation, it was sufficiently identified to authorize its admissions in evidence, under the express provisions of Code 1896, § 1822. *Southern Ry. Co. v. Weatherlow*, 153 Ala. 171, 44 So. 1019.

Writs of Attachment.—Where a deputy sheriff testified without objection that certain writs of attachments were issued, and that he seized certain goods under them, there was sufficient proof of the authenticity of the writs to warrant their admission in evidence. *Ryan v. Young*, 147 Ala. 660, 41 So. 954.

Levy of Execution.—The indorsement of a levy on an execution by the sheriff or his deputy, being an act required by law, is to be considered as true until impeached, and is admissible in evidence without proof of the handwriting of the officer. *Barron v. Tart*, 18 Ala. 668.

Production of Papers Filed in Another Court.—A court can not order papers on file in another court to be produced before some court entirely beyond the control of the court making the order. *Wright v. Dunklin*, 83 Ala. 317, 3 So. 597.

Certificate of Land Office.—A certificate from the land office of the United States is to be taken as genuine, and what it purports to be, until the contrary appear. *Cox v. Jones*, 1 Stew. 379.

§ 273 (2) Proof of Genuineness in General.

Record.—A record is proved by the mere production and inspection of the original, or of an exemplified or authenticated copy. *King v. Martin*, 67 Ala. 177.

Proof of Execution Docket.—Where the clerk of a court testifies that a book produced was the regular execution docket kept by him in his office, in which he made the entries of the issuing and return of certain executions, in respect to these entries the book may be received as evidence. *Stewart v. Conner*, 9 Ala. 803.

The testimony of the clerk or his deputy that an entry upon the execution docket is genuine, and that he has no doubt but it correctly states the day when an execution was returned, makes such entry admissible evidence if not otherwise. *Hartley v. Chandler*, 6 Ala. 857.

Judgment.—In an action against a sheriff for failing to execute final process, if it is necessary to produce the judgment, there can be no objection to the clerk who was its keeper testifying that it was the judgment that he had been required to produce, and that there was no other of a similar nature. *Spence v. Tuggle*, 10 Ala. 538.

Execution.—Where the sheriff of one county levies an execution issuing from another on personal property, to which a claim is interposed, the copy of the execution, returned by him to the circuit court of the county in which the levy is made, is admissible in evidence without other proof than that which the return affords. *Lanier v. Branch Bank*, 18 Ala. 625.

Tax Receipt.—In the absence of any statutory provision making a tax receipt self proving, it must be proved like any other paper introduced in evidence, unless it is an ancient document, when it may be received under the usual requirements in such a case. *Chastang v. Chastang*, 141 Ala. 451, 37 So. 799.

Proceedings of Justice of the Peace.—A justice of the peace is competent to prove his warrant and proceedings by their production and his oath, in a case where he is not interested; and if the proceedings be had before two justices,

and be signed by both, the testimony of one is sufficient to prove them. *Scott v. McCrary*, 1 Stew. 315.

§ 273 (3) Judicial Acts and Records.

See, also, ante, "Judicial Acts and Records," § 242; "Judicial Records and Proceedings," § 249.

Validity of Execution.—An execution issued by a justice of the peace is admissible as evidence without proof of his signature or personal identity. *Sandlin v. Anderson*, 76 Ala. 403.

An execution issued by a justice of the peace in one county, and indorsed by a justice of the peace in another county, according to the statute, is admissible in evidence without proving the signature of the magistrate who issued it. *Burgess v. Sugg*, 2 Stew. & P. 341.

In an action by the plaintiff in execution against the claimant of property taken on such execution, on the production of the execution the judgment on which it issued will be presumed to be valid until the contrary appear. *Carlton v. King*, 1 Stew. & P. 472.

§ 273 (4) Production of Part of Record or Document in General.

Only Part of Record Bearing on Case.

—Where the bill in a former action, offered in evidence, was the only part of the record having any bearing on the case, it was properly admitted without requiring the balance of the record to be produced. *Smith v. McGehee*, 14 Ala. 404.

Order of Court to Assignee.—Where, in ejectment by the purchaser from an assignee in bankruptcy, the defense relied on was that the premises were exempt to defendant's grantor as his homestead, a certified copy of an order of court directing the grantor's assignee to execute to him a conveyance of certain realty as homestead exemption was not admissible, as it should have been accompanied by the petition in the action of the court in assigning the homestead, or other judicial proceedings had in connection with it. *Farley v. Whitehead*, 63 Ala. 295.

§ 273 (5) Part of Judicial Proceedings.

Proceedings Relating to Judgment.—Where a record is used in evidence

merely to show that there was a certain judgment, then it is not necessary to put in the proceedings on which it is based. *Locke v. Winston*, 10 Ala. 849.

§ 273 (6) Necessity of Producing Part Showing Jurisdiction.

Exemplification of Decree Sufficient.—Though a party relying upon a former decree as an adjudication of the subject matter must produce the whole record, that the court may be able to construe the decree in the light of all the proceedings on which it is founded, yet, if the only point of inquiry is the existence of the decree, an exemplification of the decree alone is sufficient, without proof of the other proceedings. *Adams v. Olive*, 62 Ala. 418.

§ 273 (7) Parol or Extrinsic Evidence to Supply Defects.

See, also, post, "Parol or Extrinsic Evidence Affecting Writings," §§ 290, 353.

Proof of Proceeding before Justice.—Where plaintiff in a proceeding under Code, §§ 3521-3529, for the partition of crops between himself and a joint owner, offers in evidence in proof of his eviction the record of a forcible entry and detainer suit by defendant against him, it is competent for the justice in whose court such suit was had to testify, as preliminary to the admission of the record, that there was such a suit in his court. *Gassenheimer v. Huguley*, 64 Ala. 83.

§ 273 (8) Official Deeds in General.

A sheriff's deed, duly acknowledged and recorded within twelve months after its execution, is admissible in evidence without proof of its execution. *Parsons v. Woodward*, 73 Ala. 348.

A sheriff's deed can not be given in evidence without producing the judgment and execution under which the sale was made, such documents being necessary to show that the sheriff had authority to sell. *Lewis v. Goguette*, 3 Stew. & P. 184.

Deeds of Courthouse Commissioners.—Deeds purporting to have been executed by the courthouse commissioners of a county, and to be signed by one of their number for himself, and as agent for the

others, conveying lots, the title to which they held in trust for the county, are not admissible in evidence without due proof of the authority of the assumed agent to act for the other grantors, even conceding that such authority could be delegated. *Johnson v. Common Council of Dadeville*, 127 Ala. 244, 28 So. 700.

Contract with Secretary of United States Treasury.—Where an original contract for the sale of lands was executed by the secretary of the treasury of the United States under the seal of the treasury department, it is sufficiently authenticated to be admissible in evidence without further proof of its execution. *Jinkins v. Noel*, 3 Stew. 60.

§ 274. Examined Copies of Records.

Verified by Competent Witness.—Rev. Code, § 2694, authorizing the admission in evidence of public documents on the certificate of the head of a department of the general government, does not exclude examined copies verified by evidence of a competent witness, admissible at common law. *Blackman v. Dowling*, 57 Ala. 78.

§ 275. Compelling Production by Adverse Party.

§ 275 (1) Right in General.

Production by Party Objecting to Contents of Letter.—Where one objects to evidence of the contents of a letter written to him, upon the ground that the letter itself was the best evidence, and it appears that he has it in his possession in court, it is not error to require him to produce the same forthwith. *Winslow v. State*, 92 Ala. 78, 9 So. 728.

§ 275 (2) Nature of Document and Relation to Issue.

Books Belonging to Association.—In an action against defendants as individuals, they can not be compelled to produce the books of an association to which they all belonged, as evidence of the contract on which the suit was brought, as only parties who have the custody of the books can be required, by attachment, to produce them. *National Fertilizer Co. v. Holland*, 107 Ala. 412, 18 So. 170.

§ 275 (3) Form and Sufficiency of Notice.

Waiver of Sufficiency of Notice.—Where a notice to produce a paper is

given in open court to the party who has it in his possession, he can not object, after denying such possession, to the sufficiency of the notice to produce, or that the court requires him to answer whether he has the paper. *Littleton v. Clayton*, 77 Ala. 571.

§ 275 (4) Subpœna Duces Tecum.

Unaffected by Statutory Provision.—

Where a witness who was summoned by a subpœna duces tecum produces at the time the books of the corporation, it is no objection to the introduction of such books in evidence that the statute provided another mode of securing the production of the books in evidence. *Cobb v. Lagarde*, 129 Ala. 488, 30 So. 326.

§ 275 (5) Time for Application or Notice.

No Basis for Motion to Produce Books.—It was not error to deny an oral motion for time to move to require a party to produce his account books, where it did not appear by the motion that any fact existed which the statute provides as a basis of an order requiring the production of such books. *McDuffee v. Collins*, 117 Ala. 487, 23 So. 45.

§ 275 (6) Hearing and Determination.

Refusal to Require Production Error.

—In an action on a written contract, refusal to require the production of the contract, where the record shows that plaintiff had it in court, is reversible error. *Street v. Nelson*, 80 Ala. 230.

As held in this case on the former appeal (67 Ala. 504), the plaintiff should be required to produce the written contract with Robbs Brothers under which the timber was felled, and by which the relative rights of the parties are to be determined; and the refusal to require the production of this paper, when the record shows that the plaintiff had it in court, is a reversible error. *Street v. Nelson*, 80 Ala. 230.

§ 275 (7) Excuse for Nonproduction.

Disclosure of Secrets of Organization.

—In an action on a contract between a secret association and its members, books of the association containing evidence of the contract must be produced in evidence, if necessary, though secrets of the association will be thereby disclosed.

National Fertilizer Co. v. Holland, 107 Ala. 412, 18 So. 170.

Sufficiency of Excuse in Discretion of Court.—Upon notice to the plaintiff, under the eighth rule for the regulation of practice in the circuit and county courts, to produce the writing sued on, the sufficiency of the excuse for its nonproduction is addressed to the discretion of the primary court, and its decision is conclusive. *Herndon v. Givens*, 16 Ala. 261.

§ 275 (8) Effect of Failure to Produce.

Can Not Show Contents of Writing.—

A party in possession of a writing, who does not produce it, or account for its nonproduction, should not be allowed to prove its contents, though the opposite party did not give notice to produce it. *Phillips v. Americus Guano Co.*, 110 Ala. 521, 18 So. 104.

"As the plaintiff made out no case, the cause is not in a condition that we can properly pass on the other questions presented by the record. We remark, however, that, the written order sent by Gamble to the plaintiff for the fertilizer being in its possession, in order to get the benefit of it the plaintiff should have produced the writing, or accounted for its nonproduction. Without accounting for its absence, secondary evidence of its contents was inadmissible; and this without regard to whether defendants gave plaintiff notice to produce it or not." *Phillips v. Americus Guano Co.*, 110 Ala. 521, 18 So. 104, 105.

Nonsuit.—Under the express provisions of Code 1896, §§ 1859, 1860, plaintiff should, on motion of defendant, have been required to produce the receipts if he had them in court, and was subject to nonsuit for failure to do so. *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26.

Opposite Party May Give Secondary Contents of Writing.—

The legal consequence of a failure or refusal to produce writings or books upon notice is to entitle the other party to give secondary evidence of their contents, and not that the court should order their production to be used as evidence against the party having possession and to whom they belong. *Golden v. Conner*, 89 Ala. 598, 8 So. 148.

Evidence to Contradict Evidence of Contents.—In an action against an in-

insurance company, where a policy was alleged to have been signed, filled up, and issued by the insurance agent, but after the loss occurred had disappeared, and had not since been in plaintiff's possession, and on such showing plaintiff was allowed to introduce secondary evidence of the contents of the policy, evidence on the part of defendant tending to contradict such evidence is inadmissible; there having been no proof of the loss or destruction of the policy, or that defendant was unable to produce it. *Home Ins. Co. v. Adler*, 71 Ala. 516.

Judgment by Default.—Where, on a motion to require a party to produce a document, no evidence was produced that any such document was in existence, or in the custody or control of the party required to produce it, while his attorney stated, under oath, that no such paper was under his custody or control, that if it was in existence he did not know of it, that his client informed him that he had no such paper in his custody or control, and did not know of it, if it was in existence, judgment by default against the party ordered to produce the paper was improperly granted, under Code 1907, §§ 4058, 4059, authorizing the court to require the production of books and writings in the possession, custody, or control of a party, and to give judgment against a party failing to produce them as ordered. *Goss v. Weiman & Co.*, 5 Ala. App. 404, 59 So. 364.

§ 275 (9) Effect of Production in General.

May Produce Entire Account.—If the defendant call upon the plaintiff to produce an account of sales, for the purpose of showing when the sale was made, this is sufficient to entitle the plaintiff to give the whole account in evidence. *Young v. Bank of Alabama*, 5 Ala. 179.

§ 275 (10) Introduction by Party Producing Document.

Party in Possession Can Not Read Instrument.—An instrument of writing, produced in pursuance of notice to that effect, may be read by the party who has required the production; but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it

has been, to read it without proof. *State v. Wisdom*, 8 Port. 511.

"The notice given by the solicitor, to produce the bill of sale on the trial, did not authorize the prisoner to use it without proof. The rule as to the introduction of such evidence, is clearly laid down by most elementary authors on evidence, and may be stated thus: If produced on the motion, it may be read by the party who has requested its production, but if he does not choose to give it in evidence, the mere notice will not have the effect to allow the party in whose possession it has been, to read it without proof, 2 Starkie on Ev., 360. A different rule would produce the result of making evidence, by the mere act of notice; and a false instrument might be introduced, which it would be difficult, if not impossible, to disprove." *State v. Wisdom*, 8 Port. 511, 517.

§ 276. Preliminary Evidence for Authentication.

§ 277. — Necessity in General.

§ 277 (1) In General.

Proof of Genuineness of Letter.—Before a letter, relevant and material, is competent evidence, its genuineness must be shown. *C. W. Zimmerman Mfg. Co. v. Dunn*, 163 Ala. 272, 50 So. 906.

Statement of Engineer.—In an action on a contract for the construction of sanitary sewers for a city, the final statement purporting to have been made by the engineer is inadmissible in the absence of proof of the correctness of the statement by the engineer or by some one having knowledge thereof, or of an admission by the city. *City of Ensley v. J. E. Hollingsworth & Co.*, 170 Ala. 396, 54 So. 95.

Books Must Have Been Fairly and Honestly Kept.—Another element necessary under the common law rule and by express statute in many states, to be shown preliminary to the introduction by a party of his books of account within the foregoing rules, is evidence that the transactions were correctly recorded, or, as it is sometimes expressed, the books must appear to have been fairly and honestly kept. *Wagar Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949; *Powell v. State*, 84 Ala. 444, 4 So.

719; *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907, cited in note in 52 L. R. A. 590.

Proof of Attestation.—Where a paper is attested it is not admissible in evidence until the attesting witness is called to prove it. *Richmond & D. R. Co. v. Jones*, 92 Ala. 218, 9 So. 276, cited in note in 35 L. R. A., N. S., 346.

Admissible in Connection with Declarations of Party.—Where a written instrument is so connected with the declarations of a party that they can not be fully understood without it, proof of its execution is not a prerequisite to its admissibility in evidence, in connection with and as explanatory of the declarations. *Mims' Ex'rs v. Sturtevant*, 18 Ala. 359.

Medical License.—Under the Code, a medical license is competent evidence, without proof of the signatures. *White v. Mastin*, 38 Ala. 147.

§ 277 (2) Denial of Execution.

Denial of Execution of Deed.—In ejectment, a writing purporting to be a deed to the lot in question was properly excluded where the alleged grantor denied the execution of such deed, and there was no evidence of any delivery thereof to the alleged grantee, or to any one for him. *Bynum v. Hewlett*, 137 Ala. 333, 34 So. 391.

Effect of Expurgatory Oath.—The expurgatory oath required by Aik. Dig., p. 283, § 127, to be taken by defendant in an action on a written instrument, as a condition to compelling plaintiff to prove its execution, does not impose on plaintiff the necessity of proving it more strictly than the common law requires, but in fact revives the common law so far as the particular case is concerned. *Jones v. Rives*, 3 Ala. 11.

§ 277 (3) Conveyances, Contracts, and Other Writings in General.

Affidavit.—On exceptions to the payment of certain notes by the executors of deceased, an affidavit purporting to have been signed by him, and acknowledging his liability, is not self proving, though containing a certificate of a notary to its subscription and verification, and, in the absence of proof that it was signed by deceased, is inadmissible in evidence. *Keyland v. Keyland*, 101 Ala. 297, 13 So. 278.

Deeds.—Where a deed is offered in evidence to show color of title, it is not necessary that its execution be proved. *Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

In ejectment, plaintiff offered in evidence a deed acknowledged as follows: "State of Alabama, Etowah County. Before me, P., an acting notary public in and for said county and state, personally appeared H. and wife, E., with whom I am personally acquainted with, and they have, on the day and date the above conveyance was signed, sealed, and delivered, acknowledged same to be their voluntary act. This 4th day of December, in the year 1872. [Signed] P., Notary Public & J. P." Held, that it was properly admitted, in that, though the acknowledgment was in some respects defective, the signature and certificate of the magistrate was sufficient as an attesting witness; it having been shown at the trial that he was then dead, and his handwriting and the genuineness of the signature having been fully established. *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935.

§ 277 (4) Proof of Authority to Execute.

Authority to Sign Receipt.—In an action against Oliver P. Hill on a receipt signed "Hill & Sulser," the writing is competent evidence, without proof of his signature or of the existence of a partnership. *Hill's Adm'r v. Nichols*, 50 Ala. 336.

§ 277 (5) Proof of Recording.

Opinion of Clerk as to Identity of Instrument.—The opinion of the clerk by whom the deed ought to have been recorded, that the deed offered in evidence was the one which was recorded, is illegal and inadmissible as evidence. *Jones v. Parks*, 22 Ala. 446.

§ 277 (6) Unrecorded Instruments.

Mortgage.—Where a mortgage was not filed within the provisions of Code 1896, § 992, providing that conveyances which are acknowledged or proved according to law and recorded within twelve months from their date may be received in evidence without further proof, proof of its execution was necessary to render it admissible in evidence. *Lewis v. Glass* (Ala.), 39 So. 771.

Conveyance.—A conveyance of prop-

erty not recorded within twelve months after its execution is not admissible in evidence without proof of execution, since, under Code 1896, § 992, a conveyance, to be self proving, must be acknowledged and recorded within that time. *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928.

§ 277 (7) Record Dispensing with Proof of Execution.

Trust Deed.—A certificate of registration upon a trust deed is not sufficient to authorize the reading of it in evidence, but the execution of such deed must be proved, whether recorded or not. *Brock v. Headen*, 13 Ala. 370.

Conveyances Recorded in Twelve Months.—Code, § 1798, providing for the admission in evidence of conveyances acknowledged and recorded within twelve months without further proof, applies to a deed by a foreign corporation, bearing the corporate seal, signed by its officers, and acknowledged by them before a United States consul. *Jinwright v. Nelson*, 105 Ala. 399, 17 So. 91.

Mortgage of Personalty.—A mortgage of personalty is a "conveyance of property," within the meaning of Code 1886, § 1798, admitting such conveyances in evidence, without further proof of execution when they have been acknowledged or proved and recorded, as required by law. *Patterson v. Jones*, 89 Ala. 388, 8 So. 77.

Certificate of Notary Public.—The certificate of a notary public, under his notarial seal, of the acknowledgment by the principal of a power of attorney, is sufficient to authorize its admission in evidence. *St. John v. Redmond*, 9 Port. 428.

Certificate of Proof of Acknowledgment.—A deed conveying land and personal property in trust to pay debts can not be used in evidence on the certificate of the clerk that it was acknowledged or proved to have been executed before him, but the fact of its execution must be established by proof aliunde. *Raviesies v. Alston*, 5 Ala. 297.

Deed Recorded in Foreign State.—A deed executed in a foreign state with two subscribing witnesses, proved by one of them in the manner prescribed by the

local statute, and certified by one styling himself a notary of the other state, authenticated by his seal, when properly recorded as required by the local statutes in the county where the land lies, is self proving. *Hart v. Ross*, 57 Ala. 518.

Curative Acts.—Deeds recorded within the time specified by Act 1875, p. 180, omitted from Code 1876, may be received in evidence without further proof. *Hart v. Ross*, 57 Ala. 518.

Deed of Gift of Wife.—Under the provisions of Code, §§ 1274-1296, relative to registration of instruments, a deed of gift by which a life estate is conveyed, if recorded in the county in which the grantor resides, and where the property was at the time, is admissible in evidence without further proof. *Twelves v. Nevill*, 39 Ala. 175.

Deed Recorded after Passage of Curative Act.—Under Acts 1888-89, p. 41, providing that deeds theretofore executed according to law, but not recorded within the time required by law, if recorded within two years after its passage, shall "have the same force and effect in all things" as if recorded in due time, a deed recorded under such act is admissible in evidence without proof of execution. *Hertzfeld v. Bailey*, 103 Ala. 473, 15 So. 912.

§ 277 (8) Documents Produced on Notice or Order.

Production of Book as Dispensing with Identification.—In an action on contract, a book produced by defendant under a subpoena duces tecum, requiring him to produce all books and papers in his possession relating to the contract, is admissible without further identification; the production in such case being an admission that such book belonged to and was kept by defendant. *Woodstock Iron Co. v. Reed*, 84 Ala. 493, 4 So. 369.

A bill of sale produced on notice by the party claiming under it is competent for the other, without proof of execution or identity. *Ward v. Reynolds*, 32 Ala. 384.

§ 277 (9) Proof of Execution of Original to Authorize Introduction of Copy.

Contract of Sale of Land.—A copy of the original contract of the sale of land,

certified by the secretary of the treasury department of the United States, with the seal of the treasury department, to be a true copy from the records of his office, in all respects similar to the original, is admissible in evidence without further proof of its execution. *Jenkins v. Noel*, 3 Stew. 60.

§ 277 (10) Instruments and Assignment, Indorsement, or Guaranty Thereof.

Assignment of Mortgage.—Where, on a bill to quiet title, complainant claims under a writing purporting to be an assignment of a mortgage, and also an assignment thereof by the assignee to her, she not being a party thereto, it is inadmissible until its execution is proved. *Collier v. Carlisle*, 133 Ala. 478, 31 So. 970.

Settlement.—Where a settlement in writing was agreed on, and a person was employed to put it, in the presence of the parties, on the back of an instrument to which it referred, the written settlement is admissible without proof of the execution of the instrument on which it is indorsed. *Walker v. Driver*, 7 Ala. 679.

§ 278. — Writings Collateral to Issues.

Subscribing Witness Unnecessary.—

Secondary evidence is admissible where the instrument is to be used collaterally, and it is not necessary in such a case to call the subscribing witnesses. *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365; *Lavretta v. Holcombe*, 98 Ala. 503, 12 So. 789, cited in note in 35 L. R. A. 350.

In trover for a horse, on an issue as to whether R., under whom defendants claimed, or P.'s wife, under whom plaintiff claimed, was the owner of the horse, plaintiff testified as to his purchase from R.'s wife, and gave in evidence his purchase money note. Held, that as the note was not a muniment of title, but merely incidental to the main issue, its execution need not be proved by the subscribing witness. *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365, cited in note in 35 L. R. A. 350.

"Nor was there any error in allowing the witness Dewey to testify as to the fact that Mr. Robertson had written him a letter relative to the friction between

them, nor as to the contents of the letter. This writing, of course, were merely collateral or incidental to the main issue, and it was not necessary that it be produced, in order to let in parol evidence of its contents. *Costello v. State*, 130 Ala. 143, 30 So. 376; *Cobb v. State*, 100 Ala. 19, 14 So. 362; *Foxworth v. Brown*, 120 Ala. 59, 24 So. 1; *East v. Pace*, 57 Ala. 521; *Street v. Nelson*, 67 Ala. 504; *Winslow v. State*, 76 Ala. 42." *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37, 43.

"Therefore, under our statute authorizing proof of written instruments by the party executing, and under the rule declared by this court, the execution of this contract was sufficiently proven to authorize its introduction in evidence. *Smith v. Keyser*, 115 Ala. 455, 22 So. 149; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; *Allred v. Elliott*, 71 Ala. 224; *Guice v. Thornton*, 76 Ala. 466." *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37, 42.

§ 279. — Ancient Documents.

§ 279 (1) Admissibility in General.

Admissible without Further Proof.—

An ancient document coming from proper custody is self proving and admissible without evidence of its authenticity. *Brannan v. Henry*, 175 Ala. 454, 57 So. 967.

Documents Filed in Land Office.—

Copies of ancient documents filed in the United States land office, and findings of the register of that office, were admissible in ejectment to establish color of title. *Garrow v. Toxey*, 171 Ala. 644, 54 So. 556.

Under the facts of this case, a statutory real action in the nature of ejectment, it was held that the ruling of the primary court, in allowing the plaintiff, in support of his title, to read in evidence a duly certified transcript from the receiver's journal, a book belonging to the United States land office, showing that a party under whom the plaintiff claimed, had purchased the land in controversy in 1809, was free from error. *Bernstein v. Humes*, 75 Ala. 241.

Transcripts of Record of Probate Court.—Nor did the primary court err in allowing the plaintiff to read in evidence

transcripts of the records of deeds in the office of the judge of probate, executed in 1818 and 1833, under which the plaintiff claimed, although the deeds may not have been properly acknowledged, and not recorded within the time prescribed by the statute. *Bernstein v. Humes*, 75 Ala. 241.

§ 279 (2) Necessity of Authentication in General.

Ancient land certificates are self proving, and recitals therein are evidence that there were such persons as those named in the certificates, and that they purchased the lands in question. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415.

Land certificates issued more than thirty years before trial are ancient documents and self proving documents, and it was unnecessary that they should come from proper source or even be exhibited to the court for inspection as to genuineness or age; there being no circumstances to create suspicion. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 So. 415.

A deed thirty years old is admissible in evidence without proof of its execution. *Farmer's Heirs v. Eslava*, 11 Ala. 1028; *Carter v. Chaudron*, 21 Ala. 72; *Alexander v. Wheeler*, 78 Ala. 167.

"After proving title by government patent to Arthur Alexander, defendant's ancestor, granting to him the lands in controversy, plaintiff offered in evidence what on its face purported to be a deed from said Arthur to him, conveying the lands sued for. This deed appeared to be more than thirty years old, and purported to have subscribing witnesses. It was offered in evidence without proof of execution. 'The defendant objected to said paper writing being read in evidence to the jury, on the ground that its execution was not proved. This objection, being on a specified ground, was a waiver of all other grounds.' 1 Brick Dig. 887, § 1194; *Massey v. Smith*, 73 Ala. 173. The objection, as made, was rightly overruled. Deeds thirty years old are admissible proof of their execution. 1 Greenl. Ev. § 154; *White v. Hutchings*, 40 Ala. 253, *Sharpe v. Orme*, 61 Ala. 262; *Bernstein v. Humes*, 75 Ala. 241. Other questions might possibly have been raised as to the actual date of the deed, in fix-

ing its age, and as to its custody, in determining its genuineness. These were not raised; and hence we must suppose the paper came from the proper custody—*Wheeler produced it*—and that it bore the marks of age." *Alexander v. Wheeler*, 78 Ala. 167, 170.

A deed more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof, the witnesses being presumed dead; and when it is found in the proper custody, and is corroborated by enjoyment under it, or by other equivalent explanatory proof, it is allowed to prove itself. *Carter v. Chaudron*, 21 Ala. 72.

A deed, thirty years old, is admissible as evidence without proof of its execution; and when the only objection to its admissibility is the failure to prove its execution, the appellate court will presume, in favor of the ruling of the court below, that the paper came from the proper custody. *Alexander v. Wheeler*, 78 Ala. 167.

Where a deed which plaintiff offered as a link in his title was more than thirty years old, and was received by him from his grantor, its proper custodian, and the grantee in the deed had paid the taxes on the land, though not in actual possession, because the land was wild, uninclosed timber land, the deed was admissible as an ancient document, without proof of execution. *White v. Farris*, 124 Ala. 461, 27 So. 259.

Unrecorded Deed.—While a deed not recorded within the time required by statute is not self proving, yet a deed thirty years old is admissible in evidence without proof of execution. *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, cited in note in 18 L. R. A., N. S., 521.

Title Bond.—In ejectment, defendant introduced in evidence a title bond purporting to have been executed nearly thirty years before by one claiming an interest in the land, in connection with other proof showing payment of the purchase price of land. Held admissible without proof of execution, and without preliminary proof of possession under it, there being no circumstances casting suspicion on its genuineness. *Woods v. Montevallo Coal, etc., Co.*, 84 Ala. 560, 3 So. 475.

§ 279 (3) Sufficiency of Authentication in General.

Found in Proper Custody.—An ancient deed, found in the proper custody, is admissible in evidence, when supported by proof of corresponding possession. *Beall v. Dearing*, 7 Ala. 124; *Farmer's Heirs v. Eslava*, 11 Ala. 1028; *Carter v. Chaudron*, 21 Ala. 72.

§ 279 (4) Proof of Possession under Instrument.

Sufficient Proof of Possession.—A deed over thirty years old, coming from the proper custody, without any mark of suspicion attaching to it, under which the grantee and those claiming under him have looked after the land and paid taxes on it, is admissible in evidence under the doctrine of ancient documents, with further proof of actual possession by the present owner of its predecessors in title under the deed. *Sloss-Sheffield Steel, etc., Co. v. Lollar*, 170 Ala. 239, 54 So. 272.

To overcome the presumption in favor of the due execution and genuineness of a deed over thirty years old, regular on its face, by proof that it was signed in blank, the evidence must be clear, satisfactory, and convincing. *Sloss-Sheffield Steel, etc., Co. v. Lollar*, 170 Ala. 239, 54 So. 272.

§ 279 (5) Ancient Maps, Plans, and Surveys.

Map of City.—A copy of a map of a city, prepared about fifty years ago by one employed by the city to lay out a map thereof, is an ancient document, and when coming from a proper custody is competent to show boundary lines of private ownership. *Barker v. Mobile Elect. Co.*, 173 Ala. 28, 55 So. 364.

"Official records show that about 1848 one Troost was employed by the city of Mobile to lay out a map of the city. A copy of so much of this map as shows the block containing the property in controversy was introduced in evidence. This map was hearsay, but it was an ancient document and came from a proper custody. It was competent to show boundary lines of private ownership. 1 Greenl. Ev. (16th Ed.) § 140a; *Taylor v. Fomby*, 116 Ala. 621, 22 So. 910; *Boardman v. Reed*, 6 Pet. 328, 8 L. Ed. 415,

Jones on Ev. § 308." *Barker v. Mobile Elect. Co.*, 173 Ala. 28, 55 So. 364, 367.

§ 279 (6) Defects and Irregularities in Instrument.

Sufficiency of Instrument.—The rule as to admission of ancient deeds without proof of execution applies only where the deed on its face is sufficient to pass title, and not to a deed signed by the grantor by his mark only, and not witnessed or acknowledged as required to give it validity. *O'Neal v. Tennessee Coal, Iron & R. Co.*, 140 Ala. 378, 37 So. 275.

Burden of Proof as to Authenticity of Instrument.—Where an instrument purporting to have been executed more than thirty years is offered as an ancient instrument, and is admitted in evidence, though there is evidence tending to show that its date had been changed, and that it had been executed within less than thirty years, it is received as at least prima facie an ancient document, self proving, and the burden is on the other party to prove that it is not. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

One offering an instrument on which an erasure or alteration appears has the burden of explaining it, and failure to explain is a circumstance against its validity. *Wisdom v. Reeves*, 110 Ala. 418, 18 So. 13.

Insufficiently Acknowledged.—A deed more than thirty years old, unblemished by alterations, is admissible in evidence without further proof, notwithstanding that the certificate of acknowledgment is insufficient under the statute in force at the date of the deed. *White v. Hutchings*, 40 Ala. 253, cited in note in 35 L. R. A. 343, 344.

§ 280. — Form and Sufficiency in General.

§ 280 (1) In General.

Deed Signed in Another State.—Evidence of a witness that she sent a deed to her brother in Colorado, that he signed and returned it to her, and that she knew his handwriting, without stating that the signature was in his handwriting, was insufficient proof of execution to admit the deed in evidence; her testimony that he signed it being incompetent, as she did not see the act. *Powers v. Hatter*, 152 Ala. 636, 44 So. 859.

Execution of Chattel Mortgage.

Where defendant claimed under a chattel mortgage, execution of which he sought to prove by the mortgagor, it was not necessary to show by what means the mortgagor knew that he had signed that particular writing. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

Assignment of Lease.—On an issue as to whether a lease of certain premises had been assigned to a witness, the witness produced such a lease, on the back of which was a written transfer, acknowledged before a notary, and witness testified that he knew the writing of the landlord and the lessee to the lease and that of the lessee to the transfer, and that the signatures were in the handwriting, respectively, of the parties purporting to have executed them. Held, that an objection to the introduction of the lease and transfer on the ground that the same had not been properly proven was untenable. *Rutherford v. Dyer*, 146 Ala. 665, 40 So. 974.

Railroad Pass.—In an action against a railroad for the wrongful death of plaintiff's intestate, where a pass had been described by witnesses, and defendant's conductor had testified that the intestate told him that he had that pass, and that he took his word for it, and let him proceed without seeing the pass, the pass was admissible in evidence. *Neyman v. Alabama, etc., R. Co.*, 174 Ala. 613, 57 So. 435.

Execution of Contract.—A witness testified that an alleged contract between him and plaintiff resulted from correspondence; that the contract was drawn up in duplicate by plaintiff and sent to him by mail, with instructions to sign the same and return both to plaintiff; that one of the duplicates was returned to a witness, purporting to have been signed by plaintiff; that subsequently plaintiff shipped goods to the witness, who sold a part thereof and made returns pursuant to the contract. Held, that the execution of the contract was sufficiently shown, rendering it and a statement of account purporting to come from plaintiff in due course of business admissible in evidence. *Richards v. Herald Shoe Co.*, 145 Ala. 657, 39 So. 615.

The certificate of a judicial officer or

clerk of a court, of the acknowledgment or proof of deeds, need not be under seal; and the handwriting of the judge or clerk taking the acknowledgment, may be proved in open court by any witness acquainted with it. *Powers v. Bryant*, 7 Port. 9.

The handwriting of a judicial officer in the certificate of acknowledgment of a deed may be proved by any witness acquainted with it. *Powers v. Bryant's Adm'r*, 7 Port. 9.

Code 1867, § 1546, provides that acknowledgments may be made within the United States, and beyond the state of Alabama, by judges of any "court of record" in any state. Held that, though a certificate of acknowledgment purporting to be taken by a judge of a superior court of North Carolina failed to show that such court was a court of record, yet the signature was valid as the attestation of a witness. *Torrey v. Forbes*, 94 Ala. 135, 10 So. 320.

"In the case of *Merritt v. Phenix*, 48 Ala. 87, 90, it was held that an insufficient acknowledgment was equivalent to the attest of one witness, and, though not sufficiently authenticated to be received in evidence, it was entirely competent to supply the deficiency by proof of its due execution. In the case of *Sharpe v. Orme*, 61 Ala. 263, the deed was not recorded in time to authorize its being read in evidence without further proof. The court declared: 'The acknowledgment and certificate in this case is merely a substitute for the attestation by a witness. If it had been attested, no more than the signature of the witness would have been necessary; no affirmation by him of his knowledge of the parties, or of their identity, or of their acknowledgment that, with knowledge of its contents, they voluntarily executed it, could be required. The certificate of acknowledgment, operating as the substitute for the attestation of a witness, when it is shown that it is legally impossible to produce the officer making it, by reason of his residence without the jurisdiction of the court, may be proved by evidence of his handwriting, and, when the evidence is given, may be read in evidence.' The principle decided in these cases was afterwards reaffirmed in the case of *Rog-*

ers *v. Adams*, 66 Ala. 600, 602, in which it was held that a certificate of acknowledgment was fatally defective in not reciting that the grantor was known to the officer, yet it would operate as a substitute for the attestation of a witness; the court holding that 'the justice himself thus becomes a witness, and his signature an attestation,' and which may be proven by proof of his handwriting. In each of the foregoing cases the principle declared, that the signature of the person before whom the acknowledgment was made, or attempted to be made, should operate as the attestation of a witness, does not rest upon the fact that such person was authorized by the statute to take acknowledgments, or one whose official signature in proper cases would be judicially known by the court; nor are the recitals of the certificate considered as evidence." *Torrey v. Forbes*, 94 Ala. 135, 10 So. 320, 322.

Delivery Not Execution.—Under Code Ala. 1886, § 2770, providing that every written instrument, the foundation of a suit, purporting to be signed by defendant, his agent, etc., must be received in evidence without proof of the execution, unless the execution is denied by plea, etc., testimony by a defendant that, when he signed a contract sued on, he also signed another paper, and delivered the two to a third person to be fastened together and delivered together, is not admissible, except under a plea denying the legal execution of the instrument declared on, as such testimony tends to show only an authority to deliver both papers together, and the delivery of only one would not be a legal execution. *Campbell v. Larmore*, 84 Ala. 499, 4 So. 593.

Execution of a deed the certificate of acknowledgment to which is insufficient may be proved by the officer who signed the certificate, his signature being taken as that of an attesting witness. *Middlebrooks v. Barefoot*, 121 Ala. 642, 25 So. 102.

Proof of Probate of Instrument.—Where a deed is not offered in evidence as a recorded instrument, it is not an error, of which the party against whom it is offered can complain, that the officer before whom probate thereof was

made, as a condition of record, was admitted to prove that proof of the deed was made before him as stated in his certificate thereon. *Brock v. Headen*, 13 Ala. 370.

Identification of Mortgages.—In assumpsit on an assignment of mortgages, defendant was properly permitted to identify the mortgages, which were admissible on an issue as to whether they had been paid, and surrendered by plaintiff to the makers. *Plott v. Foster* (Ala.), 62 So. 299.

§ 280 (2) Unwitnessed Instruments and Unauthorized Attestation.

Unattested Instrument.—Where there are no attesting witnesses to a deed executed by the grantor in an official character, proof of his handwriting and of his official character and of its date sufficiently proves its execution. *Dillingham v. Brown*, 38 Ala. 311.

§ 280 (3) Joint Instruments.

Testimony of One Joint Maker.—Under Code 1896, § 1797, providing that the execution of an instrument may be proved by the maker, the testimony of a husband alone, who joins his wife in a conveyance of her separate property, is insufficient proof of its execution. *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928.

§ 280 (4) Admissions.

Maker's Admissions.—The execution of a written instrument can not be proved by evidence of the maker's admission of such execution. *Lewis v. Glass* (Ala.), 39 So. 771.

§ 280 (5) Proof of Copies Offered as Evidence.

Copy of Steamboat Register.—A sworn copy of a steamboat register, from the records of the custom house, is not prima facie evidence of ownership, even against the person making it under affidavit, without further proof of the taking of the affidavit. *Jones v. Pitcher*, 3 Stew. & P. 135.

§ 281. — Attesting Witnesses.

§ 281 (1) In General.

General Rule.—"No doubt is entertained of the existence of the general rule, that, where the execution of an instrument is in issue, which purports to

have been attested by one or more subscribing witnesses, whether it be a specialty or simple contract; the party wishing to establish the instrument, must do so, by the testimony of the subscribing witness; unless there be some circumstance, to bring the case within some of the legal exceptions to the rule; or, unless the instrument appear to be thirty years old—when, it is to be inferred, the witnesses are dead.” *Bennet v. Robinson*, 3 Stew. & P. 227, 229, cited in note in 35 L. R. A. 338.

Who Are Attesting Witnesses.—“A subscribing witness is defined by Mr. Greenleaf as ‘one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation.’ 1 Greenl. Ev., § 569a. There was, to the mortgage in question, but one subscribing witness within the definition and rule above announced, and this was the person who wrote his name as attesting the execution of the mortgage. His presence, or that of another who could write his name, was needed to give validity to the execution of the mortgage by the defendant; and it was his signature, in this instance, which completed the subscription of the mortgage by the defendant, who made his mark thereto. Therefore the testimony of this subscribing witness was the best evidence of the execution of the mortgage, and, under the principles announced above, was the only testimony admissible for this purpose, unless he was absent, and his absence properly and legally accounted for.” *Houston v. State*, 114 Ala. 15, 21 So. 813, 814.

Execution Proved by Attesting Witnesses.—“Where the execution of a private writing is necessary to be proved, for it to become legally admissible in evidence, its execution, if attested by a subscribing witness, should generally be shown by the evidence of such witness. *Ellerson v. State*, 69 Ala. 1; *Russell v. Walker*, 73 Ala. 315; *Meyer Bros. v. Mitchell*, 75 Ala. 475, 481; *Askew Bros. v. Steiner*, 76 Ala. 218, 221; *Richmond, etc., R. Co. v. Jones*, 92 Ala. 218, 9 So. 276.” *Jones v. State*, 113 Ala. 95, 21 So. 229, 230;

Russell v. Walker, 73 Ala. 315; *Houston v. State*, 114 Ala. 15, 21 So. 813, 814.

Reason for Requiring Testimony of Attesting Witnesses.—“*Starkie* (vol. 1, p. 331), adopts the language, which has been often reiterated in both countries; that ‘the law requires the testimony of the subscribing witness, because the parties, themselves, have selected him, as the witness, have mutually agreed to rest upon his testimony, in proof of the execution of the instrument, and of the circumstances which then took place; and, because he knows those facts, which are probably unknown to others. So rigid,’ says he, ‘is this rule, that it is not superseded, in the case of a deed, by proof of an admission or acknowledgment of the execution, by the party himself.’” *Bennet v. Robinson*, 3 Stew. & P. 227, 230.

Witnesses Other than Attesting Witnesses.—There being no subscribing witnesses to a contract of guaranty, testimony of three witnesses that they were present when the contract was made and saw it signed by defendant was sufficient proof of its execution to admit it in evidence. *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 So. 613.

§ 281 (2) Instruments Signed or Attested by Mark.

Proof of Signature of Witness and Mark of Maker.—Under Code 1896, § 2151, requiring a chattel mortgage to be subscribed by the mortgagor, the subscription of an illiterate person, who makes his mark, which is attested by a witness, must be proved by proving both the signature of the witness and the mark of the maker. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

Grantors Signing by Mark.—Code 1896, § 982, requires the execution of a deed to be attested by two witnesses where the grantor can not write, etc. Section 984 provides that the acknowledgment thereafter provided for operates as a compliance with § 982. Section 998 requires deeds admitted to record on proof to be attested by two witnesses. Held, that a deed was not inadmissible in evidence because the grantors signed by marks and it was not attested under § 998, where a justice of the peace took their separate acknowledgments in accordance

with §§ 996, 997, prescribing the forms of acknowledgment and of probate of conveyances. *Russell v. Holman*, 56 Ala. 432, 47 So. 205.

Where a mortgagor signed by mark attested by a witness, error in admitting it in evidence without testimony that the persons whose names appeared as attesting witnesses has signed their names was not reached by objection that the witnesses were not called, and that it was not shown in what manner the witness identified the mortgage. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

Signature of One Witness by Mark.

Where the signature of a mortgagor to a chattel mortgage is by mark, and is attested by two witnesses, one of whom signs by mark also, while the other writes his name, the latter only is a "subscribing witness," within the rule requiring that, where an instrument attested by a subscribing witness is directly in issue, its execution must be proved by such witness unless some excuse, sufficient in law, is shown for not producing him. *Houston v. State*, 114 Ala. 15, 21 So. 813.

Need Not See Parties Sign Instrument.

—A writing, though signed by mark, may be attested by one who did not see the parties sign it; they appearing before him and acknowledging the signature as theirs, and requesting him to attest. *Elston v. Roop*, 133 Ala. 331, 32 So. 129.

"A writing may be validly attested by one who did not see the parties to it sign, where they appear before him and acknowledge the signatures are their own, and request him to sign in attestation of the fact. 1 Devl. Deeds, § 237; 9 Am. & Eng. Enc. Law, 149, and note 4. In this way Stone's attestation of the mortgage under which the plaintiffs claim was procured, and thereby the mark of Jarrett Elston became a signature, within the meaning of that clause of § 1 of the Code which provides that "signature" or "subscription" includes mark when the person can not write, his name being written near it, and witnessed by a person who writes his own name as a witness." *Elston v. Roop*, 133 Ala. 331, 32 So. 129, 130.

Testimony of Party.—And the execution of a mortgage signed by mark and attested by mark may be proved by the mortgagee, where it is admitted that the

attesting witnesses are illiterate and can neither read nor write, nor prove the execution of the instrument, nor identify the instrument or their marks. *Jones v. Hough*, 77 Ala. 437, cited in note in 44 L. R. A. 147.

Mortgage Not Properly Identified.

After a mortgage signed by the mortgagor by making his mark had been admitted in evidence without proof of the signatures of the attesting witnesses as a part of the maker's signature, but without proper objection, the maker testified that the way he identified the mortgage was because the mortgagee told him it was the mortgage he had signed, and that he had given but one mortgage to said mortgagee. Held, that a motion to exclude the mortgage, as not having been properly identified, should have been granted. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

§ 281 (3) Competency and Identity of Subscribing Witness.

Attorney Subscribing His Name to Instrument.—Where a mortgage is given by one who can not write, and is signed by the mortgagor making his mark opposite his name written by another, one who was present when the instrument was executed, representing the mortgagee as his attorney, and who, though not requested by the mortgagor to attest the execution of the paper, subscribed his name thereto in the latter's presence as an attesting witness, is a competent witness to testify to the execution of said mortgage; and, upon his testifying as to its being duly executed, such mortgage is admissible in evidence. *Chastain v. Porter*, 130 Ala. 410, 30 So. 492.

§ 281 (4) Certainty and Sufficiency of Testimony.

Evidence of Two Witnesses.—Though the execution of a mortgage is denied, proof of execution by the two attesting witnesses is sufficient to warrant its admission in evidence. *Holtzclaw v. Miley*, 172 Ala. 15, 55 So. 150.

Proof of Signature of Subscribing Witness.—Where a subscribing witness does not remember the execution of the instrument, but states that his signature is genuine, and that it would not be placed there unless he had been called to witness it, this evidence is sufficient to render the in-

strument admissible. *Graham v. Lockhart*, 8 Ala. 9.

Sufficient Proof of Execution.—Proof by a subscribing witness to a deed "that the donor signed, sealed, and delivered the same in his presence, or acknowledged he had done so, at the time witness signed it, he could not tell which," is sufficient to admit the deed in evidence to the jury. *Hale v. Stone*, 14 Ala. 803.

§ 281 (5) Necessity and Admissibility of Evidence.

Subscribing Witnesses Necessary.—The execution of a written instrument must be proved by the subscribing witnesses, if they, or either of them, can be had. *Jenks v. Terrell*, 73 Ala. 238, cited in note in 35 L. R. A. 321, 322.

It is error to admit a bill of sale in evidence, without proof by the attesting witness of its execution or accounting for his absence. *Martin v. Mayer*, 112 Ala. 620, 20 So. 963.

A bill of sale executed before an attesting witness is inadmissible in evidence to show title in plaintiff, unless the attesting witness is produced, or his absence accounted for. *Collins v. Sherbet*, 114 Ala. 480, 21 So. 997.

"The court erred in admitting the bill of sale of the wagon to the wife. There are cases where the evidence furnished by a written instrument arises merely incidentally or collaterally, and it may not be necessary to prove its execution by an attesting witness; but here the plaintiff's title was derived from and depended on the bill of sale. In all such cases the general rule applies that the attesting witness must be produced, or his absence accounted for. The reason of the rule and the principle is fully stated in the cases of *Ellerson v. State*, 69 Ala. 1; *Russell v. Walker*, 73 Ala. 315; *Martin v. Mayer*, 112 Ala. 620, 20 So. 963." *Collins v. Sherbet*, 114 Ala. 480, 21 So. 997, 999.

When there is an attesting witness to a mortgage, its execution must be proved by such writing, unless it be shown that he is without the jurisdiction of the court, in which case the execution of the instrument may be otherwise shown. *Lewis v. Glass* (Ala.), 39 So. 771.

Handwriting of Subscribing Witness.—Execution of a deed can not be shown by

proof of the handwriting of a subscribing witness not shown to be dead, or out of the state, or otherwise incapacitated from testifying. *Allred v. Elliott*, 71 Ala. 224, cited in note in 35 L. R. A. 323.

Testimony of Subscribing Witnesses Only Admissible Testimony.—Where the execution of an attested instrument, whether under seal or not, is properly in issue, the testimony of the subscribing witness is the best and only admissible evidence, unless the impracticability of producing it be satisfactorily shown, or when he is legally incompetent, from some cause not chargeable as a fault against the party on whom it devolves to make the proof. *Bennet v. Robinson's Adm'rs*, 3 Stew. & P. 227, cited in note in 35 L. R. A. 328, 337, 338.

Identity of Deed.—The production of an attesting witness to a deed is not necessary, to prove the identity of the deed with one described in an affidavit. *Planters' & Merchants' Bank v. Willis*, 5 Ala. 770, cited in note in 35 L. R. A. 347.

Testimony of Third Person Inadmissible.—Though title to personal property may be shown by possession, one who seeks to prove his title by a written instrument with attesting witnesses must prove the instrument by such witnesses, and can not do so by a third person. *Patterson v. Kicker*, 72 Ala. 406.

Effect of Grantor's Admission.—When the plaintiff claims the personal property in controversy under a mortgage, or other written instrument, which is attested by subscribing witnesses, its execution must be proved by one or both of them, or a proper predicate must be laid for the introduction of secondary evidence; and the grantor's admission of its execution, not made in *judicio*, or in open court, does not dispense with this proof. *Askew Bros. v. Steiner*, 76 Ala. 218, cited in note in 35 L. R. A. 321, 322, 346.

§ 281 (6) Grounds for Secondary Evidence.

Enumeration of Grounds for Admission of Secondary Evidence.—Among the various exceptions to the rule requiring the testimony of an attesting witness to prove an instrument, the following have been recognized: that the attesting witness is dead, has become blind, insane—that he has, since the attestation, been convicted

of an offense, which renders him incompetent, as a witness—that the witness has, since the attestation, become interested—as, where he has become the administrator of the obligee—that the witness is beyond the jurisdiction of the court—that he can not be found, after diligent enquiry, made at such place or places, where it appeared, he was most likely to be found. Any of these circumstances, and some others noticed, in the authorities, will excuse the nonproduction of the attesting witness, and authorize the introduction of secondary evidence, consisting of proof of his handwriting; and also, of the signature of the maker. 1 Starkie, 337 to 340, and authorities there cited. *Bennet v. Robinson*, 3 Stew. & P. 227, 229, cited in note in 35 L. R. A. 338.

In *Bennet v. Robinson*, 3 Stew. & P. 227, cited in note in 35 L. R. A. 338, it was said that it was an exception to the general rule where the attesting witness was convicted of an offense which rendered him incompetent.

Attesting Witness Nonresident.—Where the attesting witness to an instrument lives out of the state, secondary evidence of its execution is admissible. *Barringer v. Sneed*, 3 Stew. 201, cited in note in 35 L. R. A. 339.

Instrument Executed in Another State.—Where a contract on its face purports to have been executed out of the state, it will be presumed, in the absence of evidence, that the attesting witness is a nonresident, so as to permit his signature to be proved. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Where the attesting witness to a contract offered in evidence is a nonresident, the execution of the contract may be proved by proving the signature of the witness. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Subscribing Witness Interested in Deed.—If a subscribing witness to a deed voluntarily incapacitates himself to testify to its execution by becoming interested therein, such deed can not be proved by other evidence. *McKinley v. Irvine*, 13 Ala. 681, cited in note in 35 L. R. A. 337.

§ 281 (7) Preliminaries to Admission of Secondary Evidence of Execution.

Reason for Failure to Produce Attest-

ing Witness.—And secondary evidence of the execution of a mortgage attested by subscribing witnesses was not admissible where some excuse was not shown for not producing them. *Askew Bros. v. Steiner*, 76 Ala. 218; *Russell v. Walker*, 73 Ala. 315, cited in note in 35 L. R. A. 322.

Nonresidence of Subscribing Witness.—Proof by old residents of the town where a deed was executed, and who had resided there before and since the execution of the deed, that they never knew or heard of such persons as the witnesses to the deed, is prima facie sufficient to prove nonresidence, and to let in secondary evidence of the genuineness of the signatures to the deed. *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 370, cited in note in 35 L. R. A. 340.

Deed Executed in Foreign State.—Where a deed is executed in a foreign state, it is presumed that the subscribing witnesses also reside there, and it is not necessary to account for their absence before production of secondary evidence of its execution. *Elliott v. Dyche*, 80 Ala. 376, cited in note in 52 L. R. A. 565, 605.

An affidavit for a continuance, stating that the execution of a conveyance would be proved by an absent attesting witness, who was in the county was admitted the same as the evidence of the attesting witness. The identification of the instrument was made by other witnesses. *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770, cited in note in 35 L. R. A. 347.

Subscribing Witness Incapacitated.—And secondary evidence of an instrument was refused where the subscribing witness voluntarily incapacitated himself by becoming interested. *McKinley v. Irvine*, 13 Ala. 681, following *Bennet v. Robinson*, 3 Stew. & P. 227, cited in note in 35 L. R. A. 337.

§ 281 (8) Character and Sufficiency of Secondary Evidence.

Any Competent Witness.—Where a deed is not self proving or evidence per se, by reason of its not being recorded within twelve months after execution, as provided by Code 1876, § 2154, if the absence of the attesting witness is accounted for it may be proved by any other competent witness who can testify to the fact

of execution or to the grantor's handwriting. *Coker v. Ferguson's Adm'r*, 70 Ala. 284.

Proof of Contents by Other than Attesting Witnesses.—Where there are three subscribing witnesses to a deed, one of whom is dead, another resident out of the state, and the other, being called, is unable to prove the delivery, that may be proved by other persons, without proving the handwriting of the other witnesses. *Lazarus v. Lewis*, 5 Ala. 457, cited in note in 35 L. R. A. 327, 328.

And where there were three subscribing witnesses to a deed, one of whom was dead, another was a nonresident, and the other was called but unable to prove the delivery, it was proved by other persons, and this was held to be the same as though the testimony of none could be had. The handwriting of the other witnesses was not proved, and the evidence of the justice before whom the deed was acknowledged was held to be better evidence than that of the handwriting of the witnesses. No reference is made to *Thomas v. Wallace*, 5 Ala. 268; *Lazarus v. Lewis*, 5 Ala. 457, cited in note in 35 L. R. A. 328.

§ 281 (9) Genuineness of Handwriting.

Where subscribing witnesses to a deed are dead or beyond the jurisdiction of the court, it may be proved by showing the genuineness of their signatures. *Thomas v. Wallace*, 5 Ala. 268, cited in note in 35 L. R. A. 326, 327; *Foote v. Cobb*, 18 Ala. 585.

Signature of Nonresident Witness.—When one of the witnesses to a deed is proven to be dead, and the signature of the other witness, who resided out of the jurisdiction, clearly proved, the execution of the deed is sufficiently shown to admit it in evidence. *Smith v. Keyser*, 115 Ala. 455, 22 So. 149.

Where a subscribing witness resides in another state, proof of his handwriting is sufficient. *Foote v. Cobb*, 18 Ala. 585; *Guice v. Thornton*, 76 Ala. 466, cited in note in 35 L. R. A. 326, 327.

In Alabama proof of the handwriting of the attesting witnesses to a deed was held to be sufficient to allow it to go to the jury, where two of the witnesses to a deed resided out of the state, and the other was dead. *Thomas v. Wallace*, 5

Ala. 268. But see, *Lazarus v. Lewis*, 5 Ala. 457. In *Foote v. Cobb*, 18 Ala. 585, the case of *Thomas v. Wallace*, supra, was approved, and it was held that proof of the handwriting of the attesting witness was sufficient, where such witness was beyond the jurisdiction of the court. So, a bond was admissible in evidence on proof of handwriting of obligor, where the attesting witness was dead. It was said that there are decisions both ways, but that this evidence was admissible. *Mardis v. Shackelford*, 4 Ala. 493, cited in note in 35 L. R. A. 327.

"The deed from Phelps to Johnson was clearly admissible in evidence. It was witnessed by James W. Simpson and James Reeves. It was made sufficiently certain that James Reeves was dead, and that the other witness, Simpson, resided out of the jurisdiction of the court in Florida. His signature, if necessary to prove it after so great a length of time,—some twenty-eight years,—was clearly proved, and this was all that was necessary to be shown, for its introduction in evidence. *Coleman v. State*, 79 Ala. 49, 50; *Russell v. Walker*, 73 Ala. 315, 317; *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546; 1 Greenl. Ev., §§ 572, 575. Even if the deed had been insufficiently executed, it was admissible to show claim or color of title on which to base adverse possession. *Carter v. Chevalier*, 108 Ala. 563, 19 So. 798; *Nashville, etc., R. Co. v. Mathis*, 109 Ala. 377, 19 So. 384." *Smith v. Keyser*, 115 Ala. 455, 22 So. 149, 150.

Where a deed is witnessed by three persons, two of whom reside out of the state, and the other being dead, proof of the handwriting of either witness is prima facie sufficient to allow it to be read to the jury. *Thomas v. Wallace*, 5 Ala. 268, cited in note in 35 L. R. A. 326, 327.

Handwriting of Grantor.—See post, "Handwriting," § 282.

Certificate of Magistrate.—"There was no error in admitting in evidence the deed of W. C. Hammond, executed in 1872, to John D. Hammond and his wife, Fannie Hammond. The acknowledgment, in some respects, may have been defective, but the signature and certificate of the magistrate were sufficient as an attesting witness. *Torrey v. Forbes*, 94 Ala. 135,

10 So. 320; *Merritt v. Phenix*, 48 Ala. 87, 90; *Sharpe v. Orme*, 61 Ala. 263, 268; *Rogers v. Adams*, 66 Ala. 600. It was shown at the trial that he was then dead, and his handwriting and the genuineness of the signature was fully established." *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191, 15 So. 935, 938.

§ 281 (10) Testimony of Parties to Instrument.

Rule Previous to Passage of Code.—The execution of a chattel mortgage, to which there is a subscribing witness, can not be proven by the mortgagor or mortgagee without reason for the failure to produce the witness being shown, as against an execution creditor of the mortgagor. *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

Neither mortgagor nor mortgagee can prove the execution of a chattel mortgage to which there are subscribing witnesses whose nonproduction is not excused. *Russell v. Walker*, 73 Ala. 315, cited in note in 35 L. R. A. 321, 322.

Rule as Modified by Code.—A chattel mortgage was not inadmissible "because attested by subscribing witnesses, and neither were called or their absence accounted for," as Code 1896, § 1797, provides that the execution of a writing so attested may be proved by the maker thereof without the witnesses. *Ballow v. Collins*, 139 Ala. 543, 36 So. 712.

Under Code 1896, § 1797, providing that the execution of any instrument of writing attested by witnesses may be proved by the testimony of the maker thereof, without producing or accounting for the absence of the attesting witnesses, the grantor of a witnessed deed which is improperly acknowledged may show its execution by proving his own signature as maker, and that of the attesting witness; and it is error to exclude his testimony as to his own signature, though tendered before he has offered to prove the signature of the attesting witness. *Hayes v. Banks*, 132 Ala. 354, 31 So. 464.

Where a writing is executed by an agent, he is competent to prove it, even if the subscribing witness be within the reach of process of the court. *Falls v. Gaither*, 9 Port. 605.

Under the express provision of Code

1896, § 1797, the execution of an instrument may be proved by the testimony of the maker thereof, without producing or accounting for the absence of the attesting witness. *Lewis v. Glass* (Ala.), 39 So. 771.

Presumption from Failure to Prove Witnesses' Handwriting.—It can not be presumed, from the failure to offer to prove the signature of the attesting witness, after the refusal to allow the grantor to testify to his own signature, that the grantor could not in the first instance have proved the witness' signature. *Hayes v. Banks*, 132 Ala. 354, 31 So. 464.

§ 281 (11) Contradictory and Rebutting Testimony.

Failure of One Attesting Witness to Remember Execution of Deed.—The testimony of one whose name appears as a subscribing witness to a deed executed about twelve years previously, that he had no recollection of ever having seen and attested the deed, and believes he never did, is not sufficient to show the deed to be spurious, in opposition to one witness who testifies to its execution by the parties, and of others who state corroborating facts. *Juzam v. Toulmin*, 9 Ala. 662.

§ 282. — Handwriting.

Handwriting of Obligor.—If the subscribing witness to a bond is dead, proof of the handwriting of the obligor is admissible to establish its execution. *Mardis' Adm'rs v. Shackleford*, 4 Ala. 493, cited in note in 35 L. R. A. 326, 327.

If the subscribing witnesses to a deed have left the state, or are incompetent from interest, proof of the handwriting of the grantor alone is sufficient to admit it in evidence. *Cox v. Davis*, 17 Ala. 714, cited in note in 35 L. R. A. 326, 328, 338.

And evidence of the execution of a deed by proof of the handwriting of the grantor was allowed, where the subscribing witness had left the state. It was said that this is the rule in that state. *Cox v. Davis*, 17 Ala. 714, cited in note in 35 L. R. A. 327, citing the cases of *Mardis v. Shackleford*, 4 Ala. 493, and *Lazarus v. Lewis*, 5 Ala. 457.

"It is also assigned for error, that the court below permitted one of the deeds to be read upon proof of the grantor's signature, it appearing that the subscrib-

ing witness had left this state, and permitted another of the deeds to be read upon similar proof, the subscribing witness in the latter case having become incompetent from interest, without requiring proof of the signature of either of the witnesses. It appears to have been settled here that deeds are admissible in such cases, upon proof of the handwriting of the grantor. *Mardis v. Shackleford*, 4 Ala. 493, 503; *Lazarus v. Lewis*, 5 Ala. 457." *Cox v. Davis*, 17 Ala. 714, 717.

Handwriting of Deceased Sheriff.—Where it is material to show that writs of execution were in the sheriff's hands, it is admissible to prove that indorsements thereon acknowledging their receipt are in the handwriting of the sheriff, who has since died. *Stewart v. Conner*, 9 Ala. 803.

Signature by Mark.—It is true that in *Jones v. Hough*, 77 Ala. 437, it was held, citing and following *Gilliam v. Perkinson* (1826), 4 Rand. (Va.) 325, that although there is a distinct individual character in the handwriting of every man who can write, and with those who have written much that character is so fixed and striking that persons acquainted with it would feel no more difficulty in recognizing it than in knowing the face of the writer, it is different in the case of a mere cross made instead of a signature. But in *Jones v. Hough* there is no mention whatever of the well considered earlier Alabama case of *Strong v. Brewer*, 17 Ala. 706, cited in note in 64 L. R. A. 314.

§ 283. — Books of Account.

See ante, "Books of Account," § 263; post, "Memoranda and Statements," § 284.

§ 283 (1) In General.

Necessity for Preliminary Proof of Correctness.—It is error to admit an account book without preliminary proof of its correctness. *Powell v. State*, 84 Ala. 444, 4 So. 719, cited in notes in 52 L. R. A. 599, 53 L. R. A. 532.

Testimony of Employee as to Correctness of Entries.—Entries regularly made by a party in a book kept for that purpose from data furnished by an employee are admissible, on the employee testifying that he knew of the correctness of the items and gave them correctly to the

party, and on the party testifying that he entered the items as given to him. *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031.

An owner of a steam hoister, renting it to another for a specified sum per day, made entries in a book kept for that purpose of the number of days the hoister worked each week, based on reports made at the end of each week by an employee in charge of the hoister. The owner testified that the employee had charge of the hoister, and returned every Saturday evening, and then made a report of the number of days that the hoister had been worked that week, and that the owner would set the amount down in a book. The employee testified that he made true reports every Saturday to the owner, who entered the same at once in the book. Held, that the entries were sufficiently corroborated by independent testimony to render them admissible in evidence. *Murray v. Dickens*, 149 Ala. 240, 42 So. 1031.

Failure to Produce Person with Knowledge of Entries.—A book of entries was properly excluded where no excuse was shown for failure to produce the person who made the entries or any one having knowledge of their correctness. *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

Entries Made by Party.—In assumpsit for work and labor, an account book showing an account kept by plaintiff during the work was admissible, where plaintiff testified that the account was correct, and made by him at the time, and that he had personal knowledge of the matters making it up at the time the service was rendered and at the time the entries were made. *Alabama Const. Co. v. Wagon Bros.*, 137 Ala. 388, 34 So. 352.

Showing Payment on Mortgage.—Upon an issue as to whether a mortgage had been paid, entries on books of the mortgagee showing amounts paid on the mortgage by the mortgagor were inadmissible in the absence of any showing that they were ever assented to as correct by the mortgagor, or that at or about the time they were made witness knew them to be correct. *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26.

A garnishee's books of account kept by himself and clerk are inadmissible to prove the amount due him from defend-

ant on account which is claimed as a set off against defendant's funds in his hands, where there is no evidence that the entries are correct. *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907, cited in notes in 52 L. R. A. 590, 53 L. R. A. 541.

Statutory Conditions Must Be Followed.—Code 1907, § 4003, provides that the books of account of a merchant, etc., may be admitted in evidence as proof of the account where he kept no clerk, or the clerk is dead or disqualified, where proof is made that the book tendered is his book of original entries, and upon inspection by the court to see if the books are free from any suspicion of fraud. Held, that an account book found free from any suspicion of fraud upon inspection by the court is not admissible, unless the other two required conditions are shown. *Stewart & Bros. v. Harris, etc., Co.*, 6 Ala. App. 518, 60 So. 445.

Account Book of Landlord.—The account book of a landlord is not admissible in evidence on a criminal prosecution against his tenant for selling or removing cotton from the leased premises upon which the landlord had a lien without proof of its correctness. *Powell v. State*, 84 Ala. 444, 4 So. 719, cited in note in 53 L. R. A. 532.

Entries Not Properly Proved.—Where entries in books sought to be introduced are not shown to be correct, nor to have been made at or near the time the facts entered occurred, it was properly excluded. *Wager Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949, cited in note in 52 L. R. A. 583, 590.

Entries of Clerks.—The rule which allows the entries of a clerk in books of his employer to be used in evidence is one resulting ex necessitate by reason of the impracticability of procuring better proof, and should be confined within proper limits. *Moore v. Andrews*, 5 Port. 107, cited in note in 52 L. R. A. 566.

§ 283 (2) Proof of Handwriting in General.

Proof of Handwriting Sufficient to Identify Entries.—When the books of a party are offered in evidence, the first question is that of the identity of the entries relied on. This question is for the court, and proof that the entries are in the

handwriting of the party is prima facie sufficient. *Halliday v. Butt*, 40 Ala. 178, cited in note in 52 L. R. A. 556, 591.

Proof of Clerk's Handwriting.—Ordinarily books of account are not evidence in suits to which the party for whom they are kept is not a party, without proving such books by the clerk who made the entries if within process, or proving his handwriting if he is not within the reach of process. *Terry v. Birmingham Nat. Bank*, 93 Ala. 599, 9 So. 299, cited in note in 53 L. R. A. 542.

The rule as to a book of entries which were made by a bookkeeper regularly employed as such, who is at the time of the trial beyond the jurisdiction of the court, is that the entries are, if otherwise unobjectionable, within the rules shown in the preceding section, admissible upon proof of the fact of the absence of the bookkeeper and of his handwriting. *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, overruling *Moore v. Andrews*, 5 Port. 107, cited in note in 52 L. R. A. 564.

§ 283 (3) Testimony of Party.

Oath of Physician.—The rule of the common law that a party's books are not competent evidence in his favor is adopted by the courts of this state; and although a statute admits the original entries in the books of a physician as evidence for him that services were rendered, unless the defendant denies on oath the truth of the entries, yet the oath of the physician is not competent evidence to identify the entries. *Halliday v. Butt*, 40 Ala. 178, cited in note in 52 L. R. A. 556, 591.

But to make original entries in the books of a physician evidence in his favor, in an action to recover for medical services, they must be identified by competent testimony, and can not be proved by his own oath, notwithstanding the provision of Ala. Code, § 2298, that such entries are evidence for him that the service was rendered unless the defendant in open court denies upon oath the truth of such entries. *Halliday v. Butt*, 40 Ala. 178, cited in note in 52 L. R. A. 59.

§ 283 (4) Absence of Party Making Entries.

Absence from the state of a person making entries of goods sold and deliv-

ered does not authorize the admission of evidence to show the handwriting of such person. *Moore v. Andrews*, 5 Port. 107, cited in note in 52 L. R. A. 549, 564, 566.

Books of Compress Company.—In an action against a carrier for failure to deliver cotton, books, etc., of a compress company, through which deliveries were usually made, were not admissible against plaintiffs, who were strangers thereto, especially in the absence of the testimony of the person who made them. *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

In an action against a carrier for loss of cotton claimed by the carrier to have been delivered through a compress company, a book kept by that company, and purporting to contain a record of the cotton received during the period involved, was properly excluded from evidence, where no excuse was made for not producing the person who made the entries, or any one who could testify from his own knowledge to their correctness. *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

"During the progress of the trial the appellant, against the objection of the appellees, undertook to get before the jury, as evidence in the case, a certain book which was kept by said compress company, and which purported to contain a record of the cotton received during the period inquired about by said compress company. The evidence showed that the book offered was the book which was kept by the proper agents of the company, but no witness was produced who made any of the entries in the book or who could testify from his own knowledge to the correctness of any entry on the book touching the matters under investigation. The appellant offered no sufficient excuse accounting for the absence of the agent who made the entries and the court properly refused to allow such book or any entries made in it to go before the jury. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41; *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433." *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84, 85.

§ 283 (5) Death of Party Making Entry.

Handwriting of Deceased Clerk.—If the entries were made by a clerk or book-

keeper who has since deceased, the books are admissible on proving the accounts to be in the handwriting of such clerk or bookkeeper, and also proving his death. *Batre v. Simpson*, 4 Ala. 305; *Bank v. Plannett*, 37 Ala. 222; *Elliott v. Dycke*, 78 Ala. 150, 158; S. C., 80 Ala. 376; *Clemens v. Patton, etc., Co.*, 9 Port. 289; *Everly v. Bradford*, 4 Ala. 371; *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, citing in note in 52 L. R. A. 565.

Entries made in a merchant's books in the handwriting of a deceased clerk may be proved by a witness acquainted with his writing. *Clemens v. Patton*, 9 Port. 289, cited in note in 52 L. R. A. 565.

Entries upon the books of a storekeeper may be proved by proof of the handwriting of a deceased clerk. *Grant v. Cole*, 3 Ala. 519, cited in note in 52 L. R. A. 566, 593.

It is competent for a merchant to establish an account by proof that the entry was in the handwriting of a clerk since deceased, who is proved to have been correct and accurate in making charges. *Everly v. Bradford*, 4 Ala. 371, cited in note in 52 L. R. A. 565.

Entries Made at Time of Transaction.

—In an action by an administratrix to recover for work done by her intestate, and charged in an account book kept by him, evidence that intestate entered the items in the book at the time of the respective transactions to which they referred is sufficient to render such book admissible as prima facie evidence of the performance of the services. *Lunsford v. Butler*, 102 Ala. 403, 15 So. 239, cited in note in 52 L. R. A. 559, 575.

Entries of Deceased Bank Clerk.—"But this necessity is removed as to entries in the books of account of a bank kept by a deceased clerk, in an action to recover a deposit, by proof that the custom of the bank was to pay out money only on the checks of its depositors, and renders the rule authorizing their admission inapplicable." *Bank v. Plannett*, 37 Ala. 222, cited in note in 52 L. R. A. 566.

To Prove Payment for Dower Rights.

—Where the right of a widow to her dower is in controversy, and it is claimed that she had sold her dower interest, and that, though she had made no conveyance, the lands had been held adversely to her

for the requisite period, books kept in the usual course of business, in which original entries were made by a witness who testified that they were correct, and others in the handwriting of a deceased clerk, and which purport or are shown to have been made at or about the time of the occurrence, are admissible in evidence to show the means by which the payment to the widow of part of the purchase money for her dower was arranged. *Hancock v. Kelly*, 81 Ala. 368, 2 So. 281.

§ 283 (6) Knowledge of Witness in General.

Personal Knowledge and Instructions.

—In an action on assignments of wages, evidence of accounts due plaintiff for merchandise from the assignors was admissible, where the person who made the entry testified to the correctness of the items sold by him, and that the other items were charged by him as he was instructed by plaintiff, who sold the other goods, and plaintiff testified that he instructed the other at the time of the sale to charge the goods as he sold them. *Alabama Iron Co. v. Smith*, 155 Ala. 287, 46 So. 475.

Impression as to Correctness of Books.

—Where a witness who had been defendant's bookkeeper had no independent knowledge of the correctness of items entered in its books, and it was not shown that he made the particular entries involved, or that the entries were original or correct, testimony by such witness that he "thought" the books were correct would not authorize their admission in an action on a stated account. *Standard Talking Mach. Co. v. D. O. Matthews Supply Co.*, 6 Ala. App. 189, 60 So. 481.

Hearsay Evidence as to Correctness of Items.—It was proper to refuse to permit a witness to testify to entries in books placed there at the direction of defendant, and as to the correctness of which the witness had no knowledge. *Plott v. Foster* (Ala.), 62 So. 299.

An entry in a cash book of cash received, made by a cashier in the regular course of business, is competent, in connection with the testimony of the proprietor and his son that a sale was made for that amount and the money immediately paid over to the cashier, as tending to show a sale and delivery that day, not-

withstanding the testimony of the cashier that he knew nothing of the sale or any transaction connected therewith, except from hearsay. *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, cited in note in 52 L. R. A. 594.

Proof of Entry by Cashier.—Where, in detinue, defendant, in seeking to show that he was not in possession of the property at the bringing of the suit, offers in evidence his cashbook, containing an original entry by the cashier in the regular course of business, of a sale of the property on a day prior to the institution of the suit, and the testimony of the cashier that the entry was so made by him, the exclusion of this entry and testimony is reversible error. *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, cited in note in 52 L. R. A. 549, 564, 565, 594.

§ 283 (7) Memory as to Transaction.

Failure to Recall Particular Transaction.

—A book account proved by the clerk to be in his handwriting, and as to which he swears he would not have made the entries unless he had delivered the goods, though he recollects nothing of the particular transaction, is evidence of the delivery of the goods charged. *Knowles v. Lee*, 34 Ala. 181.

No Remembrance of Entries.—And where a creditor institutes an attachment suit against a debtor, and summons a third party as garnishee, and the garnishee claims to hold an open account against the debtor firm, and also against an old firm formerly composed in part of the same members, which he seeks to offset against the claim garnished, original entries of the items of the accounts, made in part by the garnishee and in part by his clerk, are not admissible as evidence of the correctness of the accounts, where the witness had no independent recollection of them, and there was no other evidence as to their correctness. *Kling v. Tunstall*, 109 Ala. 608, 19 So. 907, cited in note in 53 L. R. A. 541.

§ 283 (8) Certainty of Testimony.

Remote Evidence.—The facts that a merchant and his clerks kept correct books, and charged promptly all articles purchased at the store; that certain articles charged were suitable to the wants

of the defendant's family; that he traded with the plaintiffs, and was frequently at their store—are too remote to justify the presumption that a particular account is correct. *Grant v. Cole*, 8 Ala. 519, cited in note in 52 L. R. A. 566, 593.

And where the book or memorandum in which the entry is made is lost, a copy supported by the oath of the party who copied it is admissible. *Grant v. Cole & Co.*, 8 Ala. 519, as digested in 1 Brickell's (Ala.) Dig., p. 833, cited in note in 52 L. R. A. 566.

Believed to Be Correct.—It is competent to inquire whether an account against a party was not charged to him by his directions, and whether it is correct; and it is allowable for the witness to answer that it was copied from the defendant's books, and believed to be correct. *Strawbridge v. Spann*, 8 Ala. 820.

§ 283 (9) Partnership Books.

Entries Made by Other Partner.—Where partnership books are kept partly by one partner and partly by another, one will not be allowed to testify as to entries made by the other, unless he knows the sales were actually made, or can show in some other way that the entries speak the truth. *Horton v. Miller*, 84 Ala. 537, 4 So. 370, cited in note in 52 L. R. A. 591.

Horton v. Miller, 84 Ala. 537, 4 So. 370, cited in note in 52 L. R. A. 591, holds, however, that one partner can not testify to the correctness of entries in the books by the other, unless he has knowledge that the sales were actually made, or can show in some other way that he knows the entries spoke the truth.

§ 284. — Memoranda and Statements.

Entries in a memorandum book purporting to show items of personal expenditure by the owner are not competent evidence, merely on proof of his handwriting, and his own statement in a deposition that he kept such memorandum book during the period in controversy, and recorded in it all of his expenses. *Minniece v. Jeter*, 65 Ala. 222.

"A further rule is that, though the witness may have no recollection of the facts independent of the memorandum, if he is able to testify that at or about the time the memorandum was made he knew

its contents, and knew them to be true, this lets in both the testimony and the memorandum. *Acklen v. Hickman*, 63 Ala. 494, 498; *Billingslea v. State*, 85 Ala. 323, 5 So. 137; *Snodgrass v. Coulson*, 90 Ala. 347, 7 So. 736." *Bolling v. Fannin*, 97 Ala. 619, 12 So. 59, cited in note in 52 L. R. A. 549, 564, 565, 594.

A decedent's memorandum book containing the items of an account sued on is prima facie admissible in favor of his administratrix, where there is evidence that the entries were made at the time of the respective transactions to which they refer. *Lunsford v. Butler*, 102 Ala. 403, 15 So. 239, cited in note in 52 L. R. A. 559.

Statement of Account.—In assumpsit for services rendered, it was error to permit plaintiff to introduce in evidence a statement of the account, without proof that it was correct. *Callaway & Truitt v. Gay*, 143 Ala. 524, 39 So. 277.

"It will be noted that the witness did not answer the question as to whether or not the statement of the account was correct, nor is it shown by the bill of exceptions that any response was made by the witness to his attorney when the attention was called to the amount of balance due by the statement to plaintiff. In this state of the case it is manifest that the court erred in admitting the statement of the account as evidence. *Rice v. Schloss*, 90 Ala. 416, 7 So. 802; *Louisville, etc., R. Co. v. Cassibry*, 109 Ala. 697, 19 So. 900; *Lane v. May, etc., Hardware Co.*, 121 Ala. 296, 25 So. 809." *Callaway v. Gay*, 143 Ala. 524, 39 So. 277, 278.

A verified account, offered in evidence in an action thereon, which consisted of seven separate sheets of paper, on the last of which was the affidavit verifying the foregoing account, was sufficient, and hence admissible, though the papers were held together merely by the pressure of a wire device slipped over the top, and not fastened through the papers. *Murphy v. St. Louis Coffin Co.*, 150 Ala. 143, 43 So. 212.

Statement of Bank Account.—A statement of a customer's account with a bank was inadmissible in evidence against the customer, when the only evidence of its correctness was that of the bank's cash-

ier, who testified that the statement was taken by him from the bank's books, which he presumed were correct, but that they were not kept by him, nor did he receive deposits or pay out money. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 52 L. R. A. 541.

"The statement taken from the books of the First National Bank was, in the absence of evidence of its correctness, inadmissible when objected to by the defendants. The witness Littlejohn, cashier of the bank, testified that the statement of the account offered in evidence, which purported to be an account kept by the bank with Walling as tax collector, was taken by him from the books of the bank; that he did not keep the books, or receive deposits, or pay out money. All that he knew was that the account as shown by the statement offered in evidence appeared upon the books of the bank, and he presumed it was correct. This was insufficient as showing or tending to show the correctness of the account as kept on the books of the bank, and without this said account, as evidence, was not admissible. *Hart v. Kendall*, 82 Ala. 144, 3 So. 41; *McDonald v. Carnes*, 90 Ala. 147, 7 So. 919; *Todd v. McCravery*, 77 Ala. 468, 472." *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, 437.

§ 285. — Letters, Telegrams, and Other Correspondence.

§ 285 (1) Authentication of Letters in General.

Evidence of Handwriting.—Notice was given to the plaintiff to produce all papers relative to the transactions between the parties, and they were produced, but the plaintiff was not allowed to read in evidence the letters which were not examined by the defendant, without proving them by evidence of handwriting. *Stetson v. Lyons*, 34 Ala. 140.

Genuineness of Letter Must Be Proved.

—One can not testify to the contents of letters received by him, as being the letters of one in whose name they were signed, but who could not write, without proof thereof. *Hightower v. Ogletree*, 114 Ala. 94, 21 So. 934.

"The plaintiff introduced two letters

signed 'G. J. Santa Cruz,' one dated June 6th, 1902, and the other, October 11th, 1902. The defendant objected to their introduction, on the ground among others, that the signature of the letters was not shown to be the signature of G. J. Santa Cruz. It was not shown that either of the letters was in response to any letter from the plaintiff. The objection should have been sustained. It is settled with us, that 'a letter received by another through the mail, at least, one not in response to a letter previously sent to the purported writer, is not admissible against the purported writer, or his principal, without proof of its genuineness.' *O'Connor, etc., Mfg. Co. v. Dickson*, 112 Ala. 304, 20 So. 413." *Louisville, etc., R. Co. v. Britton*, 149 Ala. 552, 43 So. 108, 109.

Though it was competent for defendant to show that he notified plaintiff of a certain matter, yet he can not do this by letters purporting to be from plaintiff, without proving their genuineness; they being objected to on this ground. *Owensboro Wagon Co. v. Hall*, 149 Ala. 210, 43 So. 71.

A letter received through the mail, not in response to a previous letter written to the purported writer, is not admissible against such writer or his principal without proof of its genuineness. *O'Connor Min. & Mfg. Co. v. Dickson*, 112 Ala. 304, 20 So. 413.

Evidence that a letter alleged to have been written by plaintiff was received by defendant, in addition to its contents, without evidence that the letter was received on due course, through the mails, was insufficient to establish its authenticity. *Butterworth v. Cathcart*, 168 Ala. 262, 52 So. 896.

Letters alleged to have been received by defendant are inadmissible without some proof of genuineness and authenticity in addition to the contents thereof. *Butterworth v. Cathcart*, 168 Ala. 262, 52 So. 896.

Letters received by defendant through the mail were not admissible against the purported writer's principal, without proof of their genuineness or a showing that they were written in response to a letter from plaintiff. *Louisville & N. R. Co. v. Britton*, 149 Ala. 552, 43 So. 108.

§ 285 (2) Proof of Authority of Person Writing for Alleged Sender.

Sufficient Identification of Letter.—A letter which is shown to have been received by a witness by mail, inclosed with a paper which had been sent to the witness by mail, addressed to the person whose name appeared to be signed to the letter, the envelope inclosing it bearing the postmark of the town of such person's residence, is sufficiently identified to be admissible in evidence without proof of the handwriting. *White v. Tolliver*, 110 Ala. 300, 20 So. 97, cited in notes in 17 L. R. A., N. S., 229, 63 L. R. A. 977.

"But the witness, who was the defendant, further testified that he had mailed a certain appearance bond to Judge T. M. Arrington, of the city court of Montgomery; that he had received this letter inclosed with the same appearance bond; that the envelope inclosing the bond and letter was postmarked 'Montgomery, Ala., January 26, 1891,' and was received in due course of mail. The letter itself referred to that written by defendant to Judge Arrington inclosing the bond, and gave reasons why the writer would not approve said bond. On these facts, we think the letter should have been admitted in evidence without proof of the handwriting of T. M. Arrington, 1 Greenl. Ev., § 573a, citing *Ovenston v. Wilson*, 2 Car. & K. 1; 1 Greenl. Ev., § 577, note 2 citing *Kinney v. Flynn*, 2 R. I. 319; *McKonkey v. Gaylord*, 1 Jones (N. C.) 94. This letter bore upon contested issues of fact in the case, and tended in some degree to support the defendant's view of them. The error involved in its exclusion must therefore work a reversal of the judgment." *White v. Tolliver*, 110 Ala. 300, 20 So. 97, 99, cited in notes in 17 L. R. A., N. S., 229, 63 L. R. A. 977.

Sufficient Signature of Letter.—That a witness testified that the signature to a letter received by him in answer to his letter was not that of the purported writer did not render the letter inadmissible, it appearing that such purported writer had a number of clerks in his office, and it being open to the jury to infer that it was written either by such writer or by some one authorized to bind him. *Central, etc., R. Co. v. Malone*, 165 Ala. 432, 51 So. 730.

Letter of Agent.—In an action against

a carrier for failure to deliver wool shipped to plaintiff, a letter regarding the wool, written by defendant's agent to its claim agent, and proven by the writer, and a letter which he testified he received in answer, were admissible in evidence, both letters purporting to be written by the agents within the scope of their authority and duties. *Central, etc., R. Co. v. Malone*, 165 Ala. 432, 51 So. 730.

§ 285 (3) Proof of Handwriting.

General Agent of Insurance Company.—Papers found among those of insured, purporting to have emanated from the general agent of the insurer, with no marks other than of genuineness, though bearing his signature affixed only with a rubber stamp, are admissible, with evidence of his custom to so affix his signature, to show waiver of forfeiture of the policy. *Union Cent. Life Ins. Co. v. Washburn*, 158 Ala. 169, 48 So. 475.

Insufficient Signature.—In an action to rescind a purchase of corporate stock on the ground of fraudulent representations inducing the purchase, a letter stating that "this matter" would be taken up by the fiscal agent of the corporation on his return from a trip, and signed by a person adding to his name the words "Asst. Secy.," was inadmissible in the absence of evidence to show what the matter referred to was and who the person signing the letter was. *Southern States Fire, etc., Ins. Co. v. De Long (Ala.)*, 59 So. 61.

Proper Signature of Agent.—A letter containing an acknowledgment of the receipt of money, subscribed with the name of a deceased person, "per" another, held to purport to be the writing of the deceased executed by his agent, and admissible in evidence to charge him; the person who actually wrote and signed it testifying that he was the clerk of the other, and had written some letters for him at his request and dictation, and none without it, though he remembered nothing in connection with that particular letter, but recognized it as being in his handwriting. *Prestridge v. Irwin*, 46 Ala. 653.

Letters of Plaintiff's Clerk.—In an action by a mortgagee against a purchaser from the mortgagor for conversion of

mortgaged property, when defendant claims that after the sale to him plaintiff took from the mortgagor a second mortgage, under an agreement that it should be in satisfaction of his claim under the first, letters from plaintiff's clerk, who is not shown to have had authority to write them, are inadmissible to show such agreement. *Cobb v. Malone*, 91 Ala. 388, 8 So. 693.

Similarity to Other Handwriting.—

Testimony that the handwriting of a letter was like other handwriting the witness had seen, which purported to be that of the alleged author, was insufficient to authorize the admission of the letter in evidence. *White v. Tolliver*, 110 Ala. 300, 20 So. 97, cited in notes in 17 L. R. A., N. S., 229, 6 L. R. A. 977.

"There was no satisfactory proof that the letter offered in evidence by the defendant, and purporting to bear the signature of T. M. Arrington, was signed by said Arrington. The only witness examined with reference to the matter testified that 'he had never seen Judge Arrington write his name, and did not know that he was acquainted with his handwriting, but that the signature to the letter and the handwriting in the body of it were like other writing he had seen purporting to be the signature of Judge Arrington.' This was insufficient as preliminary proof of handwriting. 1 Greenl. Ev., § 575 et seq." *White v. Tolliver*, 110 Ala. 300, 20 So. 97, 99, cited in notes in 17 L. R. A., N. S., 229, 63 L. R. A. 977.

§ 286. — Maps, Plats, and Diagrams.

Testimony of Witness.—Where a witness testified that he had lived in the neighborhood of property about twenty years, and that the map shown him was a correct map of the locality, it was properly admitted. *Birmingham Ry., Light & Power Co. v. Long*, 5 Ala. App. 510, 59 So. 382.

§ 287. — Photographs and Other Pictures.

Testimony of Witness and Photographer.—A photograph, shown by a widow to be a good likeness of her husband, and an indorsement thereon, in his handwriting, of his name, date, and place of its ex-

ecution, are admissible evidence to show the identity of the husband and a murdered man, when offered in connection with the testimony of the photographer that it was the likeness of a man of the same name as the husband, taken at the place and about the time indorsed on it, and the further evidence of a witness, who saw deceased shortly before and after death, that it was a good likeness. *Luke v. Calhoun Co.*, 52 Ala. 115, cited in note in 35 L. R. A. 802, 807.

§ 288. Determination of Question of Admissibility.

Court Can Not Refuse Memorandum.

—The court has no discretion to refuse to admit a memorandum which a witness swears to have been correct when made, and still to be so, to aid the jury to recollect his testimony; he having testified, from independent recollection, to the correctness of each item therein. *Foster v. Smith*, 104 Ala. 248, 16 So. 61.

"There was much conflict in the evidence as to the correctness of many of the mutual demands. The plaintiff Rudder who had kept the accounts for plaintiffs, when on the stand as a witness, produced a memorandum which he had made out, and which he testified showed correctly every item of debit and credit between the parties. It does not appear that this memorandum was used to refresh his recollection as a witness, or to supply the place of recollection, upon proof that he knew of its correctness at the time it was made out, and from that fact, without recollection of the items, presently knew it to be correct. See *Acklen v. Hickman*, 63 Ala. 494. But he proposed to introduce the paper in evidence, not as evidence of the correctness of the account, but to aid the jury in recollecting his testimony as to what the correct items of account were, he having testified, from independent recollection, to the correctness of each item on the memorandum. It has been several times decided by this court that it is not error to allow an account to go to the jury under such circumstances, and for such a purpose. *Hirschfelder v. Levy & Co.*, 69 Ala. 351; *Mooney v. Hough*, 84 Ala. 80, 4 So. 19; *Snodgrass v. Coulson*, 90 Ala. 347, 7 So. 736. The question now is whether it

is error to refuse so to allow it. The writer is inclined to the opinion that the admission to the jury of such memorandum, under the circumstances of this case, for the purpose mentioned, should be left to the sound discretion of the trial court; but the other members of the court think, and we so hold, that it is a valuable right of the party offering it, the denial of which is a reversible error." *Foster v. Smith*, 104 Ala. 248, 16 So. 61, 62.

Telegram Delivery Sheet.—In an action for delay in delivering a telegram, the delivery sheet, showing time of delivery, was admissible after proof of the genuineness of the signature thereto, though the evidence as to its genuineness was conflicting, so as to make that a jury question. *Western Union Telegraph Co. v. Northcutt*, 158 Ala. 539, 48 So. 553.

"The court erred in refusing to admit the delivery sheet, after proof of the genuineness of the signature. If there was evidence contradicting the genuineness of the signature, it was a question for the jury to determine whether the telegram was received at the time therein specified. 2 Wigmore on Ev., § 1261; 3 Wigmore on Ev., § 2134." *Western Union Tel. Co. v. Northcutt*, 158 Ala. 539, 48 So. 553, 560.

Genuineness of Receipt.—This court can not undertake to say that a paper purporting to be a receipt may not bear marks or evidence on its face conclusive to show that it is not a genuine receipt, although the signature attached to it may be in the handwriting of him whose receipt it purports to be. *Aday v. Echols*, 18 Ala. 353.

Identity of Handwriting for Jury.—Whether the body of a deed and the signatures thereof were in the same handwriting, and whether the signatures were in the same handwriting as that of a witness, held, under the evidence, questions for the jury. *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, cited in note in 18 L. R. A., N. S., 521.

"Both this matter and the questions whether the body of the deed and the signatures were in the same handwriting, and also whether the two signatures and that of the witness were in the same handwriting, were questions for the jury to consider, with the aid of expert testi-

mony and other evidence. *Sharpe v. Orme*, 61 Ala. 263; *Alabama State Land Co. v. Thompson*, 104 Ala. 570, 16 So. 440; *Ravisies v. Alston*, 5 Ala. 297; *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450." *Campbell v. Bates*, 143 Ala. 338, 39 So. 144, 146.

§ 289. Conclusiveness and Effect.

§ 289 (1) Use by Adverse Party.

Mortality tables are not conclusive on the issue of life expectancy, in an action for wrongful death. *Louisville & N. R. Co. v. Holland*, 173 Ala. 675, 55 So. 1001.

Letters of Adversary.—If a party offers in evidence his adversary's letters, they become evidence as well for as against the writer; and if received to charge him, they should also be heard to discharge him. *Zimmerman v. Huber*, 29 Ala. 379.

Where the defendant has made evidence of the letters of the plaintiff, this makes evidence of the entire letters, and, if received to charge him, they should also be heard to discharge him. *Zimmerman v. Huber*, 29 Ala. 379.

§ 289 (2) Judicial and Official Acts, Proceedings, Records, Reports, and Statements.

Marriage Record.—On the trial of a case, where upon one of the issues presented a marriage license, bond, and certificate are introduced in evidence, a charge is free from error which instructs the jury that "the marriage record is only a circumstance to be considered by the jury, and is not conclusive proof of the facts recited therein." *Woods v. Moten*, 129 Ala. 228, 30 So. 324.

Receipt in Patent.—Recitals in a state patent to swamp land that there had been deposited in the office of the secretary of state a certificate of the receiver of the swamp and overflowed lands of Alabama, in and for the district of Mobile, whereby it appeared that full payment for the land had been made by the patentee according to Act February 8, 1861 (Laws 1861, p. 12), were of no consequence to the fact of payment in a subsequent action to quiet title. *Brue v. McMillan*, 175 Ala. 416, 57 So. 486.

§ 289 (3) Official Certificates.

Clerk's Attestation to Record.—Where the attestation of a clerk to a record states that it was transferred by law from

a court formerly existing in the same place to the court of which he was clerk, such law need not be produced to support the record when offered in evidence. *McRae v. Stokes*, 3 Ala. 401, cited in note in 5 L. R. A., N. S., 967, 972, 982.

The attestation of the clerk need not expressly state that the transcript is a copy of all the proceedings in the case. If he certifies that the transcript is correctly copied from the record of the proceedings of the court, and it appears to be complete, it is sufficient. *McRae v. Stokes*, 3 Ala. 401, cited in note in 5 L. R. A., N. S., 972.

§ 289 (4) Private Contracts and Other Writings.

A deed is evidence only of a conveyance of grantor's title, and not of the fact that he had title. *Malone v. Arends*, 116 Ala. 19, 22 So. 500.

Trust Deed.—Recital in a trust deed of a prior trust deed under which grantor claims the property conveyed by him is no evidence of his title thereto against an execution creditor of his grantor, asserting an adverse claim thereto. If he relies on such deed, he should prove its execution by legal testimony, and show prima facie that it is sustained by sufficient consideration. *Hooks v. Branch Bank*, 15 Ala. 609.

§ 289 (5) Books of Account.

Not Conclusive.—In determining the question to whom the credit was given upon the sale of goods, the entry in the seller's books is often of great importance, but it is not conclusive. When there is any conflict of evidence upon the subject, the weight to be given to any particular circumstance should be left to the jury. *Boykin v. Dohlond*, 37 Ala. 577.

And the entries in the books of a partnership, to which all members have had free access, must at least be considered as prima facie correct as between the partners and their estate. *Desha v. Smith*, 20 Ala. 747; *Glover v. Hembree*, 82 Ala. 324, 8 So. 251, cited in note in 52 L. R. A. 842.

§ 289 (6) Effect of Introducing Part of Document or Record.

Part of Answer in Chancery.—If a party gives in evidence a part of an an-

swer in chancery, the opposite party has a right to use the residue at any time before the close of his argument. *Bumpass v. Webb*, 1 Stew. 19.

Schedules of Bankrupt.—The admission of the schedules of a bankrupt to show an admission by defendant that he held land as tenant of plaintiff does not authorize the introduction of the balance of the bankruptcy proceedings. *Ponder v. Cheeves*, 104 Ala. 307, 16 So. 143.

Record.—Where a record is introduced by a party to prove a particular fact, the opposite party is not entitled to avail himself of it as proof of other facts, for which he could not have used it as primary evidence. *Herndon v. Givens*, 16 Ala. 261.

Judgment.—Where a judgment is offered as proof of indebtedness, to invalidate a gift made by the defendant in the judgment, the party against whom it is offered may adduce the entire record, to show to what effect the judgment and execution are entitled. *Easley v. Dye*, 14 Ala. 158.

Indorsement of Notes.—As a general rule, when a document is offered in evidence, it must be taken in its entirety, the parts operating against the interests of the party offering it, as well as the parts in his favor; and hence, where plaintiff introduced notes given it for the purchase price of specified property which retained in plaintiff the title until the purchase money was paid, they carried with them indorsements thereon to the effect that plaintiff by its president had transferred the notes, the debts evidenced thereby, and the property described to another person. *Union Iron Works Co. v. Union Naval Stores Co.*, 157 Ala. 643, 47 So. 652.

XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.

(A) CONTRADICTING, VARYING, OR ADDING TO TERMS OF WRITTEN INSTRUMENT.

§ 290. Grounds for Exclusion of Extrinsic Evidence.

Conflicting Authorities.—"There are few questions of evidence on which more has been said, than that which seeks to

vary by parol the terms of a written contract; and we may add, there are few legal questions on which there is a greater conflict of the authorities. As early as 1823, Ch. J. Tilghman characterized the adjudication on this question as a 'wilderness of cases;' nor has modern jurisprudence blazed a clear path through that wilderness. We will not attempt the task ourselves, further than may be rendered necessary by the wants of this case." *McGehee v. Rump*, 37 Ala. 651, 654.

Prevails Both at Law and in Equity.—The rule as to contradicting or varying a written instrument by parol proof, obtains with the same force in equity as at law. *Ware v. Cowles*, 24 Ala. 446.

The general principle, prevailing alike at law and in equity, is, that a contract or agreement reduced to writing, deliberately executed or accepted, and not bearing on its face any marks of incompleteness, is presumed to express the entire meaning, purpose, and contract of the parties, and parol evidence can not be received to add to, alter, or vary its terms; and when a correction of it is sought in equity, on the ground that, by fraud, inadvertence, or mistake, it expresses either more or less than the parties intended, the mistake must be plainly alleged, and, if not admitted, must be established by convincing evidence. *Green v. Casey*, 70 Ala. 417.

"The application of this general rule [excluding parol evidence to vary written instruments] to reach a particular case is frequently a task of difficulty, and has given rise to as many contradictory decisions, as any question with which courts have had to deal. If the instrument is perfect and complete, that is, if it contains the entire contract, then the rule is inflexible that parol evidence can not be received to add another term to the written instrument, or to change its legal effect. *Starkie on Ev.*, 1006; *Cowen & Hill's Notes to Phil. Ev.*, 1471; *Litchfield v. Falconer*, 2 Ala. 280; *Paysant v. Ware*, 1 Ala. 160; *Beard v. White*, 1 Ala. 436; *M'Coy v. Moss*, 5 Port. 88." *West v. Kelly*, 19 Ala. 353.

§ 291. Writings Excluding Extrinsic Evidence in General.

It is an unquestionable general rule of

evidence, that where parties have entered into a contract in writing, they are presumed to have expressed their agreement truly, and can not be allowed to add to, vary, explain or contradict it by parol testimony of stipulations previously or simultaneously made. *Self v. Herrington*, 11 Ala. 489, 491; *Paysant v. Ware*, 1 Ala. 160; *Beard v. White*, 1 Ala. 436; *Litchfield v. Falconer*, 2 Ala. 280; *Holt v. Moore*, 5 Ala. 521; *Louisville, etc., R. Co. v. Williams*, 5 Ala. App. 615, 59 So. 673, 677; *Andrews & Bros. v. Jones*, 10 Ala. 460, 471; *Carlton v. Fellows, etc., Co.*, 13 Ala. 437; *Hogan v. Smith*, 16 Ala. 600; *Waddell v. Glassell*, 18 Ala. 561; *Long v. Davis*, 18 Ala. 801; *West v. Kelly*, 19 Ala. 353; *Walker v. Clay*, 21 Ala. 797; *Grey v. Grey*, 22 Ala. 233, 237; *Nave v. Berry*, 22 Ala. 382; *Melton v. Watkins*, 24 Ala. 433; *Holley v. Younge*, 27 Ala. 203; *Nesbitt v. Ware*, 30 Ala. 68; *Cowles v. Townsend*, 31 Ala. 133; *S. C.*, 31 Ala. 428, 434; *Powell v. Thompson*, 80 Ala. 51, cited in note in 17 L. R. A. 270; *Doss v. Peterson*, 82 Ala. 253, 2 So. 644, cited in note in 17 L. R. A. 273; *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. 285, 286; *Peagler v. Stabler*, 91 Ala. 308, 9 So. 157; *Maness v. Henry*, 96 Ala. 454, 11 So. 410, 412; *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 997; *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655; *Thompson, etc., Mach. Works v. Glass*, 136 Ala. 648, 33 So. 811; *Rutter v. Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33, 37; *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855; *Baker v. Cotney*, 150 Ala. 506, 43 So. 786, 787; *Boquemore v. Vulcan Iron Works Co.*, 151 Ala. 643, 44 So. 557, 559; *Johnson v. Hataway*, 155 Ala. 516, 46 So. 760; *Alabama, etc., R. Co. v. Norris*, 167 Ala. 311, 52 So. 891; *Able v. Gunter*, 174 Ala. 389, 57 So. 464, 465; *Barringer v. Sneed*, 3 Stew. 201; *Mead v. Steger*, 5 Port. 498; *Wesson v. Carroll*, Minor 251; *Hair v. La Brouse*, 10 Ala. 548, cited in note in 31 L. R. A., N. S., 236.

"The rule is too well settled to require the citation of authority, that all previous or contemporaneous parol agreements, or understandings, between the parties, materially altering or varying, by adding to, or subtracting from, the written agreement, must be considered as merged in

that agreement, and the writing must be regarded as the evidence and sole expositor of the contract of the parties, when it is clear and unambiguous. *Gordon v. Phillips*, 13 Ala. 565, 567, and cases cited on the brief of counsel." *Melton v. Watkins*, 24 Ala. 433, 436; *Garrow v. Carpenter*, 1 Port. 359, 371.

"No principle of law is more frequently the subject of consideration in this court, than the rule of evidence which governs this case, that parol testimony can not be heard, to add to or diminish a written contract. Exceptions have been engrafted on the rule, which are as well settled as the rule itself; as, for example, that a latent ambiguity, may be explained by parol proof. It is not contended that this case falls within any of the established exceptions to the rule; but that the parol testimony offered, should have been received, because it merely superadded a condition, as to which the written contract was silent. Or if that view is inadmissible, that the evidence merely showed an agreement in discharge of the written contract, and therefore, entirely consistent with it. The rule is one of the utmost importance in the administration of justice, and should be preserved inviolate; as it is difficult to foretell the amount of mischief which would ensue, if it were abrogated or frittered away, by nice and insensible distinctions." *Beard v. White*, 1 Ala. 436, 437.

To Give Direction and Application to a Written Instrument.—Parol evidence is admissible to give direction to and apply a written instrument, but not to add to, or vary its terms. *McLendon v. Godfrey*, 3 Ala. 181.

§ 292. Judicial Records and Proceedings.

§ 292 (1) In General.

To Disprove Original Copies.—Where the record on appeal described copies admitted as evidence as copies proved by a witness to have been compared with the originals, the appellate court refused to hear a suggestion that the copies were made from copies. *State v. Bell*, 5 Port. 365.

Bills of Exceptions.—"It is a common principle of law that parol evidence is inadmissible to contradict, add to, or vary a record; and, by repeated decisions of

this court, the rule has applied to bills of exceptions, after they had been signed and sealed by the judge." *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

A replevin bond returned by the sheriff is no part of the record, and can not be looked to to explain or contradict the sheriff's return. *Kirksey v. Bates*, 1 Ala. 303.

Time of Issuing Execution.—Evidence is admissible to show when, in fact, an execution issued, either by proving that the clerk made a mistake in the teste of the writ, or that it has subsequently been altered. *Harrell v. Martin*, 6 Ala. 587.

To Prove Judgments Rendered by Agreement.—An administrator, having allowed creditors of the estate to obtain judgments at law against him, can not obtain equitable relief against such judgments by showing that they were rendered on an agreement that no effort was to be made to charge him personally, or to charge the sureties on his bond with the amount of such judgments. *Weakley v. Gurley's Adm'r*, 60 Ala. 399.

Vary or Add to Language of Decree.—Parol evidence is inadmissible to vary or add to the language of a judgment, decree, or record of court expressed in plain and unambiguous terms. *King v. Martin*, 67 Ala. 177.

To Contradict Award.—On motion to have an award entered as a judgment of the circuit court, oral testimony of one of the arbitrators, contradicting one of the facts recited in the award as having been ascertained by them, is inadmissible; the award not being assailed for fraud, partiality, or corruption. *King v. Jemison*, 33 Ala. 499.

Record Relating to Selection of Grand Jury.—Oral evidence is inadmissible to contradict a record or impugn the certificate of officers in whom the selection of grand jurors is confided. *State v. Allen*, 1 Ala. 442.

The certificate of the officer selecting a grand jury is a record, and can not be impeached by showing that it was not signed by the clerk whose name appears to it, and that he was not present when the duties were performed. Such certificate is the proper evidence of the manner in which the jurors were returned. *State v. Clarkson*, 3 Ala. 378.

To Prove Identity of Record.—Parol evidence to prove the identity of a record, where the venue is changed, is admissible, on a suitable issue joined raising the question. *State v. Matthews*, 9 Port. 370.

To Amend Records.—In the matter of amending records, nunc pro tunc, this court has always followed the English rule, which excludes parol evidence, and allows such amendments to be made only on record evidence, or quasi record evidence; but, on applications to substitute records which have been lost or destroyed, parol evidence is admissible. *Lilly v. Larkin*, 66 Ala. 122.

§ 292 (2) In Probate Court.

Record of Administration.—The entry of a record in the orphans' court that administration of an estate has been granted is conclusive to show that all the prerequisites of the law had been complied with; and hence, in an action against an administrator, he will not be permitted to contradict the record of the grant of administration to him by proving that the bond required by law was not executed until afterwards, and that the official oath was not then administered. *Eslava v. Elliott*, 5 Ala. 264.

Requiring New Administrator's Bond.—Where an administrator was required to give a new bond, and the records of the court do not show that it was done on the application of one or more of the sureties on his former bond, parol evidence of that fact can not be received, since it is not permissible to show by such evidence that a record is defective, and then to have its defects in the same manner corrected or supplied. *Jones v. Ritter*, 56 Ala. 270.

Order Probating Will.—An order by a judge of probate in proceedings to probate a will can not be assailed by parol evidence in the court in which it was rendered. *Deslonde v. Darrington's Heirs*, 29 Ala. 92.

To Vary Record of Petition.—The petition of an administrator for the sale of land being lost or mislaid, the testimony of the judge of the court can not be received, that the petition was in fact different from the recital of it in the orders of the court setting forth the grounds set forth in the petition for the sale of the

land. *Bishop's Heirs v. Hampton*, 15 Ala. 761.

§ 292 (3) In Justice's Court.

Confession and Release.—Where the judgment entered by a justice of the peace stated that defendant confessed judgment for \$30 and accepted a release for all but \$8.50, and that by order of the plaintiff's attorney defendant was released for all but \$8.50, parol evidence to show that the entries did not mean what they said, and that it was only intended to release a garnishee, instead of defendant, was incompetent. *Dudley v. Stansberry*, 5 Ala. App. 491, 59 So. 379.

Contradicting Recital of Jurisdiction.—Where, on trial of a petition for writ of habeas corpus, the proceedings of a justice court were attacked by petitioner for want of jurisdiction, and the record of such proceedings, introduced in evidence, recited facts giving such court jurisdiction, such facts could not be contradicted by parol testimony. *Ex parte Davis*, 95 Ala. 9, 11 So. 308.

Record of Orphans' Court.—The testimony of the clerk of the orphans' court is inadmissible to show that a copy of a record of that court, properly authenticated and purporting to be a complete transcript, is incomplete. *Carroll v. Pathkiller*, 3 Port. 279.

§ 292 (4) Orders of Court.

Contradicting Recitals in Orders.—Parol evidence can not be received to contradict the recitals in orders and entries made during the progress of a cause in the court in which the proceeding is pending. *Deslonde v. Darrington's Heirs*, 29 Ala. 92.

§ 292 (5) Damages Included in Judgment or Award.

Contradicting Terms of Award.—In an action to recover land claimed by defendant railroad under condemnation proceedings, plaintiff may not show by parol evidence that the award in such proceedings was for his crop, and not for the land; the petition therein describing the land, and it, after verdict of the jury, being adjudged to be condemned for the use of the railroad. *Choate v. Southern Ry. Co.*, 143 Ala. 316, 39 So. 218.

§ 293. Official Records and Documents.

§ 293 (1) In General.

Record Having Suspicious Appearance.

—A record imports absolute verity, and unless impeached for fraud, can not be varied or contradicted by parol evidence; yet, when a person offers in evidence a record which bears on its face the marks of alteration, or other suspicious appearances, he is required to explain and account for such alteration or suspicious appearance. *Hensley v. Rose*, 76 Ala. 373.

Deed Not Correctly Recorded.—A record copy of a lost deed, or a transcript from the record, which is declared by the statute to be "as good and effectual and available in law as if the original deed were then and there produced and proved," is only *prima facie* evidence of the contents of the deed, on the ground that all public officers must be presumed to have discharged the duties which the law requires of them; but parol evidence is admissible to show that it was not correctly recorded. *Harvey v. Thorpe*, 28 Ala. 250.

"As to the principal question in the case—the admission of parol evidence to contradict the transcript of the deed certified by the clerk—the English cases certainly lay down the rule very broadly, that there are no degrees in secondary evidence (*Rowlandson v. Wainright*, 1 Nev. & Per. 8; *Coyle v. Cole*, 6 Car. & P. 81; *Rex v. Hunt*, 3 B. & Ald. 506; *Brown v. Woodman*, 6 Car. & P. 206); while, on the contrary, the current of American authorities goes very strongly to show that, although the facts may warrant the admission of secondary evidence, the best kind of that character of evidence which appears to be in the power of the party to produce, must be offered. *U. States v. Britton*, 2 Mason, 464 [Fed. Cas. No. 14,650]; *Kello v. Maget*, 18 N. C. 414; *Renner v. Bank of Columbia*, 9 Wheat. 582-597 [6 L. Ed. 166]; *Popino v. McAlister*, 7 N. J. Law, 46-53; *Blade v. Noiland*, 12 Wend. 173 [27 Am. Dec. 126]. We confess that the American rule appears to us more reasonable than the English; and we see great propriety, if there was an examined copy of an instrument in the possession of a party, in re-

fusing to allow him to prove it by the uncertain memory of witnesses. A copy of a letter, taken by a copying press, would unquestionably be better evidence of the original than the recollection of its contents by a witness; and the same reasons which would require the production of the original, if in the control of the party, would operate in favor of the production of the facsimile, or of the examined copy. But, in all these cases, the strength of the proposition consists in the fact, that there is secondary evidence, in its nature and character better than that which the party offers, and that it is in his power to produce it. He certainly must be allowed to show, that what appears to be secondary evidence of a higher degree is not so in fact. In other words, he would be allowed to show that the paper, which purported to be a copy, was not in fact and in truth one." *Harvey v. Thorpe*, 28 Ala. 250. 262.

To Supply Deficiency in Acknowledgment.—Parol testimony of the officer who took the acknowledgment is inadmissible to supply the deficiency, where a certificate of acknowledgment to a deed is substantially defective. *Scott v. Simons*, 70 Ala. 352.

Incorrectness of Deed Shown by Comparison.—When a certified copy of a registered deed is admissible in evidence, it is *prima facie* a correct copy of the original, but may be shown to be incorrect by comparing it, either with the original deed or the record of it on the register's book. *Congregational Church at Mobile v. Morris*, 8 Ala. 182.

Though, in an action against a railroad company for killing stock, the appraisement secured by plaintiff is evidence of the true value of the animal killed, plaintiff may show that for a certain purpose the appraisement was not made on the basis of the animal's value. *East Tennessee, V. & G. R. Co. v. Bayliss*, 74 Ala. 150.

§ 293 (2) Legislative Journal or Records.

Unaffected by Officer's Testimony.

—The journals of the two houses of the legislature are the sole records of legislative proceedings, and they can neither be contradicted nor amplified by memo-

randa of the clerical officers of the houses. *State v. Martin*, 160 Ala. 181, 48 So. 846.

§ 293 (3) Plats and Surveys.

Not Conclusive Evidence.—A survey and diagram of land, made by a county surveyor without notice to the opposite party that such survey would be made as required by Rev. Code, § 953, is not conclusive that the lines bounding the land are correctly shown. *Bridges v. McClen-don*, 56 Ala. 327.

§ 294. Deeds.

§ 294 (1) In General.

Inadmissible to Affect Deed.—Parol evidence is inadmissible to add to, vary, or change the terms of a deed not attacked on the ground of fraud or mistake. *Hogan v. Smith*, 16 Ala. 690; *Rogers v. Peebles*, 72 Ala. 529; *Pettus v. Mc-Kinney*, 74 Ala. 108.

Proof Contradicting Deed.—In the absence of an allegation of fraud, or that any language not truly expressive of the contract was inserted in a deed, or that mistake was made in writing it, proof contradicting the deed is not admissible even in equity. *Brassell v. Fisk*, 153 Ala. 558, 45 So. 70.

Deed Operating to Discharge Note.—Where land was conveyed to A. in trust that, if the grantor should make default in the payment of a certain note, A. should sell the land and apply the proceeds to the payment of such note, it was held that parol evidence was not admissible to show that at the time the deed was executed it was agreed by the parties that it should operate a discharge of the note. *Brooks v. Maltbie*, 4 Stew. & P. 96, cited in note in 20 L. R. A. 103.

§ 294 (2) Description of Premises.

Substitution of Boundaries.—Parol evidence is not admissible to substitute a different boundary for the one expressed in the conveyance. *Donahoo v. Johnson*, 120 Ala. 438, 24 So. 888.

Where the property conveyed is described by metes and bounds, parol evidence is not admissible to show a mistake in the description of the premises, or to alter or vary the boundary as specified, or to establish another and different

boundary for that expressed in the deed. *Guilmartin v. Wood*, 76 Ala. 204.

To Show Intention to Convey Different Lot.—Parol evidence is not competent to show that a deed offered in evidence which describes an entirely different lot was intended to cover the lot sued for. *Griffin v. Hall*, 115 Ala. 482, 22 So. 162.

"The witness examined by plaintiffs makes it plain that the lot sued for and the one described in the deed are not the same lots. We can not make them such without injecting into the deed a correction, to make it cover a lot in no way described therein. This can not be done. If the deed describes a lot entirely different from the one intended to be conveyed, the one intended to be conveyed can not, in order to maintain the title to it, be shown by parol evidence to be the one that was conveyed. If the deed is to be corrected, it must be done in another forum. All that it is competent for a court of law to do in aid of the description of land in a deed, which is uncertain, is to allow parol evidence to be introduced, in order that that which is uncertain in description may be made certain." *Griffin v. Hall*, 115 Ala. 482, 22 So. 162, 163.

Grantor's Declaration Contradicting Description.—Grantor's declaration that the deed then made erroneously embraced a twelve-foot strip on one side of the lot conveyed was inadmissible to contradict the description. *Foster v. Carlisle*, 159 Ala. 621, 48 So. 665; *Foster v. Reddick*, 159 Ala. 668, 48 So. 666.

Enlarging Boundary.—A description in a deed covering "the south part of the east half of the northeast quarter of section 27, township 16 range 12, containing 40.10 acres," can not be varied by parol evidence that the entire south half of the half quarter was intended to be conveyed. *Lamar v. Minter*, 13 Ala. 31.

Deed Conclusive Evidence.—When the purchaser of land files a bill seeking to be relieved against the payment of a part of the purchase money on the ground of a deficiency in the quantity of land, and does not allege in his bill that there was any fraud or mistake in the execution of the deed, or that any language not truly expressive of the contract had been in-

serted therein, or any part of the contract omitted, the deed of conveyance must be taken as conclusive evidence of the terms of the contract. *Frederick v. Youngblood*, 19 Ala. 680.

Conveyance of Specified Number of Acres.—In an action to recover the purchase money for a tract of land, parol evidence is not admissible to contradict the deed by showing that it does not in fact convey the number of acres that it purports to convey. *Carter v. Beck*, 40 Ala. 599.

§ 294 (3) Estate or Interest Conveyed.

Conveying Undivided Interest.—If a deed purporting to convey an undivided interest in land is unambiguous in its terms, it can not be varied by evidence tending to show that the vendor, who at the time of the sale was the owner of the whole lot, intended to convey the particular interest which he had acquired from a former owner of an undivided share of the lot. *Phillips v. Costley*, 40 Ala. 486.

§ 294 (4) Reservations or Limitations.

Where a contract to purchase land was reduced to writing and executed by a deed which described the land, complainant in a suit to quiet title could not show by parol, over twenty years thereafter, that he contracted for and bought other land than that described. *Brown v. Powers*, 167 Ala. 518, 52 So. 647.

§ 295. Leases.

Inability to Sign Lease.—Where a lease is silent as to the lessee's right to assign his term, parol evidence is inadmissible to show that the premises were to be used and occupied by the lessee himself. *Nave v. Berry*, 22 Ala. 382.

To Show Purpose of Lease.—Where plaintiff, in writing, leased vacant land to defendant for a term of years, and agreed that defendant could erect such buildings as he deemed proper, and remove them on the expiration of the lease, oral evidence as to the purpose for which defendant leased the ground is inadmissible. *Cox v. O'Neal*, 142 Ala. 314, 37 So. 674.

§ 296. Mortgages.

§ 296 (1) In General.

In the absence of allegations of fraud or mistake, parol evidence is inadmissible

to vary the terms of a mortgage. *Edwards v. Dwight*, 68 Ala. 389; *Cowley v. Shelby*, 71 Ala. 122.

In a suit in equity for the foreclosure of a mortgage on land, it is not competent for the mortgagor to prove parol evidence that he intended to convey an interest in the land different from that specified in the mortgage. *Cowley v. Shelby*, 71 Ala. 122.

A party litigant can not properly testify as to the intention of the parties to a mortgage, to which he was also a party, with respect to the lands intended to be conveyed thereby. *Chambers v. Ringstaff*, 69 Ala. 140.

Mortgage on Crops.—Where, in an action by a landlord for the conversion of a crop raised in C. county on which he claimed a lien for rent, defendant relied on the right to take the crop under a mortgage of crops to be raised in T. county, parol evidence that the tenant making the mortgage intended it to read C. County, instead of T. county, was inadmissible, as varying the terms of the mortgage. *Baker v. Cotney*, 150 Ala. 506, 43 So. 786.

§ 296 (2) Debt or Obligation Secured.

Extending Liability of Mortgage.

Where the only debt secured by a mortgage on a wife's land was a debt of her husband, the mortgage could not be changed or extended by parol, so as to include the liability for the cost of insurance taken out by the mortgagee. *Hanchey v. Powell*, 171 Ala. 597, 55 So. 97.

§ 297. Contracts in General.

§ 297 (1) In General.

General Rule.—In the absence of mistake or fraud, parol evidence is not admissible to vary or add to the terms of a written contract. *Duff v. Ivy*, 3 Stew. 140; *Paysant v. Ware*, 1 Ala. 160; *McLendon v. Godfrey*, 3 Ala. 181; *Hair v. La Brouse*, 10 Ala. 548; *West v. Kelly's Ex'rs*, 19 Ala. 353; *Nesbitt v. Ware*, 30 Ala. 68; *Winston v. Browning*, 61 Ala. 80, cited in note in 31 L. R. A., N. S., 289; *Caldwell v. May*, 1 Stew. 425.

Where a contract is susceptible of a sensible construction, and in the absence of mistake or fraud, parol evidence is inadmissible to explain or determine its construction. *Bennett v. Hubbard*, Minor

270; *Barringer v. Sneed*, 3 Stew. 201; *Johnson v. Ballew*, 2 Port. 29; *Paysant v. Ware*, 1 Ala. 160; *Litchfield v. Falconer*, 2 Ala. 280; *Powell v. State*, 84 Ala. 444, 4 So. 719, cited in notes in 52 L. R. A. 590, 53 L. R. A. 532.

A written contract can not be contradicted nor varied by a contemporaneous parol agreement. *Miles v. Sledge*, 157 Ala. 523, 47 So. 595; *Paysant v. Ware*, 1 Ala. 160, 165; *Echols v. Exum*, 5 Ala. 419, 420; *Pierce v. Wilson*, 34 Ala. 596.

Written contracts, not bearing any evidence of incompleteness, are presumed to comprise the whole contract of the parties, and parol evidence is not admissible to add to, alter, or vary their terms. *Thomas v. Irvine*, 171 Ala. 332, 55 So. 109.

"The contract set out in the replication is complete in itself. The general principle, prevailing in courts of equity and courts of law, is that contracts or agreements between parties, reduced to writing, deliberately executed or accepted, not bearing any evidence of incompleteness, are presumed to comprise the whole meaning, purposes, and contract of the parties. Parol evidence is not admissible to add to, alter, or vary the terms of such a contract." *Green v. Casey*, 70 Ala. 417; *Crescent Brewing Co. v. Handley*, 90 Ala. 486, 7 So. 912; *Am. & Eng. Encyc. of Law*, vol. 21, p. 1090. The court committed no error in excluding, on motion of the plaintiff, parol evidence offered by defendant tending to show a verbal warranty, and thereby altering the written contract between the parties, nor in instructing a verdict for the plaintiff, as the account sued on was admitted by the defendant to be correct." *Thomas v. Irvine*, 171 Ala. 332, 55 So. 109, 110.

"The estoppel set up by the special replications in the case at bar was the same as the one set by the replications in the case of *Blanks v. Moore*, 139 Ala. 624, 36 So. 783, and it was there held, and properly so, that a contract in writing can not be contradicted or varied by a contemporaneous parol agreement. It is true that the pleas were doubtless framed under the case of *Parker v. Bond*, 121 Ala. 529, 25 So. 898, and were there held good as against the demurrer; but the plaintiff did not, in said case, resort to a replication. The plaintiff, in the case at

bar, evidently conceded that the pleas were good under the *Bond Case*, supra, and replied thereto under the authority of *Blanks v. Moore*, supra." *Miles v. Sledge*, 157 Ala. 528, 47 So. 595, 596.

Contract Distinguished from Receipt.

—In so far as a written instrument was a contract and not a receipt, it could not be contradicted or varied by contemporaneous parol evidence. *Jones Cotton Co. v. Snead*, 169 Ala. 566, 53 So. 988.

Agreement to Account for Insurance.

—Where a bailee of goods insures the contents of his store, and, after loss, includes the goods in his schedule of destroyed articles, and receives the whole amount of insurance, and gives the owner a writing agreeing to account for his proportion of insurance when ascertained, he can not show by parol that he intended by the writing merely to account out of what might remain after his own loss had been satisfied. *Durand v. Thouron*, 1 Port. 238.

To Vary Defendant's Liability.—Parol testimony that it was the intention of the parties that defendant's liability should depend on the consummation of a sale of the leased property was incompetent, since it tended to vary an absolute written contract by a repugnant condition. *Dexter v. Ohlander*, 93 Ala. 441, 9 So. 361.

§ 297 (2) Completeness of Writing and Presumption in Relation Thereof.

Complete Writing Sufficient.—A contract complete in all its parts, which relates to an executory agreement, and which is delivered by one of the parties to the other, and is retained by the other, is conclusively presumed, as a general rule, to contain within itself the sole evidence of the contract; and it can not be modified by parol evidence. *Louisville & N. R. Co. v. Williams*, 5 Ala. App. 615, 59 So. 673.

§ 297 (3) Contracts for Partnership or Dissolution Thereof.

Increasing Obligations of Partner.—Parol evidence is inadmissible to ingraft on a written agreement for a partnership independent stipulations on the part of one of the partners increasing his obligations. *Couch v. Woodruff*, 63 Ala. 466.

§ 297 (4) Compromise or Settlement, and Arbitration.

Composition of Debt.—On the payment of a note to the payee, the note, having been indorsed to a third person, was not delivered up, but a receipt was given, which showed the payment of the principal of the note only, and contained an obligation by the payee to pay the interest. Held, that under Rev. Code, § 2636, requiring settlements for the composition of debts to be in writing, parol evidence by the maker that he paid the principal in discharge of the notes was not admissible, in connection with the receipt, to show that the two together amounted to a composition of the whole debt. *Hart v. Freeman*, 42 Ala. 567.

§ 298. Contracts of Sale or Exchange.

§ 298 (1) Real Property.

Mistake as to Number of Acres.—The condition of a bond described land by metes and bounds, and stated a sale at a gross price. Held that, there being no fraud, it was inadmissible at law to prove by parol that the sale was at a certain price per acre, and that, in computing the entire sum, there was a mistake as to the number of acres. *Dozier v. Duffee*, 1 Ala. 320.

Identification of Land.—Where defendant contracted in writing to sell complainant "My five acre tract of land at Arlington Station, Gate City car line," plaintiff could show that defendant resided in Jefferson county, Ala., that he owned at Arlington Station, Gate City car line, in that county, one particular five acre tract of land on the day he made the contract and no other, and that at the time of making the contract defendant delivered to plaintiff a deed by which the land had been conveyed to defendant describing the five acres of land as situated at "Arlington Station, Gate City car line," which was the only five acres of land in one body which defendant owned on said day at that point, to identify the land described, which description was not so defective as to render the contract unenforceable. *Bender v. Barton* (Ala.), 62 So. 732.

Incomplete Entry in Auctioneer's Record.—Where lands are sold at auction, and the entry on the auctioneer's book

does not show the name of the person on whose account the sale is made, nor refer to any other writing in which the name is stated, the sale is void under the statute of frauds (Code, §§ 1551-52), and the defective entry can not be aided by parol evidence. *Knox v. King*, 36 Ala. 367.

§ 298 (2) Personal Property in General.

Articles Suitable for Particular Purpose.—In the absence of fraud, parol evidence is not admissible to show that articles called for by a written contract of sale were intended to be suitable for a particular use. *Whitehead v. Lane & Bodley Co.*, 72 Ala. 39.

Contract to Resell Chattels.—A written contract by which one bound himself to "resell" certain chattels which he had purchased, and for which he had received a bill of sale, can not be contradicted by parol, unless the contract was obtained by fraud or entered into by mistake or surprise. *McKinstry v. Conly*, 12 Ala. 678.

Substitution of Contracts.—A contract which parties intended to make, but did not make, can not be set up in the place of one which they did make, but did not intend to make; and, where a promise to pay for goods to be furnished to another is unlimited as to quality or amount, the promisor's liability is not affected by his intention that goods of a certain character only should be furnished and the fact that this intention was known to the promisee. *Sanford v. Howard*, 29 Ala. 684.

§ 299. Bills and Notes.

Parol Evidence to Vary Terms of Note.—The legal effect of a promissory note can not be varied by proof of a contemporaneous oral agreement that the note should be discharged in any other manner than by the payment of money according to its terms. See *Patrick v. Petty*, 83 Ala. 420, 3 So. 779; *Tuscaloosa, etc., Oil Co. v. Perry*, 85 Ala. 158, 4 So. 635, cited in note in 43 L. R. A. 459.

Prior Inconsistent Terms.—The makers of a promissory note, payable absolutely at a time certain, can not introduce parol evidence of prior or contemporaneous stipulations, that are inconsistent with the terms of the note, to defeat a recovery by the payee. *Gliddens v. Harrison*, 59 Ala. 481.

"The note was converted from an absolute, into a conditional promise, and the contingency on which it was to become an operative promise, might occur before, or not until long after the time of payment appointed in it. The admission of the evidence, was an infringement of the rule, that contracts in writing can not be varied or contradicted by parol evidence prior or contemporaneous, inconsistent or repugnant stipulations. *West v. Kelly*, 19 Ala. 353; *Litchfield v. Falconer*, 2 Ala. 280." *Gliddens v. Harrison*, 59 Ala. 481, 482.

Statements of Maker at Time of Executing Note.—In an action on an instrument in the form of a note, where it appeared that the instrument had not been legally executed, what was said by the alleged maker when it was alleged to have been executed could have no bearing on its validity, and was properly excluded. *Penton v. Williams*, 163 Ala. 603, 51 So. 35.

Parol Agreement as to Payment.—In an action on a note payable in money, evidence of an antecedent parol agreement is not admissible to show that such note was to be discharged by crediting the amount on the indebtedness of another party, and that defendant, after the maturity of the note, had made such credit. *Clark v. Hart*, 49 Ala. 86, cited in note in 31 L. R. A., N. S., 238.

Place of Payment.—Where a note was made payable at the Branch Bank of Montgomery, parol evidence to prove that at the time the note was made it was agreed that, if the note was sent to the bank, the maker should be exonerated from payment, is inadmissible, because it contradicts one of the terms of the note. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

When a note was made payable at the Branch Bank at Montgomery, parol evidence to prove that at the time the note was made it was agreed that, if the note was sent to the bank, the maker should be exonerated from payment, is inadmissible, because it contradicts one of the terms of the contract. The case might be varied by proof that the notes, under this promise, were fraudulently obtained. *Montgomery R. Co. v. Hurst*, 9 Ala. 513.

Note Given for Hire of Negro.—That a note was given for the hire of a

negro, and that it was agreed between the parties that as the negro was sickly the hirer should deal tenderly with him, and that the value of the time which should be lost by him on account of sickness should be deducted from the promissory note, and that he was sick for a long time during the hiring, constitute no defense in such an action, and a plea setting up such facts is demurrable. *Caldwell v. May*, 1 Stew. 425, cited in note in 43 L. R. A. 461.

Right to Make Deductions.—A parol agreement between the parties to a note given in payment of the purchase price of lands, which was payable absolutely at stated periods, that if any repairs were necessary to the mills or dam upon the property purchased within three years they were to be made by the purchaser and allowed out of the last payment, is inadmissible in evidence in an action on the note, as it would tend to add to or diminish the written contract. *Beard v. White*, 1 Ala. 436, cited in note in 43 L. R. A. 461.

§ 300. Indorsements and Transfers of Bills or Notes.

Agreement for Indulgence of Maker.—In an action by an indorsee against an indorser, parol evidence of an agreement at the time of the indorsement that the maker should be indulged two years is not admissible in excuse of due diligence. *Sommerville v. Stephenson*, 3 Stew. 271.

Waiver of Statutory Rights.—The indorser executed the following agreement on the back of the note: "I bind myself and my representatives not to take advantage of the statute by which indorsers are relieved from liability after the first court ensuing the maturity of the note." Held that, such agreement being unambiguous, parol proof was inadmissible to vary it. *Foster v. Stafford*, 14 Ala. 714.

§ 301. Contracts of Guaranty and Suretyship.

See the title, PRINCIPAL AND SURETY.

§ 302. Contracts of Insurance.

§ 302 (1) In General.

Oral Representations of Agent.—In an action on a life insurance premium note, insured could not show oral representa-

tions, promises, etc., by insurer's agent, who took the written application for insurance, inconsistent therewith, where the application recited that no statement had been made to or by any agent of insurer inconsistent with the application, etc. *Miles v. Sledge*, 157 Ala. 528, 47 So. 595.

§ 302 (2) Beneficiaries.

Inclusion of Other Beneficiaries.—A policy of life insurance is not more open to variation by parol evidence than any other written instrument; and, where the beneficiaries are therein described as the children of the assured, parol evidence can not be received to show that a grandchild was intended to be included. *Russell v. Russell*, 64 Ala. 500.

§ 303. Contracts of Carriage.

See the title CARRIERS.

Bill of Lading.—Parol evidence is inadmissible to contradict a bill of lading, in so far as it is a contract of carriage. *McTyer v. Steele*, 26 Ala. 487; *Cox v. Peterson*, 30 Ala. 608.

A bill of lading issued by a carrier contemporaneously with the acceptance of freight for transportation is, in the absence of fraud or mistake, a legal, binding contract, and can not be varied by parol. *Louisville & N. R. Co. v. Williams*, 5 Ala. App. 615, 59 So. 673.

"While, as a general rule, a contract, complete in all its parts, which relates to an executory agreement, and which is delivered by one of the parties to the other part, and which is retained by such party, will be conclusively presumed to contain within itself the sole memorial of the contract (*Cornish v. Suydam*, 99 Ala. 620, 13 So. 118; *Mylin v. King*, 139 Ala. 319, 35 So. 998), nevertheless it is also a well recognized rule that, where several writings are made as part of one transaction, they will be read together, each being construed with reference to the other; and this is true whether all of the writings are made on the same day or not. 9 Cyc., p. 580, § 6, and authorities cited. In fact, it is but a legal truism that when two writings are connected by the reference of one to the other they may and should, ordinarily, be construed as constituting one and the same contract in the same manner as if embodied

in one instrument. 2 Mayfield's Dig., p. 762, § 155, and authorities there cited." *Louisville, etc., R. Co. v. Williams*, 5 Ala. App. 615, 59 So. 673, 678.

A bill of lading as a contract must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc. *Alabama, etc., R. Co. v. Norris*, 167 Ala. 311, 52 So. 891.

A bill of lading as a receipt is open to explanation or modification by parol evidence. *Alabama, etc., R. Co. v. Norris*, 167 Ala. 311, 52 So. 891.

"A bill of lading is of a dual character and effect; one is that of a receipt, and the other, that of a contract. As a receipt, like other receipts, it is open to explanation or modification by parol evidence; as a contract it like other contracts must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate, route, etc. *Louisville, etc., R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 803; *McTyer v. Steele*, 26 Ala. 487; *Wayland v. Mosely*, 5 Ala. 430; *Tallassee Falls Mfg. Co. v. Western Railway*, 128 Ala. 167, 29 So. 203." *Alabama, etc., R. Co. v. Norris*, 167 Ala. 311, 52 So. 891, 892.

In an action against a common carrier, the bill of lading must be taken as the sole evidence of the final agreement of the parties, and can not be varied by parol evidence. *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama*, 117 Ala. 520, 23 So. 139.

"In the transportation of freight [as this court has said in *Louisville, etc., R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 803], the bill of lading embodies the contract between the shipper and the carrier, and when delivered by the carrier and received by the shipper, its terms, stipulations and conditions are as binding on the parties thereto, as are the terms, stipulations and conditions of any other

written contract. A bill of lading is, therefore, to be taken as the sole evidence of the final agreement of the parties, by which their duties and liabilities must be regulated, and parol evidence is inadmissible to vary its terms or legal import." *Tallassee Falls Mfg. Co. v. Western Railway*, 117 Ala. 520, 23 So. 139, 140.

"Mr. Greenleaf on the same subject says, 'Oral proof can not be substituted for the written evidence of any contract, which the parties have put in writing. Here, the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in negotiable securities; and in all cases of written contracts, the writing is tacitly agreed upon, by the parties themselves, as the only repository and the appropriate evidence of their agreement. The written contract is not collateral, but is of the very essence of the transaction.' 1 *Greenl. Ev.* § 87." *Tallassee Falls Mfg. Co. v. Western Railway*, 117 Ala. 520, 23 So. 139, 140.

Contract of Other Than Person Named.—Parol evidence is admissible to show that a bill of lading is the contract of other persons than him in whose name it is executed. *McTyer v. Steele*, 26 Ala. 487.

§ 304. Receipts.

§ 304 (1) In General.

General Rule.—A receipt, being a mere acknowledgment of payment, is subject to parol explanation or contradiction. *Kirksey v. Bates*, 1 Ala. 303; *Pettus v. Roberts*, 6 Ala. 811; *McKeagg v. Collehan*, 13 Ala. 828; *Driver v. Hudspeth*, 16 Ala. 348; *Cowan v. Sapp*, 74 Ala. 44; *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756.

"Receipts, whether for money paid or for other matter or thing, are regarded as informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence. 2 *Whart. Ev.*, § 1064; 1 *Greenl. Ev.*, § 305; 2 *Pars. Cont.* 555; 1 *Brick. Dig.*, p. 860, §§ 809, 810." *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756, 759.

A receipt, whether for money or other matter or thing, is regarded as an informal writing, open to explanation, modification, or contradiction by parol evi-

dence. *Willoughby v. Hannon*, 156 Ala. 585, 47 So. 241.

"The rule is well settled that 'receipts, whether for money or for other matter or thing, are regarded as informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence.' * * * Such a paper may be of a twofold character. It may be not only an acknowledgment or admission of the receipt of money or other thing in payment or satisfaction of a debt, but it may contain a contract distinct and independent, or, as expressed by Mr. Greenleaf, 'terms, conditions, and agreements or assignments.' *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756." *Willoughby v. Hannon*, 156 Ala. 585, 47 So. 241.

"The only theory upon which that provision of the receipt relating to the acceptance by defendant can be held to be a contract, and, therefore, not subject to explanation, modification, or contradiction by parol evidence, must be predicated upon the idea that it operated as a release of plaintiff of the contract obligation assumed by him to procure and deliver the policy in the amount and of the kind averred in the pleas. In short, unless the recital of acceptance in the receipt rose to the dignity of a contract between the parties, the defendant was not precluded from showing by parol, at the time of its execution, all the facts and circumstances inducing his acceptance of the policy described in the receipt that was delivered. The receipt has in it no words of release, nor words expressive of an intent to release the plaintiff from his obligation to procure and deliver the policy he contracted to procure and deliver, other than such as may be implied from the use of the words 'accepted' and 'the same is hereby accepted.' Should such an implication be indulged, and this language accorded the dignity of a release or contract, it would be nudum pactum, for the want of a valuable consideration to support it, which is as necessary to support a release as to support any other contract. *Mobile, etc., R. Co. v. Owen*, 121 Ala. 505, 25 So. 612." *Willoughby v. Hannon*, 156 Ala. 585, 47 So. 241.

Application of Payment.—A receipt reciting that the money is paid on a book

account is not conclusive, but it may be shown that the debtor did not agree to the payment being applied on such account, but directed it to be applied on a mortgage. *Lynn v. Bean*, 141 Ala. 236, 37 So. 515.

"The receipt given on the payment does not describe the judgment or execution, nor refer to either, but is descriptive only of a promissory note corresponding with that upon which the judgment was founded. A receipt for the payment of money in peculiarly open to parol evidence. It is not in fact regarded as a contract in writing, but as an acknowledgment or admission of the party giving it,—of but little more force or dignity than a mere verbal declaration. Misdescriptions, or imperfect, inaccurate references to the account or debt on which the money is received, can be corrected or supplied by parol evidence. 2 Parsons' Contracts, 535; 1 Brick. Dig., 860, § 209. And whatever may be its terms,—though purporting to be in full demands,—it is subject to explanation or contradiction; and by parol it may be shown that it was given in mistake of fact, or by surprise; or that it was obtained fraudulently, by misrepresentation, or by a concealment of material facts. *McKeagg v. Collehan*, 13 Ala. 828." *Cowan & Co. v. Sapp*, 74 Ala. 44, 50.

Correcting Misdescription of Debt.—A receipt given on the payment of money, whatever may be its terms, is open to explanation or contradiction by parol evidence; and any misdescription, or defective description of the debt, on which the payment was made, may be corrected or supplied by parol evidence. *Cowan & Co. v. Sapp*, 74 Ala. 44.

Receipt Indorsed on Order of Payment.—Though a receipt for the amount of a debt be indorsed on an order drawn on a third person, and given in payment, and found in the possession of the person drawn on, it is not conclusive, but the creditor may explain it, and show that it was not paid. *Gayle v. Randle*, 1 Stew. 529.

Explanation of Term "with Interest."—A receipt in these terms, to wit, "Received of A. two notes of hand on B. and C., amounting to \$1,750, due January 1, 1838, which we are to collect, or return

the same to A. with interest from the time it was due," is open to explanation by parol evidence, so as to show whether the words "with interest" were intended to refer to the return of the money by the signers, or to the amount which was to be collected from the notes. *Hogan v. Reynolds*, 8 Ala. 59.

Official Receipt.—The receipt of a clerk of a court, like that of any other person, is open to explanation by extrinsic proof. *Haynes v. Wheat*, 9 Ala. 239.

§ 304 (2) Receipt in Full on Compromise, Settlement, or Discharge.

Receipt Discharging Mortgage.—A mortgagee, in an action against one who purchased mortgaged property on the strength of a receipt showing the debt secured to have been paid in full, was not estopped from denying the satisfaction of the mortgage, but might explain or contradict the receipt. *Hart v. Sharpton*, 124 Ala. 638, 27 So. 450.

Amount Received as Compromise.—Code 1896, § 1805, provides that receipts must have effect according to the intention of the parties. Section 1806 provides that all compositions of debts must operate according to the intent of the parties. Plaintiff agreed to deliver timber to defendant for \$8.50 per thousand feet as delivered, with fifty cents per thousand additional if the whole sum did not amount to \$4,220. The amount received by plaintiff was \$3,935. He had signed receipts reciting that he had received specified sums in full for logs sold to date. Held, since § 1805 does not change the probative force of a receipt, and since § 1806 does not apply to mere receipts, as they have none of the elements of a composition, parol evidence was admissible to explain them, and to show whether the additional sum per thousand was included. *Stegall v. Wright*, 38 So. 844, 143 Ala. 204.

§ 304 (3) Writing Containing Matter Other than Receipt.

Receipt Having Force of Contract.—In the absence of fraud or mistake, parol evidence is inadmissible to contradict the plain terms of a receipt. *Murphy v. Black & Laird*, 148 Ala. 675, 41 So. 877.

"The general rule is that receipts are

open to explanation by parol evidence. But the exception to the rule is that, when a receipt imports a contract, it can not be explained by parol. *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756. However this may be, there is no rule, in the absence of fraud or mistake, that will permit parol evidence to contradict plain terms of a receipt. There is no error in the rulings of the court on the admissibility of evidence. Here the receipt is unambiguous, and it was the duty of the trial court to interpret it and declare its effect to the jury. Its legal effect is an acquittance for any trespasses that may have been committed by the defendant and afforded a complete defense puis darrein continuance, under the facts and pleadings in this case." *Murphy v. Black*, 148 Ala. 675, 41 So. 877, 878.

In so far as a written instrument was a receipt and not a contract, it would be contradicted and explained by parol evidence. *Jones Cotton Co. v. Snead*, 169 Ala. 566, 53 So. 958.

"That a written instrument can not be varied or contradicted by parol testimony, is a familiar rule of evidence, daily acted on in courts of justice, and of most beneficial tendency. Receipts have been long considered as an exception to the rule. They are considered as admissions, and may be contradicted, varied or explained by parol testimony. The question, whether the recital of the consideration in a deed stood upon the same footing, and to what extent it was open to explanation has long been a vexed question. This question was considered by this court in *Mead v. Steger*, 5 Port. 498, and it was there held, as the result of the cases, that where a moneyed consideration was expressed in a deed, it might be shown to be greater or less than stated; but that a different consideration could not be proved. In *Saunders v. Hendrix*, 5 Ala. 224, we held that an acknowledgment in the body of the deed that the consideration money was paid, was a receipt for money merely, and open to explanation by parol proof as any other receipt for money." *Pettus v. Roberts*, 6 Ala. 311, 812.

§ 304 (4) Receipt of Premium on Insurance.

Payment by Note.—A receipt for the

initial premium on a policy of insurance, delivered to the assured by the agent of the insurer at the time of the delivery of the policy, when introduced in evidence in an action on the policy, is open to explanation by parol evidence showing that no actual payment was made, but that the agent took the insured's note, which had never been paid, though past due; there being on the face of the receipt a condition that failure to pay the note at maturity operated to end the policy. *Batson v. Fidelity Mut. Life Ins. Co.*, 155 Ala. 265, 46 So. 578.

§ 304 (5) Receipt for Taxes.

Two Receipts for Same Payment.—A receipt is merely prima facie evidence of payment, and is no more conclusive when given in transactions between officials in the course of their official duties than in private transactions; and hence, in an action against a tax collector for failure to turn over taxes collected, it may be shown that two receipts given the collector by the treasurer were for the same payment. *Walling v. Morgan County*, 126 Ala. 326, 28 So. 433, cited in note in 53 L. R. A. 541.

§ 304 (6) Receipt for Property by Carrier.

A receipt in full for shipment of lumber is open to explanation or contradiction by parol evidence; but testimony of the person who signed the receipt, that the matter of interest on the amount due for lumber was not mentioned, and denying that the execution of the receipt had the effect which the law imputes to it, does not contradict the receipt, or tend to show that there was any agreement on the subject of interest, other than that expressed in writing. *Hunnitt Lumber Co. v. Mobile, etc., R. Co.*, 2 Ala. App. 436, 57 So. 73.

"We fail to find any error in the ruling of the court upon the objection to the question propounded to the plaintiff as a witness, touching the general custom in shipping lumber when dressing in transit arrangements were allowed. The terms of a written contract, when fully set forth, and the obligations assumed thereunder can not, as a matter of course, be varied by proof of a custom; nor can a carrier, when otherwise liable under

his undertaking, avoid liability by parol evidence of a custom which is in opposition to the established principles of law. But in all contracts 'as to the subject matter of which known usages prevail, parties are supposed to proceed with the tacit assumption of these usages; and parol evidence of custom and usage is always admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with this known and established usage.' *Boon & Co. v. Steamboat Belfast*, 40 Ala. 184, 186. In the instant case, there was no attempt to vary the written contract by proof by parol of a custom established at Brent, Ala. We fail to see that appellant was injured in any way by his answer to the question objected to, and for this reason, also, this assignment of error is unavailing to reverse the case." *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 555, 56 So. 862, 864.

§ 305. Releases.

Release of Right to Slaves.—Plaintiff was living separate from his wife, and brought suit against her father to recover slaves received by plaintiff on his marriage, but which were in defendant's possession. On the trial of the action, defendant set up the release of plaintiff in defense, and plaintiff offered to prove that the release was given on the promise of defendant to bring about a reconciliation with his family, by the testimony of a messenger between the parties in the negotiation, there having been no personal interview between them. Held, that it was admissible. *Turnipseed v. McMath*, 13 Ala. 44.

§ 306. Writing Incomplete on Its Face.

Showing Consistency of Additional Stipulations.—Where a written contract does not purport to contain all the stipulations between the parties, parol evidence is admissible to show such additional stipulations as are not inconsistent with the writing. *West v. Kelly's Ex'rs*, 19 Ala. 353; *Powell v. Thompson*, 80 Ala. 51.

"But if it be apparent that the instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received

to prove the entire contract, otherwise the contract could not be brought before the court. *Cowen & Hill's Notes to Phil. Ev.*, 1471-2-3. But the parts of the agreement proposed to be proved by parol must not be inconsistent with, or repugnant to, the intention of the parties, as shown by the written instrument; for, to receive parol proof of a part not reduced to writing, which is directly repugnant to the intention of the parties, as expressed in the written instrument, would at once annul the rule that parol evidence can not be received to contradict or vary the terms of a written agreement. *Jeffrey v. Walton*, 1 Starkie, 267; *Cowen & Hill's Notes*, 1472." *West v. Kelly*, 19 Ala. 353, 354.

"Applying these general rules to the instrument sued on, and to the parol proof offered by the defendants, which was rejected by the court, I can perceive no error. The note shows upon its face that it was given for professional services, to be afterwards rendered, but it is payable at a time certain, and is, in legal effect, a promissory note. The parol proof, however, tended to show that it was the agreement of the parties that the note should not be paid, unless the payees, who are attorneys at law, should be successful in the suit they were to bring, and for the bringing of which the note was given. To allow this proof would be to allow parol evidence to change the intention of the parties as expressed in the note. It would not only alter the time of its payment, but would show that the payment of the money, according to the contract, was dependent on a condition or a contingency, and thus the legal effect of the instrument as a promissory note would be destroyed." *West v. Kelly*, 19 Ala. 353, 354.

To Cure Variance in Bond.—The variance in a bond reciting the issuance of an execution against L., when in fact it issues against him and others, and the omission to conform the sums recited in the execution, may be cured, and the matters omitted supplied by parol evidence. *Meredith v. Richardson*, 10 Ala. 828.

To Show Entire Contract.—Though parol testimony is inadmissible to alter the terms of a written contract, if it is

apparent the writing does not contain all the stipulations of the parties, parol testimony is admissible to show the entire contract. *Roquemore v. Vulcan Iron Works Co.*, 151 Ala. 643, 44 So. 557.

A memorandum, which recited that it was incomplete and was to be perfected by a later writing, which was never done, may be explained by parol testimony. *McCullars v. Jacksonville Oil Mill Co.*, 169 Ala. 582, 53 So. 1025.

"The written memorandum was not such an instrument as that its terms could not be explained by parol evidence. It recites that it was incomplete, and was to be perfected by later writings, which was never done. *Maness v. Henry*, 96 Ala. 454, 11 So. 410. It was also contended that the memorandum had been altered." *McCullars v. Jacksonville Oil Mill Co.*, 169 Ala. 582, 53 So. 1025, 1026.

To Fill Blank in Attachment Bond.—In an action on an attachment bond, in which the penalty was left blank, parol evidence is not admissible to show what sum should have been specified. *Copeland v. Cunningham*, 63 Ala. 394.

To Identify Disease of Slave.—Where a slave was, by a writing, warranted sound, venereal disease excepted, the vendee was allowed to show a verbal representation as to the particular kind of venereal disease he was afflicted with, and as to its curability, as bearing on the question of fraud. *Blackman v. Johnson*, 35 Ala. 252.

§ 307. Writing Showing Alteration.

Erasure or Alteration of Date.—Evidence to explain an erasure or alteration of the date of a written instrument is admissible, where it is offered in evidence by the party claiming under it. *Connally v. Spragins*, 66 Ala. 258.

Interlineation upon Notes.—In a suit between an attaching creditor and one claiming by virtue of a sale from the debtor, plaintiff having introduced the debtor's notes, which do not show that they were the notes on which the attachment was sued, it is not error to allow plaintiff to read an interlineation made immediately after the execution of the notes, with consent of the debtors, which stated the debt for which the notes were given. *Mayer v. Clark*, 40 Ala. 259.

§ 308. Date of Instrument.

True Date of Execution.—Parol evidence is admissible to show that a note was in fact executed on a day different from that shown on its face. *Burns v. Moore*, 76 Ala. 339.

A deed may be shown to have been executed on a day different from its date. *Miller v. Hampton*, 37 Ala. 342.

Where two instruments were executed as part of the same transaction, parol evidence is admissible to show the true date on which either was executed, though different from the date appearing on the face of the instrument, and though the instruments were not executed on the same day. *Robbins v. Webb*, 68 Ala. 393.

It is competent to show by parol evidence that a bond was executed on a different date from that stated in it. *Miller v. Hampton*, 37 Ala. 342.

The presumption of law that a deed containing on its face no indications of falsity was executed on the day of its date may be controverted by evidence aliunde. *Nelson v. Brown*, 164 Ala. 397, 51 So. 360.

"When there are no indications of falsity on the face of a deed, the presumption of law is that it has been executed upon the day of its date. This presumption is controllable, of course, by evidence aliunde, but the mere suggestion of fraud or falsity does not put upon the party producing it the burden of proving that the deed was actually made upon the day of its date. *Smith v. Porter*, 10 Gray (Mass.) 66; *Pullen v. Hutchinson*, 25 Me. 249; *Costigan v. Gould*, 5 Denio (N. Y.) 290; *McFarlane v. Loudon*, 99 Wis. 620, 75 N. W. 394, 67 Am. St. Rep. 883; *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460, 68 Am. St. Rep. 399; *Aldridge v. Branch Bank*, 17 Ala. 45, 47; *Hauerwas v. Goodloe*, 101 Ala. 162, 13 So. 567." *Nelson v. Brown*, 164 Ala. 397, 51 So. 360, 362.

Instrument Dated on Sunday.—In an action on an instrument dated on Sunday, it may be proved, if alleged, that the instrument was in fact executed and delivered on a different day. *Aldridge v. Branch Bank*, 17 Ala. 45.

§ 309. Sustaining Validity of Instrument.

Variance between Execution and Judgment.—Parol evidence is admissible to explain any immaterial variance between an execution and the judgment on which it was issued. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

"Parol evidence is always admissible to point out and connect the writing with the subject-matter, and identify the object proposed to be described. And so, such evidence is admissible to explain away any mere immaterial and not substantive variations between an execution and the judgment, on which it issued. *Guilmartin v. Wood*, 76 Ala. 204; *Corbitt v. Reynolds*, 68 Ala. 378; *Pope v. Pickett*, 51 Ala. 584. And, on still higher grounds, the execution docket of the clerk is admissible, in such connections, to identify and unite a judgment and executions which issued on it, for, this is record evidence, such as the law requires to be kept, for such purposes, among others. Code, § 768, subd. 7." *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777, 779.

Supplying Omitted Names.—The supposed variance in omitting to set out the names of all defendants in the forthcoming bond taken on an execution, and to conform the sums recited to the execution, may be supplied by parol evidence. *Meredith v. Richardson*, 10 Ala. 828.

Parol Evidence to Show Official Character of Officer.—The warrant should be valid on its face to justify an officer in serving it, it could not be aided as to its validity by parol evidence that the person who signed it was a justice of the peace. *Reach v. Quinn*, 159 Ala. 340, 48 So. 540.

"We do not think that the paper can be aided as to its validity by parol evidence of the fact that the J. W. Jones who signed it was a justice of the peace. The warrant should be valid on its face to justify the officer in executing it. In this connection, see *Oates v. Bullock*, 136 Ala. 537, 33 So. 835." *Reach v. Quinn*, 159 Ala. 340, 48 So. 540, 541.

To Validate Description of Land.—Before pronouncing a deed void for uncertainty in the description of the lands conveyed, the court is bound to receive parol evidence of the circumstances sur-

rounding the grantor, which have relation to the subject-matter, when the conveyance was executed and interpret the words of the deed in the light of such circumstances. *Clements v. Pearce*, 63 Ala. 284.

Appointment of Guardian Ad Litem.—Where the probate record in a settlement of a guardian's account fails to show the appointment and the appearance of a guardian ad litem for the ward, the defect can be supplied by parol testimony. *Hutton v. Williams*, 60 Ala. 133.

Record of Probate Court.—Where a will is set out in a record, and is described as dated November 18, 1873, and subsequently, in the judgment of the court, it is stated that it was executed in 1875, the record also showing that testator died prior to 1875, it is a mere clerical error, which the record itself corrects, and parol evidence is inadmissible for that purpose. *King v. Martin*, 67 Ala. 177.

Erroneous Entry of Case.—When an order has been made granting a new trial in a case which has been entered erroneously in the motion docket and minute entry by adding the name of a person as defendant who is not a party in the cause, parol evidence is admissible, on a motion to strike the cause from the docket, to show the connection of the order with the case. *Ex parte Nall*, 36 Ala. 299.

§ 310. Connection of Contemporaneous Writings.

Connection between Two Contracts.—Where there are two written contracts in question, it is competent to show by parol that they relate to one and the same transaction and constitute in effect but one contract, without offending the rule against varying a written contract by parol. *Rock Island Sash & Door Works v. Moore & Handley Hardware Co.*, 147 Ala. 581, 41 So. 806.

Exchange of Contracts.—Plaintiff introduced a writing signed by defendant, agreeing to pay him a salary for certain months, and another writing, signed on a different day by himself, agreeing to work for defendant for the same months at the same salary. Held not error to allow plaintiff to show that the instru-

ments were exchanged at the same time. *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723.

Purpose of Two Bills of Sale.—It may be shown by parol evidence that two bills of sale executed to each other by two parties respectively were in fact a means only of affecting an exchange of the chattels conveyed therein. *McGehee v. Rump*, 37 Ala. 631.

Purpose of Two Notes.—Parol evidence is admissible to show that two notes, although given at different dates, were for purchase money of a single sale, and that the lands were sold as an entirety under one contract. *Reader v. Helms*, 57 Ala. 440, overruling *Gaines v. Shelton*, 47 Ala. 413.

Connecting and Identifying Writings.—While the contract may consist of two or more writings, they must be connected by clear reference in one to the other; and parol evidence is inadmissible to connect them, but it may in such case be resorted to to identify the writing referred to. *Alabama Gold Life Ins. Co. v. Oliver*, 82 Ala. 417, 2 So. 445.

§ 311. Matters Not Included in Writing or for Which It Does Not Provide.

§ 311 (1) In General.

"If any material term of a written contract, has been omitted by the parties, it can not be supplied by parol. To permit this, would be at once to abrogate the statute of frauds, as was held by this court, in the case of *Adams v. McMillan*, 7 Port. 73. See also, the case of *Clinian v. Cook*, 1 Schoale & Lefroy, 22, where all the case on this subject are learnedly examined, and *Beard v. White*, 1 Ala. 436." *Ellis v. Burden*, 1 Ala. 458, 464.

"Parol evidence is said to be admissible to prove collateral and independent facts, about which the writing is silent. 1 Phil. Ev. 562, 563." *Self v. Herrington*, 11 Ala. 489, 491.

§ 311 (2) Judicial Records and Proceedings.

To Procure Amendment of Record.—On application to amend a judgment nunc pro tunc at a subsequent term, parol evidence is admissible to supply the deficiencies of the record. *Tanner v. Hayes*, 47 Ala. 722.

Identity of Matters Litigated in Different Actions.—Where the record of a judgment relied on as a bar to another action does not show on its face that the questions litigated and settled under the former suit were the same as those in the second suit, that fact may be shown by parol evidence. *Strauss v. Meertief*, 64 Ala. 299. See the title JUDGMENTS.

§ 311 (3) Official Records and Proceedings.

Date of Recording Instrument.—Under Code 1886, § 1793, making instruments authorized to be recorded operative as a record from their delivery for registration to the probate judge; and § 1792 (Code 1896, § 986), requiring him to certify on recorded conveyances the date of the receipt and record, the date of recording an instrument may be proved by parol where the judge's certificate of registration indorsed on the instrument fails to disclose that fact. *Truss v. Harvey*, 120 Ala. 636, 24 So. 927.

§ 311 (4) Deeds.

Failure to Designate Township.—In ejectment, it is not competent for defendant, in testifying, to look at the deed under which he claims, and which fails to designate whether the land is in a south or north township, or in an east or west range, and to state in which range and in which township the land is actually located. *Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

§ 311 (5) Mortgages or Security.

Mortgage for Supplies.—In an action to recover personal property under a mortgage given for supplies furnished and to be furnished defendant by plaintiffs, evidence is admissible of an agreement, made at the time the mortgage was given, as to the times when and quantities in which the supplies were to be furnished; the mortgage being silent thereon. *Smith v. Rice*, 56 Ala. 417.

§ 311 (6) Contracts for Buildings and Other Works.

Character and Amount of Material Furnished.—Where plaintiff sued on a contract for repairing a building, and the contract did not specify the character and amount of material to be furnished,

nor show by what time the work was to be completed, it was competent to prove such facts by parol evidence, in so far as they did not contradict the terms of the contract. *Whatley v. Reese*, 128 Ala. 500, 29 So. 606.

"It will be noticed, that the contract introduced in evidence, admissible as tending to show the value of the labor and materials furnished, is loosely and inartificially drawn. It does not specify in detail—but mentions in very general terms—what the work to be done and the character and amount of the materials to be furnished were; nor does it show by what time the work was to be completed. These details of the work and materials are not set out in the written agreement, but rested in parol. To the extent that such parts of the agreement were not contradictory of that which was written, they were susceptible of parol proof. *Murphy v. Farley*, 124 Ala. 279, 27 So. 442, 446; *Huckabee v. Shepherd*, 75 Ala. 342; *Powell v. Thompson*, 80 Ala. 51. The court allowed liberal latitude on both sides in the introduction of evidence, to clear up the obscurities of the writing; but at last, for this purpose, the evidence was in conflict." *Whatley v. Reese*, 128 Ala. 500, 29 So. 606, 608.

Identification of Property to Be Conveyed for Labor.—Where A. and B. agreed in writing that A. should do the brick work and plastering on sixteen tenements, and on completion B. was to give him a deed for three of the tenements, parol evidence is admissible to show which of the three tenements were to be conveyed. *Ellis v. Burden*, 1 Ala. 458.

§ 311 (7) Contracts of Sale.

Weight of Cotton Bales.—Where a contract for the sale of cotton did not specify the weight of the bale, the buyer could show, in an action for breach under allegations of the complaint to that effect, that the bales contemplated were those of customary weight, and what that weight was. *Smith v. Wilson Mercantile Co.*, 6 Ala. App. 171, 60 So. 484.

§ 311 (8) Bills and Notes and Indorsement Thereof.

Agreement to Pay Discount.—In assumpsit to recover the discount on depre-

ciated bank notes received by plaintiff from defendant on a settlement had between them, parol proof is admissible to show that, at the time of the settlement, defendant promised to pay this discount, although he gave his duebill for the balance found against him, estimating them at par. *Mills v. Geron*, 22 Ala. 669.

Purpose of Signing Conditional Note.

—Parol proof is admissible to show that a conditional note was signed by the maker, with the distinct admission on the part of the payee that it did not contain the terms of their agreement, and the understanding that they should afterwards, at a convenient time, draw another instrument which would truly express the contract. *Hopper v. Eiland*, 21 Ala. 714.

§ 311 (9) Contracts of Carriage.

Parol Evidence to Show Route of Shipment.—Where a bill of lading for live stock did not specify the route over which the shipment was to be conveyed, parol evidence of directions by the consignor that the shipment should be delivered by the initial carrier to a particular connecting carrier, was not objectionable as tending to contradict the bill of lading. *Louisville & N. R. Co. v. Duncan & Orr*, 137 Ala. 446, 34 So. 988.

§ 312. Parties to Instrument or Obligation.

Party Signing Instrument.—A writing signed by defendant reciting that he has received a relinquishment of a lease "for consideration of \$150. to be paid in ten days," binds defendant, and parol evidence that he acted as agent, and intended to bind another, is immaterial. *Dexter v. Ohlander*, 93 Ala. 441, 9 So. 361.

Parol testimony is inadmissible to show that one signing a written instrument signed by others who are recited therein to be the parties thereto intended to bind himself thereby. *Brown v. O'Byrne*, 153 Ala. 621, 45 So. 129.

"It is too well settled in this state to admit of controversy that where an instrument in writing purports on its face to be made by certain parties named therein, and the signature of a party not named therein appears to the instrument, it is not the deed or contract of said last named party, and parol testimony is not admissible to show that he intended to

bind himself thereby. *Fite v. Kennemer*, 90 Ala. 470, 7 So. 920; *Hammond v. Thompson*, 56 Ala. 589; *Blythe v. Dargin*, 68 Ala. 370; *Davidson v. Alabama Steel, etc., Co.*, 109 Ala. 383, 19 So. 390; *Agr. Bank of Miss. et al. v. Rice et al.*, 4 How. (U. S.) 225, 11 L. Ed. 949; *Lancaster et al. v. Roberts et al.*, 144 Ill. 213, 33 N. E. 27; *Evans v. Conklin et al.*, 71 Hun 536, 24 N. Y. Supp. 1081; *Blackmer v. Davis*, 128 Mass. 538. It may be added that to allow the liability as guarantor to be established by parol in this case would be violative of the statute of frauds." *Brown v. O'Byrne*, 153 Ala. 621, 45 So. 129.

Character as Agent.—Notwithstanding there is evidence a contract by which a borrower formally constituted a certain person his agent to negotiate a loan, he may show that such person in fact acted as the agent of the lender. *State v. Bristol Sav. Bank*, 108 Ala. 3, 18 So. 533.

Lease Made by Administrator.—Parol evidence is admissible to show that a written lease purporting on its face to be made by an administrator in his own name was made for the benefit of the estate. *Russell v. Erwin's Adm'r*, 41 Ala. 292.

Parties Not Signing Instrument.—Parol evidence is not admissible to show that a sale was made by two persons, Where the bill of sale was executed by one of them alone. *Wren v. Wardlaw*, Minor 363.

Members of Partnership.—In an action on a written contract for carrying merchandise, signed by a person individually, parol evidence is admissible to show the existence of a mercantile partnership between such person and another, and that the latter had acknowledged himself bound by the contract. *Snead v. Barringer*, 1 Stew. 134.

§ 313. Nature of Consideration.

§ 313 (1) In General.

Rule Stated and Construed.—"While there are authorities which state the broad proposition that the consideration of an instrument can always be inquired into by parol evidence, and that where a valuable consideration is expressed, it may be shown to be different in amount from that expressed on the face of the instrument

itself, though its kind can not be varied, such cases we apprehend are those where the instrument constitutes a mere acknowledgment of receipt of a consideration and nothing more. Such expressions are proper as applied to the facts of such cases. However, we hold it to be the true rule upon the subject, that where a consideration expressed in a contract is something more than a mere acknowledgment of receipt, and is of a contractual nature, and such consideration is made of the essence of the contract, in such event parol evidence is no more competent to vary the terms of the consideration as thus promised or undertaken than it can be received to vary any other term of the contract. *Bank v. Mobile, etc., R. Co.*, 69 Ala. 305, 17 Cyc. 661, and authorities cited in note." *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 So. 613, 616.

Parol Evidence Inadmissible.—Where the consideration expressed in a contract is something more than a mere acknowledgment of receipt, and is of a contractual nature, and such consideration is made the essence of the contract, parol evidence is no more competent to vary the terms of the consideration as thus promised or undertaken than it is to vary any other term of the contract. *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 So. 613.

Explanation of Consideration.—The consideration of a deed can be explained by parol. *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978, cited in note in 25 L. R. A., N. S., 1208.

The consideration of an agreement may be shown to be different from that expressed. *Mead v. Steger*, 5 Port. 498.

"When the matter of consideration is collaterally presented, as it seems to be always, when a deed is to be purported by proof of a consideration, or defeated for the want of it, the question of letting in parol evidence, to explain or alter the written instrument does not arise. Lord Thurlow, in *Coote v. Boyd*, 2 Bro. C. 527, puts the matter on its proper ground, when he says, 'a question of presumption donec probetur in contrarium will let in all sorts of evidence. When the presumption arises from the construction of words, merely as words, no evidence can be admitted. In this case, the question is

not one of construction, but is of intention, and the deed is valid, or void, as there may be a consideration or the want of it shown. In this connection it is of little importance whether there is a mistake in the description of the debt, as the deed would be bona fide, if there was one substantially agreeing with the description, and if entirely misdescribed, there is no doubt of the power of chancery to correct the mistake. In *Brooks v. Maltbie*, 4 Stew. & P. 96, and *Mead v. Steger*, 5 Port. 498, the conclusions to which we have arrived, are stated as the result of the cases, though the questions then before the court were not the same as they now are. See *Strover v. Herrington*, 7 Ala. 142." *Graham v. Lockhart*, 8 Ala. 9, 24.

Consideration May Be Shown by Parol.—Generally the consideration for a promise or obligation may be inquired into, and what in fact the consideration was may be shown by parol. *Pollak v. Gunter & Gunter*, 162 Ala. 317, 50 So. 155.

Stipulation as to Consideration Resting in Parol.—"When the parties reduce their contract to writing, the stipulations contained in it, can not be varied either by adding to or diminishing them. If, however, no such attempt is made, but as is frequently the case upon the sale of property, a note is given for the price of the thing sold by one party, and the stipulations as to the consideration and subject matter of the contract, are not evidenced by writing, but rest in parol, there can be no objection, if the ends of justice require that they should be known, that such facts should be established by parol. Thus, in the case of *Murchie v. Cook*, 1 Ala. 41." *Beard v. White*, 1 Ala. 436, 439.

§ 313 (3) Deeds in General.

American and English Rule.—"In England it is settled, that the recital of the consideration money in a deed, in the absence of fraud, is conclusive upon the parties upon all questions arising out of the instrument itself. *Shelly v. Wright*, Willes 9; *Cossens v. Cossens*, ib. 25; *Rountree v. Jacob*, 2 Taunt. 141; *Lampson v. Corke*, 5 B. & Ad. 606; *Baker v. Dewey*, 1 B. & C. 704; *Hill v. Manchester Waterworks*, 2 B. & Ad. 544; *Lainson v. Tremere*, 1 Ad. & El. 792; *Bowman v. Taylor*, 2 ib. 278. In the American courts,

however, a different (and, as we think, a sounder) doctrine prevails; and in every state in which the question has been made, with the exception of North Carolina (*Graves v. Carter*, 9 N. C. 576 [11 Am. Dec. 786]; *Spiers v. Clay's Adm'rs*, 11 N. C. 22), it has been held, after some struggles and much discussion, that the consideration clause in a deed is not conclusive." *Eckles v. Carter*, 26 Ala. 563, 564.

True Consideration May Be Shown.—Though the consideration expressed in the deed is prima facie evidence of the true consideration, yet parol evidence may be introduced to show the true consideration, as affecting the damages. *Mead v. Steger*, 5 Port. 498; *Saunders v. Hendrix*, 5 Ala. 224; *Larkinsville Min. Co. v. Flipppo*, 130 Ala. 361, 30 So. 358, 359.

Parol evidence is admissible to show the actual consideration for a deed. *Mead v. Steger*, 5 Port. 498.

Conveyance to Wife.—On an issue of fraudulent conveyance to one's wife, the consideration recited in the deed not being conclusive, she can show that the amount of the husband's debt for which the deed was given exceeded the recited price. *Savage v. Milum*, 120 Ala. 115, 54 So. 180.

Inconsistent Consideration.—Parol evidence is inadmissible, in a trial at law, to prove a consideration inconsistent with or different from that expressed in a deed. *Murphy v. Branch Bank*, 16 Ala. 90, cited in note in 20 L. R. A. 111.

Parol evidence is not admissible to establish that the consideration was a prior agreement by the grantor to convey the property to a trustee for the sole use of his wife, where the consideration is recited to be anxiety to provide for his wife, and one dollar, as it is an entirely different one. *Murphy v. Branch Bank*, 16 Ala. 90, cited in note in 20 L. R. A. 111.

"The general rule is too well established now to be shaken, that a consideration not expressed in a deed, and which is inconsistent with the consideration expressed can not be shown by parol proof. 1 Greenl. Ev., § 285; *Mead v. Steger*, 5 Port. 498; *Toulmin v. Austin*, 5 Stew. & P. 410. If, however, there is no consid-

eration expressed, proof may be received to show what the consideration was. 1 Vesey, 128; [Davenport v. Mason] 15 Mass. 92. And it is said, if a deed mentions a consideration, and adds the words for other considerations, that proof may be received to show what those other considerations are. So if a moneyed consideration is expressed, proof may be received to show that the sum was greater or less than the amount expressed in the deed. But the authorities deny that parol proof can be received to establish a consideration wholly different from that expressed in the deed. *Garrett v. Stuart*, 1 McCord, 514; *Starkie Ev.* 1004; *Mead v. Steger*, 5 Port. 498, 506; [Schemerhorn v. Vanderheyden] 1 Johns, 139 [3 Am. Dec. 304]. Here the deed sets out the consideration on which it purports to have been executed, to wit, the anxiety of the grantor, to provide for his wife, and one dollar, in cash paid. The proof would establish that the deed was executed in conformity with an undertaking entered into by Dossey, at the time the negroes were delivered to him. This is a consideration entirely different from that mentioned in the deed, and parol proof can not be received to establish it, without violating the rules of evidence." *Murphy v. Branch Bank*, 16 Ala. 90, 94.

"There is a marked distinction between letting in parol evidence to show a different consideration from that stated in the deed, when the contest is between the parties to it, and a stranger. The rule is universal, that a stranger may attack a deed by showing, either that it is without consideration, or is for a different one than stated (2 *Starkie's Ev.* 556); and though it is said that one who claims under a deed, will not be permitted to show a consideration, in support of it, different from that expressed (2 *Starkie's Ev.* 556), yet we think this expression must be understood as referring to a difference in the quality of the consideration, and not that it must be shown to be precisely as stated." *Graham v. Lockhart*, 8 Ala. 9, 23.

Promise as Consideration.—A conveyance by a husband to his wife, based on her promise to execute her will, and devise to him one-third of her estate, including said lands, is based on a valua-

ble consideration, and the recital in the deed of a valuable consideration is open to parol evidence to show such promise. *Manning v. Pippen*, 86 Ala. 357, 5 So. 572.

Consideration for Release of Power.—Where a husband executed a quitclaim deed to one who had purchased his land at mortgage sale, with the understanding that the grantee would also purchase the land at a sale under execution, the lien of which was superior to the mortgage, and that the grantee would give the husband better terms of redeeming it than allowed by law, and the wife joined in said deed, thereby releasing her dower, the consideration for such quitclaim may be shown, notwithstanding the deed express a nominal consideration in dollars. *Bailey v. Litten*, 52 Ala. 282.

Promise to Do Certain Things.—In an action to cancel for nonperformance by the grantee of his agreement a deed reciting one dollar and other good and valuable considerations parol evidence may be given that the actual consideration was the grantee's promise to do certain things, and the benefit the grantor expected to realize therefrom. *Piedmont, etc., Imp. Co. v. Piedmont, etc., Mach. Co.*, 96 Ala. 389, 11 So. 332, cited in note in 20 L. R. A. 109.

Love and Affection and Additional Consideration.—When a deed purports on its face to be made, not only in consideration of natural love and affection, but also "for divers other good considerations," which are not specified, parol evidence is admissible to show what the other considerations were. *Johnson v. Boyles*, 26 Ala. 576, cited in note in 20 L. R. A. 111.

Extinguishment of Grantor's Indebtedness.—Parol evidence is admissible that the consideration, instead of money, was the payment of debts due the grantee from the grantor to help sustain the deed. *Buford v. Shannon*, 95 Ala. 205, 10 So. 263; *Hamilton v. Blackwell*, 60 Ala. 545; *Mason v. Buchanan*, 62 Ala. 110, cited in note in 20 L. R. A. 110; *Pique v. Arendale*, 71 Ala. 91, cited in note in 20 L. R. A. 110; *Henry v. Murphy & Co.*, 54 Ala. 246, cited in note in 20 L. R. A. 110.

Although the consideration of a deed is stated to be money paid to the grantor, it may be shown by parol that the real

consideration was the extinguishment of a debt of the grantor; both considerations being of the same kind or degree, and the admission of the parol evidence not varying or contradicting the legal effect of the instrument. *Mason v. Buchanan*, 62 Ala. 110, cited in note in 20 L. R. A. 110.

"Another well settled rule is, that conveyances of property, real or personal, whether the consideration is adequate or inadequate, good or valuable, if made in good faith, are valid and operative as between the parties. 'But as against the existing creditors of the grantor, they can not be supported, unless shown to have been found on an adequate and valuable consideration. Where between the grantee, and an existing creditor, a controversy arises as to the validity of the conveyance it has long been the settled rule of this state, that the recital of a consideration is the mere declaration or admission of the grantor, and is not evidence against the creditor.' If the consideration is averred to be a debt of the grantor, or of the debtor from whom the consideration for the conveyance originally moved, the existence and validity of such debt must be proved. *Hubbard v. Allen*, 59 Ala. 283, 296; *Houston v. Blackman*, 66 Ala. 559; *Buchanan v. Buchanan*, 72 Ala. 55, 57; *Tutwiler v. Munford*, 68 Ala. 124." *Ely v. Pace*, 139 Ala. 293, 35 So. 877, 878.

Though the recited consideration of a deed is money "in hand paid," it may be shown that the real consideration was the satisfaction of prior indebtedness. *Burford v. Shannon*, 95 Ala. 205, 10 So. 263, cited in note in 20 L. R. A. 110.

Exchange of Property.—Where a deed is executed in consideration of \$1, parol evidence is competent to show that the real consideration was an exchange of property. *Harraway v. Harraway*, 136 Ala. 499, 34 So. 836, cited in note in 25 L. R. A., N. S., 1198. See, also, the title, **VENDOR AND PURCHASER**.

In an action by judgment creditors to set aside the deed of the grantor's interests in certain property, it was held in *Miller v. Rowan*, 108 Ala. 98, 19 So. 9, cited in note in 25 L. R. A., N. S., 1206, that parol evidence was admissible to show that the grantor and the grantee

were cotenants of the property, and that, for several years previous to the making of the deed, the grantor had appropriated the whole income, and that grantee had paid certain debts for the grantor, and that the money consideration mentioned in the deed was a fair adjustment of the transactions between them.

Consideration Compatible with Expression in Deed.—Parol or extrinsic evidence, is admissible to establish the consideration of a deed, provided it be not incompatible with the consideration expressed in the deed itself. *Toulmin v. Austin*, 5 Stew. & P. 410.

Although the nature of the consideration may not be changed, any consideration of the same kind, and not inconsistent with that recited, may be proven; and if it be adequate, will support the conveyance. *Hubbard v. Allen*, 59 Ala. 283, cited in note in 20 L. R. A. 110.

Showing Love and Affection as Consideration.—Parol evidence was not allowed in the following cases that the consideration was love and affection for a deed reciting a valuable one in order to sustain the deed. *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Hubbard v. Allen*, 59 Ala. 283, cited in note in 20 L. R. A. 110.

Allowing Vendor to Retain Possession.—In *Carter, etc., Co. v. Happel*, 49 Ala. 539, cited in note in 20 L. R. A. 111, parol evidence was given without objection noted, of a verbal agreement by which the vendor of premises for a valuable consideration was allowed to retain possession for a time.

Must Not Limit Use of Land.—In *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978, cited in note in 25 L. R. A., N. S., 1208, it was held that, although the consideration of a deed may be explained, yet parol evidence as to consideration is not admissible where the effect is to limit or restrict the free and unqualified use of the land.

§ 313 (3) Additional Consideration for Deed.

Must Not Alter Effect of Instrument.—Parol evidence is admissible to prove some other consideration than that which is expressed, if it be consistent with that which is expressed, and does not alter the effect of the instrument. *Toulmin v. Aus-*

tin, 5 Stew. & P. 410; *Steed v. Hinson*, 76 Ala. 298, cited in note in 20 L. R. A. 103.

Purchase of Slave.—In an action to recover damages for the breach of a special contract by which the purchaser of a slave agreed with the vendor, at the time of the sale, to pay him one-half of the profit which might be realized on a resale, in addition to the sum specified in the bill of sale as the consideration, parol evidence of such agreement is admissible, and does not contradict the bill of sale. *Thomas v. Barker*, 37 Ala. 392, cited in note in 20 L. R. A. 105.

A deed to a railroad company, expressed to be for the consideration of "one dollar," and "the benefits which will arise to the grantor from the ownership by the grantee of the property hereby conveyed," does not estop the grantor from showing, as an additional consideration, that the grantee verbally agreed to grade a certain lot, and to remove a portion of a warehouse thereon. *Mobile & M. Ry. Co. v. Wilkinson*, 72 Ala. 286, cited in note in 20 L. R. A. 105.

Operation of Manufacturing Plant as Additional Consideration.—Parol evidence is admissible to show that part of the consideration for a conveyance of land to a manufacturing company was the company's promise to operate its works for a period of two years from the time it should commence work. The admission of this evidence is no infringement of the general rule providing the introduction of parol evidence to vary a written contract although the deed may recite a moneyed consideration. *Wilkerson v. Tillman*, 66 Ala. 532; *Mason v. Buchanan*, 62 Ala. 110; *Piedmont, etc., Imp. Co. v. Piedmont, etc., Mach. Co.*, 96 Ala. 389. 11 So. 332, 333.

§ 313 (4) Acknowledgment of Payment in Deed.

Consideration Clause Merely a Receipt.—"When the legal effect of a deed is not to be varied by proof of a consideration different from that expressed, and when the object is not to establish a resulting trust in the grantor, it is a familiar principle, that the consideration clause of a deed is always open to unlimited explanation; and that an acknowledgment of

the payment of the consideration is considered as a receipt for money merely, and is open to explanation by parol as any other receipt is. *Mobile, etc., R. Co. v. Wilkinson*, 72 Ala. 286; *McGehee v. Rump*, 37 Ala. 651; *Eckles v. Carter*, 26 Ala. 563; *Saunders v. Hendrix*, 5 Ala. 224." *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655, 658.

Controlled and Rebutted by Parol Evidence.—The clause in a deed acknowledging payment of the consideration is mere prima facie evidence, and may be controlled and rebutted by parol evidence. *Saunders v. Hendrix*, 5 Ala. 224.

Retention of Rent Notes.—In an action against a tenant for rent, by a lessor, after he has conveyed the land by deed which recites consideration to be money paid, the plaintiff may show by parol that a part of the consideration for his conveyance was the retention of the rent notes. *Steed v. Hinson*, 76 Ala. 298.

"But, however this may have been, such claims are made assignable by § 3470, which provides: 'The claim of the landlord for rent, and advances and property obtained, with values advanced, may be assigned by the landlord; and the assignee shall be invested with all the rights of the landlord, and be entitled to all his remedies to enforce them.' It is manifest that the effect of the statute is, to authorize a severance of the claim for rent from the reversion; and this may be shown by parol evidence, where such evidence does not tend to contradict or vary the terms or legal effect of the deed. In *Quimby v. Stebbins*, 55 N. H. 420, parol evidence was admitted to prove a contract, that the vendor should occupy the premises sold for a designated term thereafter, as part of the consideration of the conveyance. *Cushing C. J.* said: 'But the defendant, not denying the plaintiff's right to the possession of the lands, and not denying that he would be liable to pay for it, and not denying the receipt of the consideration so far as is necessary to support the deed, proposed to show that a part of the consideration of the deed was, by agreement, to be applied in payment of this rent. If so much of the consideration of the deed had been left in the plaintiff's hands unpaid, the defendant might have maintained an ac-

tion to recover the balance. He may equally well show, that so much of the consideration money of the deed had been paid by the plaintiff and received by him, by its being appropriated to the payment of this rent.' *Kent v. Kent*, 18 Pick. 569; *Preble v. Baldwin*, 6 Cush. 549." *Steed v. Hinson*, 76 Ala. 298, 302.

Nonpayment of Purchase Money.—In an action for the recovery of land, brought by the heirs of a descendant against a purchaser at a sale under an order of the probate court, parol evidence is inadmissible to prove the nonpayment of the purchase money, after a conveyance has been made by order of the court, on the application of the purchasers, under Rev. Code, § 2026. *Dugger v. Taylor*, 46 Ala. 320.

Application of Payment.—Where the consideration expressed in a deed is a certain sum of money in hand paid, parol evidence is admissible to show that only a part of the money was paid, and that the balance was to be applied in discharge of certain debts due from the grantor to third persons. *Hair v. Little*, 28 Ala. 236, cited in note in 20 L. R. A. 113.

Payment of Notes of Grantor.—Where the consideration of a deed of slaves and other property is a certain sum of money in hand paid, parol evidence may be given of an undertaking to pay certain debts of the grantor as part of the consideration, as this is not inconsistent with that expressed. *Hair v. Little*, 28 Ala. 236, cited in note in 20 L. R. A. 113.

Facts Establishing Valuable Consideration.—Under a deed reciting the consideration as \$1,644.50 paid, with a qualifying clause reciting it as a payment of a debt of \$1,644.50 due the grantee, it was competent to show that the true consideration was the cancellation and surrender of a note of \$600 held by the grantee, and the assumption and payment of \$1,000 on a note of \$1,644.50 owing by the grantor to another creditor, on which the grantee was indorser; and those facts established a valuable consideration. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137.

"It is equally well settled that, under a deed reciting a money consideration, or a consideration resting in the payment of a debt, or any other valuable equivalent, it

is competent to support the conveyance by parol proof of any consideration, however differing from the recital, which is valuable as distinguished from a merely good consideration, since thereby the effect and operation of the instrument is not changed, and the rule against varying or altering writings by parol testimony is not offended. *Wait, Fraud, Conv.*, § 221; *Hubbard v. Allen*, 59 Ala. 283, 297; *Stringfellow v. Ivie*, 73 Ala. 209; *Mobile, etc., R. Co. v. Wilkinson*, 72 Ala. 286; *Manning v. Pippen*, 86 Ala. 357, 5 So. 572; *McKinster v. Babcock*, 26 N. Y. 378." *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137, 139.

§ 313 (5) Sustaining Validity of Deed.

Payment in Two Ways.—A grantee in a deed reciting a money consideration may, as against a judgment creditor of his grantor, show that the true consideration was partly the payment of a debt due from the grantor, and partly a promise by the grantee to pay the grantor a sum of money. *Pique v. Arendale*, 71 Ala. 91, cited in note in 20 L. R. A. 110.

To Show Valuable Consideration.—Where a conveyance to the grantor's mistress and illegitimate child recites that it was made on divers good considerations, and for kindness felt by him towards them, parol evidence is inadmissible to show a valuable consideration. *Potter v. Gracie*, 58 Ala. 303, cited in note in 20 L. R. A. 110.

Where a deed was made "in consideration of natural love and affection and \$1," parol evidence was admissible to show that other valuable considerations passed. *Mead v. Steger*, 5 Port. 498.

Intended as Gift.—Although a deed undertaking to convey property, recites a valuable consideration, as an inducement to its execution, it is notwithstanding, competent for a creditor of, or purchaser from the grantor, to show, that it was intended as a mere gift. *Meyers v. Peek*, 2 Ala. 648, cited in note in 20 L. R. A. 110.

§ 313 (6) Bills of Sale.

Failure to Deliver Property.—In an action on a note given for personal property, the bill of sale not containing words of delivery, the vendee can not show by parol that by the contract of sale the

vendor was to deliver a part, which he had failed to do. *McCoy v. Moss*, 5 Port. 88, cited in note in 43 L. R. A. 463.

Share of Profit from Resale.—The vendor in a bill of sale of a slave may show that the vendee, in addition to the consideration expressed in the bill, agreed to pay him one-half of the profit he might make by a resale of the slave. *Thomas v. Barker*, 37 Ala. 392, cited in note in 20 L. R. A. 105.

Exchange of Slaves.—The consideration clause in a bill of sale of a slave, though under seal, is open to explanation by parol evidence; as, where a consideration in money is expressed, it may be shown to have been another slave. *Eckles v. Carter*, 26 Ala. 563, cited in note in 20 L. R. A. 107.

Removal of Slave from State.—In an action on the case for fraud and deceit in the purchase of a slave by defendant from plaintiff, although the consideration is stated in the bill of sale, which is produced, to be a certain sum of money, yet parol proof is admissible to show that, at the time of the sale, defendant also promised to carry said slave out of the state. *Dixon v. Barclay*, 22 Ala. 370.

Parol Evidence of Terms of Sale.—Though a writing signed by the vendor of a slave, acknowledging payment, is in effect a bill of sale, passing title, and can not be varied by parol, a receipt, given subsequent to a sale, showing that the only writing executed at the time of the sale was a note, and reciting that the receipt is given for a partial payment of the slave, being a mere recital of the consideration on which the note was given, and not intended as a complete contract, does not preclude parol evidence of the terms of the sale. *Whitman v. Revels*, 39 Ala. 121.

Explanation of Consideration.—In attachment, where the property is claimed by a third person under a bill of sale which is attacked for fraud, claimant may show that she did not, at the time the bill of sale was executed, purchase certain claims pledged by the attachment defendant as collateral, since such testimony has reference to the consideration of the bill of sale, which, as between her and the creditor, could be explained by

parol. *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201.

§ 313 (7) Mortgages.

To Explain, Qualify, or Contradict Consideration.—Parol evidence may be received to explain, qualify, or contradict any recital of consideration contained in a mortgage or other evidence of debt. *Blum v. Mitchell*, 59 Ala. 535.

Mortgage for Future Advances.—Parol evidence is admissible to show that the real consideration of a note, and of the mortgage securing it, was the promise of the mortgagee to make future advances to the mortgagor. *Hendon v. Morris*, 110 Ala. 106, 20 So. 27.

"Such mortgages are of undoubted validity, and, when necessary, parol evidence is received to show the real consideration—the real nature of the transaction. *Tison v. People's Sav., etc., Ass'n*, 57 Ala. 323; *Forsyth v. Preer, etc., Co.*, 62 Ala. 443; *Wilkerson v. Tillman*, 66 Ala. 532." *Hendon v. Morris*, 110 Ala. 106, 20 So. 27, 29.

"Mortgages are often taken as security for present and future advances, not accurately expressing the real consideration, but expressing, as in the present case, a note or other evidence of a present indebtedness. The validity of such mortgages is well established by our decisions, and it is firmly settled that parol evidence is relevant to show the real nature of the transaction. *Hendon v. Morris*, 110 Ala. 106, 20 So. 27, and authorities cited. Where it is sought to bring a case within the foregoing rule, undoubtedly it should be carefully and rigorously examined; 'but if, upon such investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem unjust and unprecedented to deprive the person claiming under the deed of his real equitable rights, unless it be in favor of a person who has been in fact injured and deceived by the misrepresentation.' *Shirras v. Caig*, 7 Cranch (U. S.) 34, 3 L. Ed. 260; *Hendon v. Morris*, 110 Ala. 106, 20 So. 27." *Ladd v. Lookout Distilling Co.*, 147 Ala. 173, 40 So. 610, 611.

"It is settled in this state that a mortgage for future advances is a valid se-

curity, and that, when it recites an existing debt as its consideration, it is no violation of the law of evidence to receive proof that the actual consideration was advances to be afterwards made. *Tison v. People's Sav., etc., Ass'n*, 57 Ala. 323; *Forsyth v. Preer, etc., Co.*, 62 Ala. 443; *Collier & Son v. Faulk*, 69 Ala. 58. Such mortgage, if not assailed on other grounds, is valid between the parties, but this rule has some limitations when assailed by outside creditors or purchasers. *Collier & Son v. Faulk*, 69 Ala. 58; *Marks v. Robinson*, 82 Ala. 69, 2 So. 292." *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48, 49.

Mortgage to Indemnify Indorser.—It may be shown, as between the parties, that a mortgage which recites an existing debt as its consideration was executed to secure further advances. *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48.

Parol evidence is admissible to show that a mortgage, reciting that it was given to secure an indebtedness due to the mortgagee, evidenced by a note of even date, due on a certain date, was intended to indemnify the mortgagee to a specified amount against loss by reason of its indorsing notes of the mortgagor therefore and thereafter to be executed to a third person, and to secure the mortgagee against loss by reason of having become responsible for all purchases made and to be made by the mortgagor from the third person. *Ladd v. Lookout Distilling Co.*, 147 Ala. 173, 40 So. 610.

Balance Due on Mortgage.—On a prosecution under Code, § 3835, for selling mortgaged personal property "for the purpose of hindering, delaying, or defrauding" the mortgagee, parol evidence is admissible to show a balance due defendant from the mortgagee on a contract, though it be not in writing. *Cobb v. State*, 100 Ala. 19, 14 So. 362.

Debt Not Evidenced by Note.—Parol evidence is admissible to show that a debt transferred by a mortgage, and described in the mortgage as being evidenced by a note, is in fact owing by parol and not by note, since parol evidence is admissible to identify property transferred by mortgage. *Corbitt v. Reynolds*, 68 Ala. 378.

Individual Indebtedness of Husband.—Where the statutory estate of a married

woman is by her and her husband mortgaged to secure the payment of a note, it is competent to show by parol that the consideration of such note is the individual indebtedness of the husband, if no inconsistent consideration was expressed in the mortgage. *Stribling v. Bank of Kentucky*, 48 Ala. 451.

Including Debts Other than Specified.—Parol evidence is not admissible to show that a mortgage given as security for a debt was also intended to embrace other debts existing between the parties, unless, under a bill to reform, it is shown that the omission to include such debts was caused by mistake or fraud. *Wilkerson v. Tillman*, 66 Ala. 532.

In an action to foreclose a mortgage, parol evidence is admissible to show that a pre-existing debt was included in the amount of the consideration, in addition to the advances stated in the mortgage, which it is claimed are paid. *Wilkerson v. Tillman*, 66 Ala. 532.

Chattel Mortgage.—As between the immediate parties, though the consideration of a chattel mortgage be declared to be a present debt for money advanced, it may be shown by parol to have been intended as a security for future advances and contingent liabilities, and allowed to stand as a security for such liabilities and advances to an amount not exceeding the sum specified. *Tison v. People's Saving & Loan Ass'n*, 57 Ala. 323.

§ 313 (8) Contracts in General.

"The consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence, to add to, vary, or contradict writings, to receive parol evidence of the actual consideration, for the purpose of determining its validity, or its failure, or from any cause it is sufficient or insufficient to support the contract." *Ramsey v. Young*, 69 Ala. 157; *Davis v. Snider*, 70 Ala. 315." *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655, 658.

Does Not Vary Parol Evidence Rule.—The rule against the reception of parol evidence to add to, vary, or contradict a written contract is not infringed by receiving parol evidence of the actual consideration to determine its validity or its failure, or whether or not it supports the

contract. *Hamaker v. Coons*, 117 Ala. 603, 23 So. 655.

Greater or Less than Specified.—Parol evidence is admissible to show that the consideration of a contract is greater or less than that expressed. *Mead v. Steger*, 5 Port. 498.

Additional Consideration.—In an action on a written contract whereby defendant promised to pay plaintiffs a sum of money, "to be void if any of them shall put in any plea or defense to prevent the probating of" a certain will, defendant may show by parol that, in addition to the consideration specified in the instrument, it was understood and agreed at the time of the execution of the instrument, and before defendant would sign it, he was not to be sued or disturbed in any way by plaintiffs about the property given to him by the will, and that plaintiffs had sued him for two slaves which were bequeathed to him in the will. *Cowan v. Cooper*, 41 Ala. 187.

Contract to Furnish Supplies.—Where a landlord, who procured A. to make statutory advances to one of his tenants, from whom A. took a crop-lien note, agreed in writing "to bear half the loss, provided the crop does not pay said A. \$500 for furnishing B. and his hands during the year," parol evidence is admissible to show that the consideration was A.'s agreement to furnish B. supplies to the amount of \$500. *Foster v. Napier*, 74 Ala. 393.

§ 313 (9) Contracts of Sale.

See, generally, the title, SALES.

In *Honeycut v. Strother*, 2 Ala. 135, cited in note in 31 L. R. A., N. S., 239, parol evidence was admitted to show that three notes executed by a purchaser of land were to be substituted at maturity by the maker for three notes given in turn by the payee to another for the purchase price, since it did not vary the contract.

Bond for Title.—Evidence that, while a written bond for title provided only for the payment of stipulated sums, it was agreed that the vendor should have the rent from the premises until the entire purchase price was paid, is not admissible, as showing the consideration of the contract, as, in the absence of agree-

ment, the vendee was entitled to the rent for such evidence would vary the written contract. *Able v. Gunter*, 174 Ala. 389, 57 So. 464.

"It is true that, between the parties thereto, the consideration of contracts is open to inquiry by parol. *Foster v. Bush*, 104 Ala. 662, 16 So. 625, among others. But that is manifestly a different matter from allowing parol evidence of a contemporaneous agreement, the immediate effect of which would be to impose conditions wholly omitted from the written contract. The rule against the reception of parol evidence of prior or contemporaneous verbal agreements to add to or vary written contracts comprehends verbal agreements whereby the legal effect of the instrument would be changed. *Moragne v. Richmond*, etc., *Mach. Works*, 124 Ala. 537, 27 So. 240; *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 22 So. 580, 9 Ency. Ev., pp. 333, 334. If there is in a bond for title no stipulation to the contrary, 'the contract of itself operates a transmutation to the vendee of the possession, entitling him to the right of entry and enjoyment.' *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 20 So. 419; *Ashurst v. Peck*, 101 Ala. 499, 14 So. 541. In such case, the vendee is entitled to the rents and profits, as a mortgagee in possession is accountable therefor. *Ashurst v. Peck*, supra; *Loventhal v. Home Ins. Co.*, supra; *Bank v. Kizer*, 119 Ala. 194, 24 So. 11. So to admit parol evidence affecting, as indicated, the legal effect of the bond given by Able would violate the rule stated." *Able v. Gunter*, 174 Ala. 389, 57 So. 464, 465.

§ 313 (10) Bills and Notes.

See, also, ante, "Bills and Notes," § 299; also, the title, BILLS AND NOTES.

Establishment of Consideration.—The consideration of a note may be shown by parol. *Folmar v. Siler*, 132 Ala. 297, 31 So. 719.

Though parol testimony is inadmissible to contradict or vary the terms of a note, the consideration for which a note was given may be established by such testimony. *Long v. Davis*, 18 Ala. 801; *Ramsey v. Young*, 69 Ala. 157; *Baker v. Boon*, 100 Ala. 622, 13 So. 481.

The consideration of a note reciting

that it is "for value received" may be proved by parol. *Booth v. Dexter Steam Fire Engine Co.* No. 1 of Montgomery, 118 Ala. 369, 24 So. 405.

"The plaintiff introduced as a witness, one Browder, who after testifying, that he was the secretary of the plaintiff corporation, and that the note sued on was executed by defendant, was asked by plaintiff's counsel: 'What was the agreement between plaintiff and defendant as to the giving of said notes?' the one sued on, and the others given, which had been previously paid by defendant. The defendant objected to said question, upon the ground, that the same was illegal and irrelevant, and called for illegal testimony, which objection was properly overruled. It is always permissible where a note, as here, does not express on its face for what it was given, to show the real consideration (*Reader v. Helms*, 57 Ala. 440); and it is well settled, 'that the consideration of contracts in writing is in general open to inquiry, and it is not an infringement of the rule excluding parol evidence to add to, vary, or contradict writings, to receive parol evidence of the actual consideration, for the purpose of determining its validity, or its failure, or that from any cause it is sufficient or insufficient to support the contract.' *Ramsey v. Young*, 69 Ala. 157; *Davis v. Snider*, 70 Ala. 315; 1 Greenl. Ev., § 185; 1 Pars. Notes & B. 194." *Booth v. Dexter, etc., Engine Co.*, 118 Ala. 369, 24 So. 405, 408.

It is always permissible to show the consideration of a note which does not express on its face for what it was given, in order to lay the foundation for the enforcement of the vendor's lien; and in doing this the rule against adding to, or varying a written contract by parol evidence, is not violated. The decision in *Gaines v. Shelton*, 47 Ala. 413, as to the extent to which parol proof is inadmissible to show the consideration of a contract, is not reconcilable with the principles uniformly, before that time, adhered to in this state. *Reader v. Helms*, 57 Ala. 440.

Nature of Contract.—A statement of a consideration does not exclusively indicate that a note sued on is a complete expression of a contract, and it is com-

petent for defendant to show what the contract between the parties. *Self v. Herrington*, 11 Ala. 489.

Value of Articles Paid by Note.—

Where a note was given in December, 1862, when there was nothing in circulation as money but Confederate notes, it was proper to show on an issue as to whether the note was payable in Confederate money that the value of the articles for which the note was given was much less in good money than the price the maker, by the note, agreed to pay for them. *Dean v. Campbell*, 57 Ala. 372.

"And if, in addition to that, it should appear as it did, that the things for which the note was given were of much less value in good money, than the price defendant promised by the note to pay for them, no doubt would remain that the implied agreement and understanding of the parties were, that the note should be paid in Confederate currency. There was no error in permitting the questions objected to, to be asked or in the charge given by the court to the jury. See *Riddle v. Hill*, 51 Ala. 224; *Whitfield v. Riddle*, 52 Ala. 467." *Dean v. Campbell*, 57 Ala. 372, 374.

Proof of a parol contemporaneous agreement is admissible to show the consideration of a note, but not to vary its legal effect. *Long v. Davis*, 18 Ala. 801.

Writing Executed Simultaneously with Note.—

Where a party makes a note payable on a certain day, and simultaneously with the making thereof, subscribes a writing in which he recognizes the note and promises, on the same consideration, to pay an additional sum on a contingency, the writing will be regarded as the last expression of the understanding of the parties, and merges all prior stipulations. Consequently it is not admissible to prove what either party may have said some months previously in respect to the consideration. *Cuthbert v. Bowie*, 10 Ala. 163.

Note Given in Payment for Land.—

In an action to enforce a vendor's lien on land for the payment of a note, parol evidence is admissible to show that the true consideration of the note was, not only the purchase money of the land in

question, but also that of another parcel of land, and the price of a stock of merchandise sold at the same time for a gross sum. *Stringfellow v. Ivie*, 73 Ala. 200.

In an action on a note expressed to be given for certain described lands, parol evidence is inadmissible that it was given in payment of a debt for other consideration different from that expressed. *Adams v. Thomas*, 54 Ala. 175.

"The note on which the suit is founded is perfect and complete, expressing as its consideration that it is given 'for value received in the following described parcel of land,' describing it. It was not permissible for the defendant, by parol evidence, to prove that it was made on a different consideration. *Chitty on Bills*, 70; *West v. Kelly*, 19 Ala. 353; *Evans v. Bell*, 20 Ala. 509; *Hair v. La Brouse*, 10 Ala. 548; *Beard v. White*, 1 Ala. 436." *Adams v. Thomas*, 54 Ala. 175, 176.

In a suit to enforce the lien of purchase money notes upon lands, the issue being whether there were two separate sales or contracts, the fact that one of the purchase money notes, given when the writings were first drawn up, shows that it was given for a part only of the land, or one tract, goes to show that two contracts were made; it is but evidence tending to prove that fact, and oral proof may be received to rebut such inferences without infringing the rule against adding to or varying the terms of a written contract. *Reader v. Helms*, 57 Ala. 440.

Deed as Complete Satisfaction of Note.—Where the consideration expressed in a trust deed was the security of a note of a greater amount than the property sold for, parol evidence was not allowed that the deed was given in full consideration for the note, *Saffold, J.*, dissenting on the ground that a greater or less consideration than that recited might be proved. *Brooks v. Maltbie*, 4 Stew. & P. 96, cited in note in 20 L. R. A. 103.

Note for Rent of Land.—In an action on a note which purports on its face to have been given "for the rent of land," defendant can not introduce parol proof to show that the payee also agreed to repair the fencing around the land, and that he failed to do so, in consequence of which defendant's crop was damaged

by the breaking of stock. *Evans v. Bell*, 20 Ala. 509.

Note Given to Bank.—In a suit by a bank against the maker of a note purporting on its face to have been given for the maker's indebtedness to the bank, evidence is admissible to show that the agreement which constituted the consideration of the note was the extinguishment of the debt of another person to the bank, and that the proceeds were so applied. *Murrah v. Branch Bank*, 20 Ala. 392.

Transfer of Indebtedness as Consideration.—The consideration of a note from A. to B. was the transfer by B. to A. of certain notes and an account against C., with the agreement that, if A. could not use such claims in offset against C., to whom he was indebted, they were to be returned to B., and the notes given up. Held, that this agreement might be proved by parol; it being, not a varying of the written contract, but only proof of the consideration. *Simonton v. Steele*, 1 Ala. 357.

Extension of Time of Payment.—Where a note is given, payable "six months after date," "for value received," in consideration of the payees' agreement to perform certain services as attorneys at law for the maker, and no time is fixed for the performance of the services, parol evidence is inadmissible to show that the note was not to become payable until the contemplated services were rendered. *Walker v. Clay*, 21 Ala. 797.

Agreement as to Set-Off.—See the title SET-OFF AND COUNTERCLAIM.

§ 314. Existence of Condition or Contingency.

§ 314 (1) Deeds.

Parol Reservation Varying Deed.—A deed absolute in its terms, passes a fee simple estate in presenti, taking effect on delivery; and its legal effect can not be varied by a reservation in parol, so as to make the estate conveyed commence in futuro. *Wright v. Graves*, 80 Ala. 416.

Performance of Part of Conditions.—Where a deed reserved title in the vendor till the performance of certain conditions, evidence of a contemporaneous parol agreement is not admissible to show that the vendor was to be estopped to assert

its title on the performance of only one of the conditions. *Tennessee & C. R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426.

Necessity of Mortgagee Accounting for Rents and Profits.—Where a mortgagee fails to show that the mortgagee in possession was to have possession of the property without accounting for the rents and profits, parol evidence is inadmissible to show that such were the terms of the contract. *Davis v. Lassiter*, 20 Ala. 561.

"Now, the mortgage is silent as to that part of the contract, to establish which the defendant introduced parol evidence. It provides that the defendant shall have the possession of the slave until the debt was paid, and also authorizes him to sell the slave and pay the debt, if the plaintiff failed to pay; but it says nothing about the defendant's right to appropriate to himself the service of the slave until the debt was paid, in consideration of his becoming liable as security for the payment of the purchase money. As the instrument is silent on this subject, the legal construction of it is, that the defendant being a mortgagee only, he must account to the mortgagor for the hire of the slave; and to permit this legal construction to be altered, by proving another fact not written in the mortgage, would be to aid to the written instrument by oral testimony, and thus to change its legal effect. The decisions of this court clearly show that this can not be done. *Duff v. Ivy*, 3 Stew. 140; *Barringer v. Sneed*, 3 Stew. 201; *Mead v. Steger*, 5 Port. 498; *Holt v. Moore*, 5 Ala. 521; *Long v. Davis*, 18 Ala. 801." *Davis v. Lassiter*, 20 Ala. 561, 562.

Conditional Delivery of Instrument.—The question whether instruments required to be in writing were delivered absolutely or conditionally is subject to parol evidence. *Loyal v. Wolf* (Ala.), 60 So. 298.

Conditional Sale with Right to Redeem.—Parol proof is inadmissible to show that an absolute conveyance was intended to operate as a conditional sale or a sale with a right to redeem. *Peagler v. Stabler*, 91 Ala. 308, 9 So. 157.

§ 314 (2) Contracts in General.

Parol Evidence Inadmissible.—Parol

evidence is not admissible to add to a written contract a condition alleged to have been understood and assented to in parol during the transaction in which the written contract was given. *Tennessee & C. R. Co. v. East Alabama Ry. Co.*, 73 Ala. 426.

Liability Dependent on Contemplated Sale.—Where defendant had agreed in writing to pay a certain sum to plaintiff in consideration of the relinquishment by plaintiff of a lease, parol testimony is inadmissible to show that defendant's liability to pay was dependent on a contemplated sale of the premises; the agreement being absolute on its face. *Dexter v. Ohlander*, 89 Ala. 262, 7 So. 115.

Addition of New Terms.—It is not permissible, by parol proof, to add a new term to a written contract, not expressed in the writing, but alleged to have been understood and assented to in the negotiation. *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 73 Ala. 426.

§ 314 (3) Bills and Notes or Indorsement Thereof.

See, also, post, "Insufficiency or Irregularity of Execution or Delivery," § 323.

Conditional Delivery of Note.—Under Code 1907, § 4793, providing that every negotiable instrument is incomplete and revocable until delivery for the purpose of giving effect thereto, and the delivery to be effectual as between the parties and others not holders in due course must be made under the authority of the person making it, the delivery of a note may be shown to have been conditional or for a specified purpose only as between the parties and all others not bona fide holders. *Bank v. Gunter*, 4 Ala. App. 539, 58 So. 757.

Delivery of Note in Escrow.—Under Code 1907, § 4973, providing that, as between the parties and all others than a holder in due course, delivery of a negotiable instrument may be shown to have been conditional or for a special purpose only, it may, as between all others than bona fide holders, be shown to have been delivered by the maker to its payee in escrow. *Stone v. Goldberg*, 6 Ala. App. 249, 60 So. 744.

Note for Purchase of Goods.—The terms of a negotiable note given for

goods purchased were not varied by an agreement that the goods were purchased, and the note given, upon the understanding that if the purchaser should realize a certain profit thereon within a year the note should be paid; the agreement only going to the consideration of the sale. *Cochran v. Burdick Bros.* (Ala.), 61 So. 29.

"The pleas under discussion were not demurred to upon the ground that the contract or agreement set up by the pleas as defense was not in writing. In our opinion, they were not subject to such ground of demurrer, even if such a ground had been interposed to said pleas. The contract of agreement set up in said pleas does not, in our opinion, vary or contradict the terms of the instrument sued on. They simply set up an agreement going to the consideration of the bill, the subject of the suit. *Parker v. Bond*, 121 Ala. 529, 25 So. 898; *Gillespie v. Hester*, 160 Ala. 444, 49 So. 580." *Cochran v. Burdick Bros.* (Ala.), 61 So. 29, 30.

Note for Purchase Price of Horse.—In an action on a note given for the price of a horse, it is competent for defendant to prove by parol that the note was to be returned if the horse died. *Barlow v. Flemming*, 6 Ala. 146, cited in note in 18 L. R. A., N. S., 389.

Conditional Acceptance of Bill.—In an action by the payees against the acceptor of a bill of exchange, defendant can not prove that he accepted the bill under a verbal agreement with the payees to the effect that, if the bill was not paid at maturity, the "payees should not call on him until they had prosecuted the drawers to judgment or insolvency, and used all proper and lawful means to collect the same." *Cowles v. Townsend*, 31 Ala. 133.

§ 315. Existence of Custom or Usage.

"Proof of custom, though proper to be resorted to in some cases, is never admissible to vary or control a written contract which on its face is free from ambiguity, and there are no circumstances to create doubt of the proper application of terms used in the writing. Parties by express stipulations may always exclude any inference that they intend to adopt a custom or usage into their contracts. *Barlow v. Lambert*, 28 Ala. 704; *Cox*, etc.,

Co. v. Peterson, 30 Ala. 608; *Smith v. Mobile*, etc., *Mut. Ins. Co.*, 30 Ala. 167." *Tallassee Falls Mfg. Co. v. Western Railway*, 128 Ala. 167, 29 So. 203, 205.

Construction of Term "Dangers of the River."—Where the only exception specified in the bill of lading is "dangers of the river," parol evidence can not be received to show a custom among the persons who were engaged in navigating a river which exempted the owners of a boat from liability for a loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. *Boon v. The Belfast*, 40 Ala. 184.

Parol proof may be received, to show that the words "dangers of the river," in a bill of lading, are, by the usage and custom of merchants and others, understood to include other casualties than those arising from the element of water. *Sampson v. Gazzam*, 6 Port. 123.

Custom of Shipping by Steamboat.—Where a bill of lading, recited that cotton was shipped on a steamboat, parol evidence is admissible, in an action to recover for the loss of such cotton, to show a custom for steamboats, when the river was low, to carry barges in tow, and to store freight either on the boat or on the barge, at their option. *McClure v. Cox*, 32 Ala. 617.

In an action against the owners of a steamboat, as common carriers, for failing to deliver goods at places specified in the bill of lading, evidence of a custom among steamboat men to ascend the river as high as the water permitted, and then to land their cargo and deposit goods in warehouses, is inadmissible for defendants. *Cox v. Peterson*, 30 Ala. 608.

In an action against the owners of a flatboat for damages caused by the loss of freight through negligence, parol evidence is admissible to show that, by custom existing on the river, flatboat men were not responsible for a loss caused by the dangers of the river, though no exception to that effect was in the bill of lading. *Steele v. McTyer's Adm'r*, 31 Ala. 667.

Custom of Timber Men.—Parol evidence is admissible to explain the meaning, among men engaged in the timber

business, of the words "hewn timber, to average one hundred and twenty feet, and to class B No. 1 good," as used in a written contract, and to show that the terms are applied only to square timber, and do not include timber hewn octagonally for use as spars. *Jones v. Anderson*, 76 Ala. 427.

Custom of Real Estate Brokers.—"We do not think evidence of any custom among real estate brokers admissible to enlarge or diminish or affect the legal rights and liabilities of parties fixed by their written agreement about which there is no ambiguity." *Kuhl v. Long*, 102 Ala. 563, 15 So. 267, 269.

§ 316. Existence or Accrual of Liability.

Payment for Future Services.—Where a note is given for future service, parol evidence is admissible to show that the payee was to furnish certain recommendations before the payor should be required to accept his services. *Corbin v. Sistrunk*, 19 Ala. 203.

Where a note is given, payable six months after date, for value received, in consideration of the payee's agreement to perform certain services as attorney at law for the maker, and no time is fixed for the performance of the services, parol evidence is admissible to show that the note was not to become payable until the contemplated services were rendered. *Walker v. Clay*, 21 Ala. 797.

A note payable "six months after date, for value received," can not be varied by parol evidence that it was given for legal services to be performed by the payee in defending the maker from the consequences of a crime at the next term of court, and that it was agreed the note was to become payable at the time of trial, which had not occurred. *Walker v. Clay*, 21 Ala. 797.

§ 317. Nature and Extent of Liability.

§ 317 (1) Bonds.

Action on Employee's Bond.—In an action on an employee's bond conditioned to account to his employer for all moneys coming into his hands as such employee, the terms of his employment, though unknown to the sureties when they signed the bond, may be proved by parol, to show the extent of the default. *Southern*

Cotton Oil Co. v. Bass, 113 Ala. 603, 21 So. 227.

§ 317 (2) Bills and Notes and Indorsement Thereof.

Nature of Indorsement.—Where a person other than the payee writes his name on the back of a note at its inception, the nature of the transaction, and the relation of the person so indorsing, whether as maker, guarantor, or indorser, and the intention of the parties, may be shown by parol evidence. *Carter v. Long*, 125 Ala. 280, 28 So. 74.

Transfer by Assignment.—Where negotiable paper is transferred otherwise than by indorsement, that a debt due from the assignor to the assignee might be extinguished by an application of the proceeds, the inference that, if the notes were unproductive, the assignor would be chargeable on the original consideration, may be repelled by extrinsic proof, either oral or written. *Gookin v. Richardson*, 11 Ala. 889.

§ 317 (3) Principal or Surety.

Showing One Signer as Surety.—Parol evidence is admissible in an action at law to prove who is principal and who surety to a bond or note. *Pollard v. Stanton*, 5 Ala. 451, cited in note in 20 L. R. A. 713.

It is competent for one joint maker of a note to show by extrinsic evidence that he is a mere surety, though he did not inform the payee of the fact at the time the note was accepted. *Branch Bank v. Jones*, 9 Ala. 949, cited in note in 20 L. R. A. 712.

Wife as Surety.—Where a note and mortgage were signed by a husband and wife, parol evidence was admissible to establish that she signed as surety only. *Gibson v. Wallace*, 147 Ala. 322, 41 So. 960.

Notes sued on not intimating that one of the signers was a surety thereon, it did not violate the rule prohibiting parol proof to contradict or vary a written contract to allow her to show that she was a surety only. *Campbell v. Hughes*, 155 Ala. 591, 47 So. 45.

"In respect to the defense of suretyship, set up by Mrs. Campbell, the notes and mortgage not disclosing on their

faces that she was a surety, the introduction of them made out a prima facie case for the complainant. In this condition of the notes—their being without intimation of suretyship—it was not a violation of the rule of evidence that parol proof will not be allowed to contradict or vary a contract in writing for the respondent to show by parol that the debt was not hers and that she was only surety on the notes. *Carter v. Long*, 125 Ala. 280, 28 So. 74; *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39; *Price v. Cooper*, 123 Ala. 392, 26 So. 238.” *Campbell v. Hughes*, 155 Ala. 591, 47 So. 45, 47.

§ 317 (4) Medium of Payment.

Payment in Money.—The legal effect of a written contract for payment of money, which is plain and unambiguous, can not be varied by parol proof of an agreement that it should be discharged in some other way; and in the absence of mistake, fraud and the like, the rule is the same in equity as at law. *Hart v. Clark*, 54 Ala. 490, cited in note in 31 L. R. A., N. S., 238.

Thus, parol evidence of an understanding between the parties to a note which was unambiguous and made payable in money twelve months after date, that it was not to be paid in money, but that it was to be discharged by the crediting of certain unsettled accounts is not admissible in an action on the note. *Clark v. Hart*, 49 Ala. 86, cited in note in 43 L. R. A. 459.

A particular mode of payment or discharge agreed on by the parties may be proved by parol. *Honeycut v. Strother*, 2 Ala. 135, cited in note in 31 L. R. A., N. S., 239.

Parol evidence of an agreement that a note for a sum of money certain should be paid in a particular mode is inadmissible in an action on the note. *Murchie v. Cook*, 1 Ala. 41, cited in *Beard v. White*, 1 Ala. 436, cited in note in 43 L. R. A. 459.

Payment of Deed in Confederate Money. A deed which recites a cash consideration is not, at law, open to proof that the payment was made in Confederate money. *Chappell v. Williamson*, 49 Ala. 153, cited in note in 31 L. R. A. 242.

Payment of Note in Confederate

Money.—In an action on a note, evidence is not admissible to show that defendant understood that the note was payable in Confederate money. *Wharton v. Cunningham*, 46 Ala. 590. See, also, *Leslie v. Langham*, 40 Ala. 524, cited in note in 43 L. R. A. 459.

Statute Allowing Proof of Consideration of Confederate Contract.—Under Ordinance No. 26, adopted September 28, 1865, admitting parol evidence of the consideration of Confederate contracts, parol evidence is admissible, in an action by an indorsee against the drawer of a bill of exchange which was drawn in Mobile on a bank in New Orleans in 1862, and payable in currency, and which was not presented until the close of the war, to show that it was understood between the bank and the payee at the time of drawing the bill that, if it could not be sent to New Orleans in a short time, it should be returned to the bank, and the amount of Confederate treasury notes paid therefor should be returned to him, and that the indorsee knew of such agreement when he purchased the bill. *Tarleton v. Southern Bank*, 41 Ala. 722, cited in note in 31 L. R. A., N. S., 241.

The ordinance of September 28, 1865 (3), which declares that in certain cases parol evidence shall be admissible to prove whether or not it was understood or agreed that a contract between the parties should be discharged in Confederate money, and, if so, then it may be shown what was the real or true value of the consideration, and what amount can be legally, justly, and equitably recovered, according to the contract, applies to a suit in equity for the redemption of a mortgage; and, to authorize the reduction of the debt under that section, it must not only appear that the consideration of the contract was Confederate money, but that there was an agreement to discharge the debt in the same kind of money. *Scheible v. Bacho*, 41 Ala. 423, cited in note in 31 L. R. A., N. S., 241.

A promissory note for the payment of “dollars,” dated in January, 1865, is presumed to be payable in lawful money, and not in Confederate currency; but this presumption may be rebutted, by proof of an agreement or understanding, express or implied, that it should be paid in Con-

federate currency. *Hightower v. Maull*, 50 Ala. 495.

Payment in Spurious Money.—That during the progress of a sale the auctioneer proclaimed to the bystanders that bank notes of a certain railroad company would be taken in payment for the notes given for the purchase money, if the same were punctually paid, and urged the bystanders to purchase upon the ground that they could obtain property with spurious money, can not be proved by parol as a defense in an action on a note given for property purchased at such sale. *Hair v. La Brouse*, 10 Ala. 548, cited in 43 L. R. A. 459.

§ 318. Effect of Writing as to Persons Not Parties Thereto or Privies.

The rule that parol evidence is not admissible to contradict or vary a written contract does not apply in an action between one of the parties to the contract and a stranger. *Cunningham v. Milner*, 56 Ala. 522; *Lehman v. Howze*, 73 Ala. 302; *Holly v. Pruitt*, 77 Ala. 334.

"The rule against varying or contradicting writings by parol obtains only in suits between, and is confined to, parties to the writings, and their privies, and has no operation with respect to third persons, nor even upon the parties themselves in controversies with third persons." *Robinson v. Moseley*, 93 Ala. 70, 9 So. 372, 373.

"Mr. Greenleaf, in his *Treatise upon the Law of Evidence*, 318, remarks, that the rule which excludes parol evidence to contradict or vary the terms of a valid written instrument, is applied only in suits between the parties thereto; as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained. It can not affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who therefore ought not to be precluded from proving the truth, however contradictory to the written statements of others. See also pp. 26, 203, 236." *Andrews & Bros. v. Jones*, 10 Ala. 460, 471.

The rule forbidding the introduction of parol evidence to vary or contradict writings, applies only to parties and privies;

strangers to a writing, who have not assented to the truth of its statements, or that it should be a memorial of facts admitted to exist, are not bound by it, and may, whenever it is introduced to affect their rights, contradict it by parol. *Lehman Bros. v. Howze*, 73 Ala. 302.

"The recitals or statements in written agreements, are, as respects third persons, *res inter alios*, and for that reason can not conclude parties and privies." *Andrews & Bros. v. Jones*, 10 Ala. 460, 472.

"But this rule is confined in its operation to the parties in the written instrument; where it comes in question collaterally, in a suit to which a third person, a stranger to the writings, is a party, neither party is estopped from contradicting it, or from proving facts inconsistent with it. *Robinson v. Moseley*, 93 Ala. 70, 9 So. 372; *Troy Fertilizer Co. v. Norman*, 107 Ala. 667, 18 So. 201; *British, etc., Mortg. Co. v. Cody*, 135 Ala. 622, 33 So. 832; *Jones on Evidence*, § 296." *Myrick v. Wallace*, 5 Ala. App. 398, 59 So. 704, 705.

Right of Maker to Contradict Instrument.—A written instrument may be contradicted by the party making it, when offered in evidence in a suit to which a stranger to the instrument is a party. *Venable v. Thompson*, 11 Ala. 147.

Right to Contradict Consideration.—In a controversy between lien claimants as to priorities, one of them may, by parol, contradict the recitals, as to consideration, of an instrument to which he is not a party, and under which the other claims. *Carter v. Wilson*, 61 Ala. 434.

Relation of Principal and Surety as to Third Persons.—The relation of principal and surety between the makers of a note may, as between themselves, be shown by parol, but not to the prejudice of a stranger, unless he had notice thereof. *Summerhill v. Tapp*, 52 Ala. 227.

Contract Creating Lien.—One not a party to a contract creating a statutory lien, under Rev. Code, §§ 1856-60, for advances to make a crop, is not affected by its recitals, and is entitled to show that the instrument was in fact given to secure a preexisting debt. *Boswell v. Carlisle*, 55 Ala. 554.

Record of Ejectment Suit.—Where the covenantee in a suit for the breach of

a covenant for quiet use and enjoyment for a term of years introduces the record of an ejectment suit wherein there was a recovery by one having a paramount title, and a judgment for damages for use and occupation, not disclosing affirmatively the period of occupation, the covenantor, not being a party or privy to the suit, may show by parol that there was no recovery for a portion of the time of the covenantor's occupancy. *Watson v. Holly*, 57 Ala. 335.

Admission of Debt Due Third Party.

—The defendant's admission of a debt due plaintiff, contained in a written contract executed by defendant, to which plaintiff was not a party, when admitted in evidence against the defendant, was not conclusive, but was open to explanation or proof that the debt there admitted was never owed by him, or by any one else, since the rule against contradicting writings by parol is confined to suits between the parties to the writings and their privies; and, when questioned collaterally in a suit to which a third person, a stranger to the writings, is a party, neither party is estopped from contradicting it, or proving facts inconsistent with it. *Myrick v. Wallace*, 5 Ala. App. 398, 59 So. 704.

Conversation between Agent and Third Party.

—In an action to try the right of property in an attached crop, the tenant, who, as purchaser, had agreed that on default he should become his vendor's tenant, testified that before signing the contract he had a talk with the vendor's agent as to a credit on rents for any improvements he might make, and the agent told him to sign the contract, and he would make the vendor "fix that all right." Held, that the evidence was not objectionable as varying the written contract, the proceedings not being between the parties to such contract. *British & A. Mortg. Co. v. Cody*, 135 Ala. 622, 33 So. 832.

"As between the plaintiff and Barnes, if the litigation had been between them, the evidence would have been inadmissible. *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723. The rule, however, which forbids the introduction of evidence to vary or contradict writings, applies only

to parties or privies. 'Strangers to the writing, who have not assented to the truth of its statements, or that it should be a memorial of facts admitted to exist, are not bound by it, and may, whenever it is introduced to affect their rights, contradict it by parol.' *Lehman Bros. v. Howze*, 73 Ala. 302; *Robinson v. Moseley*, 93 Ala. 70, 9 So. 372; *Coleman v. Pike County*, 83 Ala. 326, 3 So. 755; *Venable v. Thompson*, 11 Ala. 147." *British, etc., Mortg. Co. v. Cody*, 135 Ala. 622, 33 So. 832, 834.

False Description in Mortgage.—When the debt secured is incorrectly described in the mortgage, or the relation of the parties to it is incorrectly stated, parol evidence is admissible at law, as against a stranger, to identify the debt. *Powell v. Young*, 51 Ala. 518.

"If the bill of exchange, on which the judgments were rendered, was misdescribed in the mortgage, or the relation of the parties to it was not properly stated, parol evidence was admissible, to show that it was the debt intended to be secured. *Graham v. Lockhart*, 8 Ala. 9; *Posey v. Decatur Bank*, 12 Ala. 802; *Morrison v. Taylor*, 21 Ala. 779; *Donald & Co. v. Hewitt*, 33 Ala. 534." *Powell v. Young*, 51 Ala. 518, 520.

Parol Agreement as to Lien on Crops.

—In a contest between the landlord and another person, as to the relative priority of their liens on the tenant's crop, each having a written contract with the tenant, a parol agreement between themselves as to their liens, supported by a valid consideration, is outside of their written contracts with the tenant, and between different parties, and may therefore be upheld. *Wells v. Thompson*, 50 Ala. 93.

§ 319. Writings Collateral to Issues in General.

"There was no error in allowing parol proof of the character and contents of papers, documents, court records, etc. In this action, where professional services were alleged to have been rendered, such papers, documents, and records were collateral—incidental—to the issues, and parol evidence was admissible in the premises. *Bulger v. Ross*, 98 Ala. 267, 12 So. 803; *Rodgers v. Crook*, 97 Ala. 725, 12

So. 108." *Pollak v. Gunter*, 162 Ala. 317, 50 So. 155, 156.

In an Action for Slander.—In a slander case based on a charge of larceny of cotton from a plantation managed by plaintiff under a contract with a company to which he had sold it, and of which defendant was president, a question was asked of plaintiff as to whether there was any agreement between him and another as president of the company about the indebtedness which had accrued on the farm, at the time of sale. Held that, if plaintiff's appropriation of the cotton was honestly made in reliance on an agreement between him and the president, he could prove an agreement which authorized the appropriation to show his intent, and thereby the falsity of the alleged slander, and the president's knowledge thereof, without infringing on the rule that, as between the parties in any proceeding to enforce the contract, the writing became the sole memorial of all prior and contemporary agreements not merely collateral thereto, and so an objection to the question that it sought to vary by parol the terms of the written contract was untenable, and there would have been no error had the court overruled it. *Phillips v. Bradshaw*, 167 Ala. 199, 52 So. 662.

"Plaintiff was asked by his counsel: 'Was there any agreement between you and Bradshaw, as president of the industrial company, about the indebtedness which had accrued on the farm, at the time of the sale?' An objection that this question sought to vary by parol the terms of a written contract was sustained. If plaintiff's appropriation of the cotton was honestly made in reliance upon an agreement made between him and Bradshaw, plaintiff had the right to make proof of an agreement which authorized the appropriation for the purpose of showing his intent, and thereby the falsity of the alleged slander, and, further, Bradshaw's knowledge of its falsity; and this, without inpinging upon the rule that, as between the parties in any proceeding to enforce the contract, the writing became the sole memorial of all prior and contemporary agreements not merely collateral thereto. *Walker v. State*, 117 Ala. 42, 23 So. 149." *Phillips v. Bradshaw*, 167 Ala. 199, 52 So. 662, 665.

§ 320. Evidence for Purpose Other than Varying Rights or Liabilities Dependent upon Terms of Writing.

Not within Statute of Frauds.—Though parol evidence of the terms of a contract for the sale of land is not admissible to supply a defect of the written memorandum of the contract, it is admissible on the assumption that such contract was a valid verbal contract, and not within the statute of frauds. *Nelson v. Shelby Mfg. & Imp. Co.*, 96 Ala. 515, 11 So. 695.

(B) INVALIDATING WRITTEN INSTRUMENT.

As to impeachment of a certificate of acknowledgment, see the title ACKNOWLEDGMENT.

§ 321. Matters Affecting Validity in General.

Instrument Wholly Void.—Parol evidence is admissible to show that a written instrument is altogether void, or that it never had any binding efficacy. *Corbin v. Sistrunk*, 19 Ala. 203.

True Character of Transaction.—In determining the validity of a contract on which an action is brought, the writing does not preclude the party to be charged from showing the true character of the transaction. *Robertson v. Robinson*, 65 Ala. 610.

Bill of Exceptions.—Parol evidence is admissible to show that a bill of exceptions, after it became a part of the record by being signed by the judge, was altered by him, or that it was in fact signed when the judge had no power to act. *Louisville & N. R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

A bill of exceptions, incorporated in the transcript on appeal, is not a part of the record, and parol evidence is admissible to show that it was not signed within the time prescribed by law and that the order extending the time was invalid. *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843.

§ 322. Incapacity of Parties.

See ante, "Effect of Writing as to Persons Not Parties Thereto or Privies," § 318.

§ 323. Insufficiency or Irregularity of Execution or Delivery.

See, also, ante, "Existence of Condition or Contingency," § 314.

Want of Delivery and Acceptance.—The rule that contemporaneous stipulations can not be shown, to alter a written contract, does not apply to cases where the execution and delivery of the writing are in issue. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

The rule which excludes parol testimony to affect a written instrument is not infringed by the admission of such evidence to show that the instrument was void, or that it never had any legal existence or binding force, for want of due delivery and acceptance. *White v. Kahn*, 103 Ala. 308, 15 So. 595.

Nondelivery of Deed.—Parol evidence is admissible to show that a deed in the possession of the grantee was not delivered. *Alabama Coal & Coke Co. v. Gulf Coal & Coke Co.*, 165 Ala. 304, 51 So. 570.

Delivery in Escrow.—It is incompetent to show by parol evidence that a note absolute on its face was delivered only as an escrow. *Garner v. Fite*, 93 Ala. 405, 9 So. 367, cited in note in 18 L. R. A., N. S., 291.

Where a deed is complete on its face, and bears no evidence that the wife of one of the grantors is to join in its execution, parol evidence is inadmissible to show that it was delivered only as an escrow, or as evidence of the receipt of the purchase money, its delivery having been absolute. *Hargrave v. Melbourne*, 86 Ala. 270, 5 So. 285.

Where the grantor voluntarily delivered a deed to the grantee, he can not show by parol that it was a conditional delivery. *Williams v. Higgins*, 69 Ala. 517.

Invalidating Inventory.—Where claimant claims under a bill of sale "per inventory," evidence that the inventory could not have been taken within the alleged time is admissible. *Tobias v. Treist*, 103 Ala. 664, 15 So. 914.

§ 324. Want or Failure of Consideration.

Failure of Consideration between Immediate Parties.—"There is a marked difference between parol evidence which

goes to vary, contradict or add to written agreements which intelligibly speak the intention of the parties, and which they have adopted as furnishing evidence and full expression of their intention, or which changes the legal effect of such agreements, and parol proof which shows that the instruction is altogether void, or that it never had any binding efficacy, or the want of consideration, either in whole or in part. While the first is inadmissible, the latter is constantly received. 1 Greenl. Ev., § 284." *Corbin v. Sistrunk*, 19 Ala. 203, 205.

In an action on a note, between the original parties thereto, parol evidence is admissible to show a want or failure of consideration. *Corbin v. Sistrunk*, 19 Ala. 203; *Pacific Guano Co. v. Mullen*, 66 Ala. 582.

Recitals in a deed as to consideration paid are not evidence thereof as against one claiming title by purchase at execution sale, under a judgment against the grantor in the deed, for a debt which arose before the date of the deed. *Wells v. Watson*, 101 Ala. 628, 14 So. 561.

Recital of Valuable Consideration.—Parol evidence is inadmissible, in an action against the devisees of the grantee of a deed by an heir of the grantor, to show, in the absence of fraud or mistake, that nothing was paid if the deed recites a valuable consideration. *Ohmer v. Boyer*, 89 Ala. 273, 7 So. 663, cited in note in 20 L. R. A. 108.

Contradiction of Nominal Consideration.—Where a deed recites a valuable consideration, a further recital of love and affection and a nominal consideration can not, in the absence of fraud or mistake, be contradicted or the adequacy of the entire contract controverted by the heirs of the grantor. *Goodlett v. Hansell*, 66 Ala. 151.

Knowledge of Defective Title.—Parol evidence that the vendee in a contract for the sale of land knew at the time of making the contract that the vendor's title was defective is admissible to excuse the literal performance of the contract by the vendor, and it is not objectionable as explaining the written contract. *Beck v. Simmons*, 7 Ala. 71.

Failure of Consideration of Similar Note.—Where the defense to a note is

failure of consideration, evidence that the consideration of a note similar to that in suit has failed is admissible. *Smith v. Armistead*, 7 Ala. 698.

Failure of Consideration of Deed of Trust.—Where a deed of trust of lands from a husband to his wife is recited to be for a valuable consideration, parol evidence is inadmissible, in a contest between the heirs of the former and the devisees of the latter, to show that no such consideration was actually paid. *Ohmer v. Boyer*, 89 Ala. 273, 7 So. 663, cited in note in 20 L. R. A. 108.

Failure of Warranty.—In an action on the case, for deceit in the sale of a slave with warranty of soundness in body, mind, and title, it is competent to prove by parol that the slave at the time of sale was represented honest, industrious, and free from vice, whereas he proved to possess the opposite qualities. *Cozzins v. Whitaker*, 3 Stew. & P. 322.

Rescission of Contract Forming Part of Consideration.—When the consideration of a note is not stated in it, parol proof is admissible to show what it was, and that the contract of which the note formed a part had been rescinded by the parties. *Newton v. Jackson*, 23 Ala. 335.

Illegal Consideration.—Parol evidence is admissible to show that the consideration of a contract is illegal. *Patton v. Gilmer*, 42 Ala. 548.

Deed from Husband to Wife.—As against prior creditors of a husband, or a purchaser at a sheriff's sale on execution against him, the recitals in his deed to his wife are not evidence of the actual consideration. *Tutwiler v. Munford*, 68 Ala. 124, cited in note in 20 L. R. A. 111.

Deed Founded on Pecuniary Consideration.—The grantor in a deed purporting to be founded on a pecuniary consideration can not, in a court of law, show the want or inadequacy of the expressed consideration. *Williams v. Higgins*, 69 Ala. 517.

Consideration of Bond.—The recital of a consideration in a bond is only *prima facie* true, and may be rebutted by parol evidence, under Code, § 2981, authorizing inquiry into the consideration of sealed instruments. *Counts v. Harlan*, 78 Ala. 551.

Failure to Fulfill Terms of Guaranty.

In an action on a guaranty of payment, defendant could show that part of the consideration of the contract was that plaintiff agreed to extend a further credit to the debtor, which it failed to do, that not seeking to vary the terms of the written contract, but properly setting up a failure of consideration as expressed in the contract sued on. *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 So. 613.

Failure of Anticipated Event.—In an action on a note, a defense that the note was given on an understanding that, in case a certain event happened, it should be surrendered to the maker, and that such event did happen, was not objectionable on the theory that it sought to vary a written contract by parol, as the true effect of the defense was to show a failure of consideration. *Dial v. McKay*, 150 Ala. 118, 43 So. 218.

§ 325. Mistake.

Mistake in Inventory of Estate.—An administrator may show errors or mistakes in the inventory of the estate returned to court by him, in order to relieve himself *pro tanto* from a charge for assets improperly returned therein. *Craig v. McGehee*, 16 Ala. 41.

Mistake in Replevin Bond.—In the case of a bond given to replevy attached property, mistakes in the recital of the attachment and levy may be corrected by parol evidence. *Adler v. Potter*, 57 Ala. 571.

§ 326. Fraud.

See, generally, the titles FRAUD; FRAUDULENT CONVEYANCES.

§ 326 (1) In General.

The rule which forbids the admission of parol evidence, to add to, vary or contradict a written instrument, does not apply where the rescission of a contract is sought in equity on the ground of fraud. *Pierce v. Wilson*, 34 Ala. 596.

"If plaintiff fraudulently imposed on defendant, and procured his signature to an instrument he had not agreed to sign, did not know he was signing, and did not intend to execute, this amounts to fraud in the execution, which may be proved by parol, and, if satisfactorily established, justifies the jury in finding against its va-

lidity. *Swift v. Fitzhugh*, 9 Port. 39; *Morris v. Harvey*, 4 Ala. 300; *Mead v. Steger*, 5 Port. 498; *Paysant v. Ware*, 1 Ala. 160; *Dickinson v. Lewis, etc., Co.*, 34 Ala. 638. But, see *Goetter, etc., Co. v. Pickett*, 61 Ala. 387." *Davis v. Snider*, 70 Ala. 315, 317.

§ 326 (2) In Deeds.

Conveyance Obtained by Fraud.—That a conveyance was obtained by fraud is open to proof. *Martin v. Evans*, 163 Ala. 657, 50 So. 997.

See, generally, the title FRAUDULENT CONVEYANCES.

Agent Taking Title in His Own Name.

—Where an agent buys land with the money of his principal, and takes a deed conveying the title to himself, it is competent for the principal to prove the fact by parol testimony, and assert his title to the land. *Andrews v. Jones*, 10 Ala. 460.

"But this rule has never been extended, so far as to exclude verbal evidence to raise a resulting trust; and it can not be endured, that an agent, who uses his principal's money in the purchase of property, can exclude the latter from its enjoyment, by taking a conveyance to himself *eonomine*; or if he sells, and receives notes payable to himself, that the principal can not enjoin their collection. In *Jackson v. Milla*, 13 Johns. 463, it was held, that parol evidence was admissible to show, and that one man advanced the consideration for the purchase of land, though the deed was taken in the name of another, so as to raise a resulting trust in favor of the former. See *Gardiner Bank v. Wheaton*, 8 Greenl. 373." *Andrews & Bros. v. Jones*, 10 Ala. 460, 471.

Amount of Timber on Land.—Parol evidence is admissible to show that a vendor of land, at the time of sale, represented that one hundred acres of the tract was timbered, whereas in fact there was timber on only seventy acres; such misrepresentation not relating to the vendor's title, nor to the quantity of land, nor to any matter embraced in the bond for title or the purchase money notes. *Thweatt v. McLeod*, 56 Ala. 375.

Fraudulent Use of Deed.—Parol evidence is admissible to show the fraudu-

lent use of a deed, or that the party, receiving an absolute deed on a promise that he would dispose of the property thereby conveyed in a particular manner, refused to perform such promise. *Kennedy's Heirs v. Kennedy's Heirs*, 2 Ala. 571.

§ 326 (3) In Assignments.

Disproving Fraudulent Intent.—Where a deed of assignment by an insolvent debtor is not fraudulent on its face, parol proof, showing that no secret fraud was intended to be consummated by it, is admissible. *Abercrombie v. Bradford*, 16 Ala. 560.

§ 326 (4) In Contracts in General.

Execution Procured by Fraud.—Parol evidence is admissible to show that the execution of a contract was procured by fraud. *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Waddell v. Glassell*, 18 Ala. 561; *Pierce v. Wilson*, 34 Ala. 596; *Tabor v. Peters*, 74 Ala. 90.

Omission to State Contract Truly.—"But notwithstanding the conclusiveness of the rule, which inhibits the introduction of parol evidence, to contradict or vary a written agreement, a party may show that by fraud or undue means, there was an omission to state the contract truly." *Mead v. Steger*, 5 Port. 498, 504.

False Representation of Contents of Contract.—Where one contracting with an illiterate person procures his signature to a written contract by falsely representing its contents, as between the parties, parol evidence is admissible to show what the contract really was. *Bank of Guntersville v. Webb*, 108 Ala. 132, 19 So. 14.

Breach of Warranty.—In actions *ex contractu*, brought for an alleged breach of contract of warranty, oral proof of a warranty is not admissible, but, where the action is *ex delicto*, based on the tort or deception practiced by the false warranty, the rule is otherwise, and parol evidence is admissible to show that the contract was induced by an oral warranty, which was known by the party making it to be false, and which was made for the purpose of deceiving the other party. *Tabor v. Peters*, 74 Ala. 90.

§ 326 (5) In Contracts for Buildings and Other Works.

Fraud in Engineer's Estimate.—A stipulation in a contract that the engineer's estimate "shall be conclusive upon both parties, unless founded on fraud or mistake" does not render such estimate, as an award of arbitrators, unimpeachable and unassailable, except in direct proceedings in equity; and, in an action at law to recover a balance due on the contract, evidence of mistakes implying fraud was properly received, entitling plaintiff to recover the agreed price for the work done, though in excess of the engineer's estimate. *Terrell Coal Co. v. Lacey* (Ala.), 31 So. 109.

§ 326 (6) In Contracts of Sale or Exchange.

To Enable Vendee to Recover Consideration.—A vendee, imposed on by the fraud of a vendor, may repudiate the contract of purchase on its discovery, and recover back the consideration paid; and the fact that the contract of sale is in writing will not prevent the admission of parol evidence of the fraud or misrepresentation. *Nelson v. Wood*, 62 Ala. 175.

"A purchaser, imposed on by the fraud of the vendor, may repudiate the contract of sale upon the discovery of the fraud, and recover back the money or things given as the consideration. The fraud may not be actual—it may consist in the representations by the vendor of the quality of the thing sold—representations not known to be untrue, but which prove untrue, on which the vendee relied, and had the right to rely. The fact that the contract of sale is in writing, does not preclude the admission of parol evidence of the fraud or the misrepresentation. *Cozzins v. Whitaker*, 3 Stew. & P. 322; *Dixon v. Barclay*, 22 Ala. 370; *Blackman v. Johnson*, 35 Ala. 252." *Nelson v. Wood*, 62 Ala. 175.

Misrepresentation as to Quantity of Land.—Misrepresentations of a vendor of land who has given a bond for title as to the quantity of a particular tract may be shown, though said bond contains no covenant as to the quantity. *Thompson v. Bell*, 37 Ala. 438.

Representations in Letter.—Though the

legal effect of a written contract can not be varied by proof of antecedent parol stipulations, or representations made through the medium of a letter, such evidence is admissible to show fraud in the procurement of the written contract. *Townsend v. Cowles*, 31 Ala. 428.

§ 326 (7) In Bills and Notes or Indorsement Thereof.

Notes Taken by Agent.—Where an agent buys land with the money of his principal, and takes a deed conveying the title to himself, or upon the sale of land thus situated, takes notes for the purchase money in his own name; it is competent for the principal to prove the fact by parol testimony, and assert his title to the land in the one case, and to the money in the other. *Andrews & Bros. v. Jones*, 10 Ala. 460.

§ 327. Undue Influence.

See, also, the title WILLS.

That a conveyance was obtained by undue influence is open to proof. *Martin v. Evans*, 163 Ala. 657, 50 So. 997.

§ 328. Illegality.

Agreement as to Usurious Interest.—

In an action on a note which does not stipulate for usurious interest, evidence of an oral contemporaneous agreement, on part payment of the note at maturity, to extend the balance at usurious interest, is improperly admitted. *Allen v. Turnham*, 83 Ala. 823, 3 So. 854. See, generally, the title USURY.

(C) SEPARATE OR SUBSEQUENT ORAL AGREEMENT.

§ 329. Grounds for Admission of Oral Evidence.

See, also, post, "Contracts of Insurance." § 331 (9).

Where parties have agreed upon the terms of a contract, which is afterwards reduced to writing, the verbal agreement is merged in the written contract, and can not be varied by parol evidence, and even though the verbal and written contracts were simultaneously made, the rule is not varied. *Mead v. Steger*, 5 Port. 498.

Agreement to Loan upon Life Insurance Policy.—Where at the time of the execution of a note for a life insurance

policy it was agreed that the policy should contain a stipulation providing for a loan of a part of the face value after three annual payments, the admission of evidence of such agreement is not precluded by the contemporaneous execution of the note, when it is offered in support of a plea relying on the noncompliance of such agreement as a failure of consideration. *Parker v. Bond*, 121 Ala. 529, 25 So. 898, cited in note in 18 L. R. A., N. S., 289.

§ 330. Prior and Contemporaneous Collateral Agreements.

§ 331. — In General.

§ 331 (1) In General.

Rule Stated.—Where parties enter into a written contract, their rights must be controlled thereby, and, in the absence of fraud or mistake, all evidence of contemporaneous oral agreement on the same subject-matter, varying, modifying, or contradicting the written agreement, is inadmissible. *Wesson v. Carroll*, Minor 251; *Caldwell v. May*, 1 Stew. 425; *Mead v. Steger*, 5 Port. 498; *Litchfield v. Falconer*, 2 Ala. 280; *Holt v. Moore*, 5 Ala. 521; *O'Neil v. Teague*, 8 Ala. 345; *Cuthbert v. Bowie*, 10 Ala. 163; *Cole v. Spann*, 13 Ala. 537; *Ware v. Cowles*, 24 Ala. 446; *Townsend v. Cowles*, 31 Ala. 428; *Mayrant v. Marston*, 67 Ala. 453; *Coleman v. Siler*, 74 Ala. 435; *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444, cited in note in 17 L. R. A. 273; *Wurtzbarger v. Anniston Rolling Mills*, 94 Ala. 640, 10 So. 129; *Garner v. Fite*, 93 Ala. 405, 9 So. 367; *Brewton v. Glass*, 116 Ala. 629, 22 So. 916; *Blanks v. Moore*, 139 Ala. 624, 36 So. 783, 784.

Evidence of prior or contemporaneous agreements is not admissible to contradict or vary the terms of the written contract. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444; *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, cited in note in 17 L. R. A. 273.

While it is a rule of law, that, in the interpretation of a written instrument, the court is permitted to place itself in the situation of the contracting parties at the time of its execution, and to consider the occasion which gave rise to it, the relative position of the parties, and the obvious design they intended to accom-

plish, this rule can not be so extended as to supplement the writing with proof of a contemporaneous oral agreement, which changes its meaning. *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 73 Ala. 426.

A contract reduced to writing, can not be varied by evidence of oral agreements, whether prior or contemporaneous. *Town of Brewton v. Glass*, 116 Ala. 629, 22 So. 916.

Negotiations and conversations leading up to a written contract are merged therein, and evidence of such conversations is inadmissible to contradict such contract. *Lambie v. Sloss Iron & Steel Co.*, 118 Ala. 427, 24 So. 108.

Agreement Releasing Dower.—L. gave P. a writing which recited that, having sold P. a certain lot, and not being able at the time to procure a release of dower from S.'s wife or his own, he agreed "to procure their release within nine months, or forfeit the amount of his note, which will be due in five years," etc. Held, in an action by P. on the instrument, that parol evidence was not admissible to prove that the intention of the parties by the use of the words "amount of his note" was that the maker should forfeit and pay an amount equal to the face of the note. *Phillips v. Longstreth*, 14 Ala. 337.

To Vary Time of Payment.—The ordinance of the convention of 1865 (Ordinance No. 26) does not authorize parol evidence in contravention of the terms of a written contract as to the time of payment. *Powe's Adm'r v. Powe*, 42 Ala. 113.

Certificate of Indebtedness Issued by Assignees.—In an action on a certificate of indebtedness by an assignee thereof, evidence is inadmissible on the part of defendant to show that the certificate was issued on an oral agreement that it should be used in payment of a debt due from the party to whom it was issued to a creditor of defendant. *Alabama & M. R. Co. v. Sanford*, 36 Ala. 703.

Agreement to Purchase Stock.—An action on a written subscription to stock can not be defeated by evidence of a prior or contemporaneous oral agreement that the stock was not to be issued, nor the subscriber held liable on his subscription. *Wurtzbarger v. Anniston Rolling-Mills*, 94 Ala. 640, 10 So. 129.

The written contract embodied in the subscription for stock of a corporation can not be varied by parol evidence of prior or contemporaneous transactions or agreements of the parties. The writing speaks for itself, and all prior oral agreements are merged therein. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650.

§ 331 (2) Assignments.

Agreement to Return Consideration.—

Evidence of a contemporaneous oral agreement by the assignor of a contract of purchase of land that, if the vendor should fail to make a deed to the assignees, he would return the consideration, and would guaranty that "it would be all right," is inadmissible, as changing the terms of the written assignment. *Griel v. Lomax*, 86 Ala. 132, 5 So. 325.

Holding Paper in Trust.—Evidence that an assignee holds a paper in trust for another, and not in his own right, does not contradict the assignment, and, in a proper case, is admissible. *Brown v. Isbell*, 11 Ala. 1009.

Assignee of Bonds.—A written contemporaneous agreement by the transferee of town railroad aid bonds to accept a judgment for less than their face in full satisfaction of the bonds, without mentioning the stock secured thereby, can not be varied by proof of a contemporaneous oral agreement that the town, as part of the consideration of such agreement, was to transfer a certain amount of railway stock to such transferee of the bonds. *Bank of Mobile v. Mobile & O. R. Co.*, 69 Ala. 305.

Assignment of Specialty.—"In *Sommerville v. Stephenson*, 3 Stew. 271, it was held by this court, that the contract evidenced by the general assignment of a specialty, could not be varied by parol evidence, as it had a specific legal import." *Tankersley v. Graham*, 8 Ala. 247, 251.

§ 331 (3) Leases.

Agreement to Repair.—Parol evidence is inadmissible to prove that the lessor agreed to make repairs, as such agreement was merged in the lease. *Thompson Foundry & Machine Works v. Glass*, 136 Ala. 648, 33 So. 811.

In an action against a tenant for rent,

parol evidence of a contemporaneous agreement by the landlord to repair, entirely distinct from the contract of renting, is admissible. *Vandegrift v. Abbott*, 75 Ala. 487.

"The admission of parol evidence of the agreement of the landlord to repair did not offend the general rule, that parol evidence is inadmissible to vary or contradict a contract in writing. The contract in writing was the promise of the tenant to pay the rent; the agreement of the landlord to repair was a distinct and separable contract, though made contemporaneously. Contracts, if a statute does not intervene, may be expressed partly in writing, and partly in parol. If the writing does not purport to set out the entire contract, if it purports to set out only the part of the contract which is obligatory on the party making it, there is no just objection to parol evidence of the distinct and separable part of the contract, not reduced to writing, obligatory upon the other party. 2 Whart. Ev., § 1015; *Garrow v. Carpenter*, 1 Port. 359; *Brown v. Isbell*, 11 Ala. 1009; *Patton v. Beecher*, 62 Ala. 579, 585; *Huckabee v. Shepherd*, 75 Ala. 342. The case of *Evans v. Bell*, 20 Ala. 509, asserting a contrary doctrine, is erroneous." *Vandegrift v. Abbott*, 75 Ala. 487, 490.

Agreement to Make Improvements.—

A breach by the lessor of an oral agreement to make additions to the leased building, made prior to or contemporaneously with the execution of the written lease, can not be shown by the lessee to defeat an action for rent. *Morningstar v. Querens*, 142 Ala. 186, 37 So. 825.

"If the agreement was made prior to or contemporaneously with the execution of the lease, the evidence was clearly not competent, upon the principle declared in *Thompson*, etc., *Mach. Works v. Glass*, 136 Ala. 648, 33 So. 811. If made after the execution of the lease, conceding the authority of the agent to bind her, no consideration is shown for it. However, the evidence was not competent under the plea in this case. If defendant wished to interpose this defense, he should have interposed a plea of recoupment or set-off." *Morningstar v. Querens*, 142 Ala. 186, 37 So. 825.

Conditional Payment of Rent.—Parol

evidence can not be introduced to prove that the payment of rent on a lease of coal land is to cease on a contingency or condition not named in the writing. *Pierce v. Tidwell*, 81 Ala. 299, 2 So. 15.

Payment of Water Rent.—On an issue whether water rent was payable in advance, evidence relating to transactions between the parties under the contract was admissible as revealing their understanding as to the time for payments. *Hieronymus v. Bienville Water Supply Co.*, 131 Ala. 447, 31 So. 31.

§ 331 (4) Contracts of Employment.

Agreement as to Termination of Contract.—Where a writing expresses the contract between parties, it is not error to exclude parol evidence that, in addition to what was expressed, it was agreed that plaintiff could terminate the contract at any time, and that defendant could discharge plaintiff when he desired. *Drennen v. Satterfield*, 119 Ala. 84, 24 So. 723.

Agreement as to Compensation.—Where an agent, employed by parol to sell land at an agreed compensation, entered into a written contract of purchase for himself, with the understanding that his compensation was not to be changed, but of which understanding the contract contained nothing, the prior agreement, being independent of the written contract, could be shown by parol. *Huckabee v. Shepherd*, 75 Ala. 342.

"The contract between the plaintiff and the defendant, bearing date on the 14th of October, 1880, had reference only to the purchase of the property, known as the 'Bibb County Iron Works,' it being shown that the plaintiff was only acting as agent for a company in which he had an interest. This written instrument contains no reference to the subject of any compensation or commission to be received by the plaintiff for effecting such sale. It may be that, presumptively, a vendee is not entitled to commissions for effecting a sale between the vendor and himself. But there was proof here tending to rebut this presumption, by showing an express agreement to the contrary. The agreement of the parties as to commissions was anterior to, as well as distinct from the contract of sale itself. The

case, then, is one where the particular contract sued on was not reduced to writing, and where the one actually put in writing was not intended to contain all matters of agreement between the parties. Oral evidence is admissible in such cases to show this state of facts, without infringing the rule excluding parol evidence of contemporaneous stipulations, which contradict or vary the legal effect of written instruments. *Brown v. Isbell*, 11 Ala. 1009; 1 Add. Contr. (Am. Ed.), § 243. This principle is a qualification of the general rule last stated, and is admitted to be of difficult, and often of delicate application in practice. But it is well founded in reason, as well as established by authority, and is often invoked by the courts 'to enable one party to escape from the fraud or injustice of the other.' 1 Greenl. Ev. (Redf. Ed.), § 284a. In this view of the law, there was no error in refusing the fourth charge requested by the appellant." *Huckabee v. Shepherd*, 75 Ala. 342, 344.

§ 331 (5) Sale or Exchange of Real Property and Deeds.

Any parol reservations to property conveyed, whether prior to or contemporaneous with the execution of an absolute conveyance, are merged in the deed, and it takes effect as an operative conveyance, according to its terms, from the time of delivery. *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978.

"Our court has not only respected the rule, but has generally applied it when the occasion arose, regardless of the rigor or hardship in any given case, and we quote from *Melton v. Watkins*, 24 Ala. 433: 'As we have said on a former occasion, there is no hardship in requiring parties to make their writing, which they adopt as the evidence of their agreement, speak truly its terms. Were we to depart from this evidence, and to go out in search of parol negotiations, either at or before the time the parties reduced their contract to writing, we should open a wide door for fraud and perjury, and would introduce the greatest uncertainty, in many cases, as to what the contract of the parties really was. The policy of the law is clearly opposed to relaxing the stringency of the rule.' See *Seay v. Marks*, 23 Ala.

532." *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978, 979.

Parol Reservation Limiting Estate.—

The legal effect of an absolute conveyance can not be varied or qualified by a reservation in parol, so as to make the estate conveyed commence in futuro, or so as to limit or restrict the use or enjoyment of the property conveyed. *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978.

"Our attention is being called to the case of *Steed v. Hinson*, 76 Ala. 298, as an authority in support of the ruling of the trial court, and which doubtless induced same, and which, we confess, is calculated to mislead. It will be observed, however, that the opinion, in said case, guards against holding that the rent could be reserved by parol, when the lessor absolutely conveys the reversion, and seems to proceed upon the idea that the rent was a mere incident to the reversion, which could be severed, and which was severed, before the delivery of the deed. In other words, the estate conveyed was not limited or restricted, but the grantor got all he bought; the rent for the year of the sale being a mere incident and was severed before the deed was delivered and which did not restrict or limit the title or estate conveyed." *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978, 980.

Agreement to Cancel Notes Given as Payment.—An absolute conveyance of property in partial satisfaction of a debt, and notes made absolutely due and payable at a certain time in discharge of the remainder of the debt, can not be varied by evidence of a parol agreement that, in the event the property conveyed shall before the maturity of the notes increase in value in a sum equal to their amount, the notes shall be delivered up and canceled. *Pearson v. Dancy*, 144 Ala. 427, 39 So. 474.

Location of Alley Mentioned in Deed.

—In an action to enjoin the obstruction of an alley granted by defendant to plaintiff's grantor, it appeared that the description in the deed of the alley was so indefinite that its identity could not be ascertained, but that after the grant it was definitely located by the parties, and passed to the possession of the grantee, who continued its use for nine years. Held, that evidence of oral statements of the parties, made prior to the grant, indicat-

ing a purpose by the grantor, at some time, to acquire other land and locate the alley over it, was incompetent. *Wharton v. Hannon*, 101 Ala. 554, 14 So. 630.

Retention of Possession by Grantor.—

Where plaintiff claims under an absolute conveyance in fee from defendant, parol evidence of a contemporaneous verbal agreement for the retention of possession by defendant until he had made another crop on the land varies the legal effect of the deed, and is therefore inadmissible. *Melton v. Watkins*, 24 Ala. 433.

"This view does not conflict with *Garrow v. Carpenter*, 1 Port. 359; for, in that case, the agreement proved by parol, and which was contemporaneous with the writing, did not go to alter, contradict or explain the writing, at all events, such was the judgment of the court. Nor does it fall within the rule, which allows absolute deeds to be shown by parol to have been intended as mortgages merely. It simply presents the case of a conveyance of an entire interest in land, without reservation of the possession, which the law, in virtue of such conveyance, transfers to the grantee, and an attempt to reserve a term to the grantor notwithstanding the deed, and in palpable violation of its legal effect, by a parol contemporaneous agreement." *Melton v. Watkins*, 24 Ala. 433, 436.

"In the case of *Melton v. Watkins*, 24 Ala. 433, a deed, absolute in terms, was executed, and the grantor attempted to show, by parol, a contemporaneous agreement, whereby he was to retain the use of the land until the expiration of the ensuing farming season. The court held that, the reservation not being in the deed, or otherwise in writing, it varied, by parol, the legal effect of the deed, and took from the grantee an interest which the deed conveyed to him." *Burroughs v. Pate*, 166 Ala. 223, 51 So. 978, 979.

Manner of Payment.—Where a written contract recited that the purchase money was to be paid on a specified day, and that the vendor was to make titles when the purchase money was settled with him, and no fraud or mistake in its execution was alleged, the terms of the contract can not be varied, in equity, by proof of a contemporaneous parol agreement that the purchase money was not to be paid

on the day specified, but was to await a settlement of accounts between the parties. *Ware v. Cowles*, 24 Ala. 446.

Payment of Outstanding Incumbrance.

—The legal effect of a covenant can not be varied by a parol contemporaneous agreement, as where a vendee, with covenants of warranty, agrees by parol to pay an outstanding incumbrance. *Holley v. Younge*, 27 Ala. 203.

Person to Whom Property Was Allotted.—Where a written agreement between the children and sons-in-law of a decedent purported on its face to allot certain portions of his property to the sons-in-law in their own right, parol evidence was inadmissible to prove that such allotted portions were intended to be in the right of their wives. *Moody v. McCown*, 39 Ala. 586.

§ 331 (6) Sale of Personal Property.

Sale of Property to Satisfy Debts.—In trover by mortgages against a third person for the conversion of mortgaged property, defendant may show by parol that, prior to the execution of the mortgage, the mortgagor, for a valuable consideration, gave him a right to receive and sell the property, satisfy certain debts, and return the surplus, and that this was made known to plaintiffs by the mortgagor, who refused to execute the mortgage without defendant's consent, which was given on plaintiff's consent to the arrangement. *Holland v. Kimbrough*, 52 Ala. 249.

Time to Remove Timber.—Where a deed of bargain and sale conveyed an absolute title to timber on land described, parol evidence that, at the time the purchase and sale was made, it was verbally agreed that the grantee's title to the timber was limited to eight years from the date of the deed, and at the expiration of that time all his interest in the timber was forfeited to the grantor, was inadmissible. *Vizard v. Robinson* (Ala.), 61 So. 959.

"Appropriate objection, seasonably saved, was taken to the quoted matter, ante, from the first paragraph of the agreed statement. It went, in variously stated grounds, to the inadmissibility of that character of parol evidence upon the inquiry involved in the construction of

the deed. Under the authority of *Hughes v. Wilkinson*, 35 Ala. 453, 462, treating fully, avoiding any necessity for repetition here, the rule the objection invokes, it must be held that such evidence was inadmissible. This doctrine of *Hughes v. Wilkinson*, has been often recognized here in these, among other, cases: *Guilmartin v. Wood*, 76 Ala. 204, 209; *Sullivan v. Louisville, etc., R. Co.*, 138 Ala. 650, 35 So. 694; *Gaston v. Weir*, 84 Ala. 193, 4 So. 258." *Vizard v. Robinson* (Ala.), 61 So. 959, 962.

Conditional Sale of Chattel.—In an action by the seller to recover a chattel sold on conditional sale, parol evidence of a contemporaneous agreement that title should pass was not admissible to contradict the written contract. *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855.

"The court erred in permitting the defendant, against plaintiff's objection, to show by the witness Langley that there was a contemporaneous agreement to release the title to the organ, and to strike out of the note or contract the stipulation retaining title in the seller. It is not pretended that any fraud was practiced in the execution of the note or contract. If there was a written release of the title executed to Sute by Langley as the agent of Forbes, then it should have been produced, or its absence accounted for, before offering parol evidence of its contents." *Forbes v. Taylor*, 139 Ala. 286, 35 So. 855, 856.

Establishment of Parol Warranty.—A written order for materials, which neither contains nor excludes a warranty of the materials, does not preclude the establishment of a parol warranty. *Flourance Wagon Works v. Trinidad Asphalt Mfg. Co.*, 145 Ala. 677, 40 So. 49.

If a bill of sale of blooded stock contains no warranty, express or implied, beyond that of title, parol evidence is inadmissible to add to it a simultaneous verbal warranty as to age and soundness. *Bush v. Bradford*, 15 Ala. 317.

"While parol evidence is always admissible in actions ex delicto, or in defenses based on the tort or deception practiced by a false warranty, to show that the contract was induced by an oral warranty, fraudulently given by one contracting party for the purpose of inducing the

other to consent to bargain, the rule is different in actions *ex contractu*, where the question of fraud does not arise. In this class of cases oral evidence of a warranty, where the written contract contains none, is not admissible, because 'its effect is clearly to vary the terms of the written instrument, by superadding another term or condition not expressed by the parties.' *Tabor v. Peters*, 74 Ala. 90; 1 Pars. Cont. 589, 590; 2 Add. Cont. § 629. Such, in our opinion, was the effect of the testimony of the witnesses Sayre and Lomax, touching the point under consideration. Any oral promise to guaranty his title, made by Griel, prior to or contemporaneously with the delivery of the written contract, must be considered as merged in the writing; and any such promise, made after the delivery of such contract, would be void, unless supported by some new consideration, other than that named in the writing." *Griel v. Lomax*, 86 Ala. 132, 5 So. 325, 327.

Bill of Sale as Security for Advancement.—Parol evidence is not admissible to vary the terms of a written bill of sale by showing that it was executed by the seller to a third person, and delivered to him as security for the advancement of purchase money to the real buyer. *Jones v. Trawick's Adm'r*, 31 Ala. 253.

Conveyance of Slaves.—A father conveyed slaves to his son by deed. Afterwards, in an action of trover by the father against the son, it was held competent to prove a parol agreement, made at the time of the conveyance, by which it was stipulated that the father should retain possession of the slaves during his life. *Strong v. Strong*, 6 Ala. 345.

§ 331 (7) Bonds.

Varying Amount of Property Covered by Forthcoming Bond.—Where a levy has been made, and a forthcoming bond executed, for "1,000 bushels of corn and one hundred bales of cotton," parol proof of a contemporaneous agreement between the obligors and the sheriff that certain cotton already ginned and ready for shipment should be reserved from levy, and that the levy was actually on the estimated amount of cotton and corn then ungathered, is inadmissible. *Boll-*

ing v. Vandiver, 91 Ala. 375, 8 So. 290, cited in note in 17 L. R. A. 273.

Bonds for Payment of Slaves.—In an action on a bond transferred to plaintiff by one who had taken it from defendant in partial payment for slaves sold to him, the question being whether or not defendant consented to the transfer, evidence that at the time of the sale the seller promised defendant that this bond should not be applied in any other way than to the extinguishment of a mortgage which a third person held on the slaves was not objectionable as contradicting the terms of the written contract. *Huntington v. Adams*, 12 Ala. 834.

§ 331 (8) Bills and Notes or Indorsement Thereof.

To admit proof of a parol agreement or understanding between the parties to a note entered into at the time it was executed, essentially varying the note itself, would be contrary to the rule of law which forbids any verbal agreement differing from a written one entered into before or at the time the written agreement was executed from being given in evidence. *Caldwell v. May*, 1 Stew. 423, cited in note in 43 L. R. A. 450.

Postponing Liability on Note.—Defendant made this note: "Good for three hundred dollars. January 15, 1829." Held, that plaintiff might show by parol that it was delivered to, and was intended to acknowledge a liability to, him, but could not introduce parol evidence to show that it was understood between the parties that there was no present indebtedness, or that it should be payable at a future day, so as to postpone the time when the statute of limitations began to operate. *Nicholas v. Krebs*, 11 Ala. 230.

In an action by the payee on a promissory note, payable unconditionally, and at a time certain, it is incompetent to prove by parol testimony any promise by the plaintiff contemporaneous with or antecedent to the execution of the note, stipulating for a postponement of the time of payment. *Doss v. Peterson*, 82 Ala. 253, 2 So. 644, cited in note in 17 L. R. A. 273.

"The notes sued on being payable unconditionally, and at a time certain, it

was incompetent to prove by parol testimony any promise by the plaintiff contemporaneous with or antecedent to the execution of the notes, stipulating for a postponement of the time of payment. Such evidence contradicted the terms of these written instruments, and varied their legal effect, and was properly excluded by the court." *Doss v. Peterson*, 82 Ala. 253, 2 So. 644, 645, cited in note in 17 L. R. A. 273.

Agreement to Surrender Note.—The maker of a note can not contradict his absolute, unconditional promise to pay by showing an agreement, made before its execution, that it would be surrendered to him. *Bomar v. Rosser*, 131 Ala. 215, 31 So. 430.

"It may not be amiss to say, for the purpose of another trial, notwithstanding the evidence was not objected to, that the plaintiff should not be allowed, if objection is made, to offer proof that it was agreed, before the note which the defendant offers to set off was executed, that the note would be surrendered to him. He can not in this way be permitted to contradict his absolute, unconditional written promise to pay. *Mead v. Steger*, 5 Port. 498; *Dexter v. Ohlander*, 93 Ala. 441, 9 So. 361; *Day v. Thompson*, 65 Ala. 269." *Bomar v. Rosser*, 131 Ala. 215, 31 So. 430, 432.

Conditional Payment for Land.—The makers of a note payable absolutely at a time certain can not introduce parol evidence of prior or contemporaneous stipulations that are inconsistent with the terms of the note, to defeat a recovery by the payee, as by introducing evidence of a verbal agreement that, if certain land should not be paid for, the note should not be paid. *Gliddens v. Harrison*, 59 Ala. 481.

Agreement to Satisfy Vendor's Lien.—Defendant bought an interest in certain property covered by a mortgage, and also subject to a vendor's lien, and gave his note for the amount due directly to the mortgagee, who afterwards brought suit thereon. The written agreement between the parties was that defendant was to buy an undivided interest in the property, and execute his note to plaintiff for the amount, and that, when this was paid, plaintiff was to release defendant's in-

terest from the mortgage. Held, that evidence of a parol agreement, made at the same time, wherein plaintiff, in case the land was sold to satisfy the vendor's lien, was to furnish the money to buy it in, but had not done so, was properly excluded. *Maness v. Henry*, 96 Ala. 454, 11 So. 410.

Place of Payment.—A writing acknowledging a receipt of money from plaintiff, and promising to pay it to him when required, or immediately, can not be varied by parol evidence showing that it was to be paid into a bank some twenty or thirty miles from plaintiff's residence. *Owen v. Henderson*, 7 Ala. 641.

Parol Proof of Set-Off.—A verbal agreement between the parties to a note given for the purchase price of certain accounts that the maker should have a set-off against the note to the amount of notes and accounts sold to him by the payee which he failed to collect, goes directly to add to and vary the writing, and unless a sufficient foundation is laid for its introduction, is clearly inadmissible in evidence in an action on the note. *Paysant v. Ware*, 1 Ala. 160, cited in note in 43 L. R. A. 461.

Delivery of Slaves as Advancement.—Where a father delivered slaves to a married daughter, taking from her a note, bearing interest, for their estimated value, such note shows a debt, and not an advancement, and parol evidence is inadmissible to show that the transaction was intended as an advancement. *Fennell v. Henry*, 70 Ala. 484.

Manner of Payment.—Parol evidence is admissible to prove a contract, entered into at the time of the execution of a note, whereby the payee agreed to receive in part payment thereof a debt on another. *Murchie v. Cook*, 1 Ala. 41, cited in 31 L. R. A., N. S., 239.

Agreement to Sell Stock.—A vendor sold land, with the purpose of forming an incorporated land company, which was done, receiving notes in payment therefor. In a suit on one of the notes the maker alleged as a defense that the vendor had promised him, as an inducement to enter the company, that he would sell enough of its stock and lands at a profit to pay defendant's notes as they matured, which he had not done. Held,

that this agreement, being verbal, and previous or contemporaneous, is presumed to be merged in the written contract, and oral evidence of it was improperly admitted. *Lakeside Land Co. v. Dromgoole*, 89 Ala. 505, 7 So. 444, cited in note in 17 L. R. A. 273.

Parol Evidence Inadmissible to Vary Indorsement.—Parol evidence is inadmissible to vary the implied contract of an unrestricted indorsement of a negotiable instrument. *Dupuy v. Gray*, Minor 357; *Hightower v. Ivy*, 2 Port. 308; *Holt v. Moore*, 5 Ala. 521; *Day v. Thompson*, 65 Ala. 269.

In *Day v. Thompson*, 65 Ala. 269, cited in note in 17 L. R. A., N. S., 840, where a draft was indorsed, for the sole purpose of enabling plaintiff to collect it, the court said: "The parol evidence, allowed to be introduced in the court below, to show that the defendant indorsed the bill in suit for the sole purpose of transferring the title to the plaintiff, and with no intent of rendering himself personally liable, was improperly admitted. The contract imported by the regular indorsement of a bill or note is of a fixed and definite character, and is interpreted by the law. It is legally incapable of explanation, contradiction, or modification by parol evidence. This rule is founded on the soundest principles of reason and public policy, as well as on the weightiest authority. The reasons for its application to commercial paper are more cogent, if anything, than to other written contracts."

An indorsement of a promissory note is a contract of defined legal operation and effect, and can not be varied by proof of a contemporaneous verbal agreement between the parties, not incorporated in it. *Preston & Co. v. Ellington*, 74 Ala. 133.

Several notes being given for the purchase money of land, and some of them being afterwards transferred by indorsement, the indorsement of each is, pro tanto, an assignment of the vendor's lien, and entitles the assignee to priority of payment, out of the proceeds of the sale of the land, before the notes retained by the vendor, without regard to the time of their maturity; but the vendor is entitled to the surplus after the as-

signed notes have been paid in full, and may assert his right to it by petition filed in the cause while the fund is in court. *Preston & Co. v. Ellington*, 74 Ala. 133.

"After the legal effect of these irregular blank indorsements is ascertained, they fall within precisely the same rules, which obtain as to such as are perfect in their nature, and are alike incapable of explanation, or modification by parol evidence." *Tankersley v. Graham*, 8 Ala. 247, 250.

Varying Effect of Blank Indorsement.—It is not proper to prove a contemporaneous parol agreement to vary the effect of a blank indorsement of a negotiable note. *Tankersley v. Graham*, 8 Ala. 247; *Preston v. Ellington*, 74 Ala. 133.

Relieving Indorser from Liability.—Where the payee of a bill or note has duly indorsed the same for value, and before maturity, parol evidence is inadmissible for the purpose of showing a contemporaneous parol agreement with the indorsee that the indorsement was only for the purpose of passing the title, and that the indorser should be relieved from all other liability. *Day v. Thompson*, 65 Ala. 269, cited in note in 17 L. R. A., N. S., 840.

Indemnity of Indorsers by Maker.—Defendant indorsed a note in the ordinary mode, and the note came into the hands of plaintiff, who was not shown to have been a party to the contract when it was made. He sued defendant on the indorsement. Held, that evidence for defendant that the makers were to place in his hands a sufficient amount of available notes and accounts to satisfy it was inadmissible. *Holt v. Moore*, 5 Ala. 521.

Purpose of Indorsement.—The legal effect of an indorsement for accommodation of the payee of a draft could not be varied by evidence of a parol agreement that defendant indorsed only to identify the payee at the bank to which the draft was negotiated. *Alabama Nat. Bank v. Rivers*, 116 Ala. 1, 22 So. 580.

Varying Indorsement of Bond.—In an action against indorsers of a bond, it is not competent to prove a parol agreement, made at the time of the indorsement, by which the indorsees were to

take other steps to collect the bond than those contemplated by the indorsements, and that defendants afterwards recognized the agreement and advised the continuance of the measures taken in pursuance of such agreement. *Carlton v. Fellows*, 13 Ala. 437.

Varying Indorsement by Showing Priority of Payment.—A vendor of lands, who retained a lien, assigned certain of the purchase money notes to a creditor of his own, by parol. Afterwards, and merely to enable the creditor to enforce the lien, he indorsed the notes to the creditor. Held that, in a suit involving an issue as to the priority in the lien of the vendor and his creditor, the indorsement could not be varied by parol proof of its purpose, and hence that the creditor had priority over the vendor, though the notes retained by the vendor were earliest due. *Preston v. Ellington*, 74 Ala. 133.

§ 331 (9) Contracts of Insurance.

See, generally, the title **INSURANCE**. See, also, ante, "Grounds for Admission of Oral Evidence," § 329.

Agreement to Return Policy.—In an action on a premium note, the plea alleged that plaintiff, acting for an insurance company, in order to induce defendant to sign the note, stated that after the insurance policy was received, if defendant did not want to take it, plaintiff would take it back, and defendant would owe nothing, and that defendant, when he received the policy, decided not to take it, and returned it within a reasonable time. Plaintiff demurred to the plea on the ground that it contained a blank; that it was indefinite, and was no defense, in that it did not state facts to show fraud, and attempted to contradict a written agreement by contemporaneous parol evidence. Held, that the demurrer was properly overruled. *Gillespie v. Hester*, 160 Ala. 444, 49 So. 580.

Arbitration of Loss.—In an action on a fire policy, parol evidence of verbal agreements, made before or contemporaneous with a written agreement, for the submission of the amount of the loss to appraisal and arbitration, tending to vary the terms of the writing, is inadmissible. *Rutter & Hendrix v. Hanover Fire Ins. Co.*, 138 Ala. 202, 35 So. 33.

Payment of Premiums.—The condition in an insurance policy as to the time and place of payment of premiums can not be varied by proof of a prior parol agreement. *Mobile Life Ins. Co. v. Pruett*, 74 Ala. 487.

Representation of Solicitor as to Additional Provisions in Policy.—In an action on a note given to the agent of the insurer for the first premium on life insurance policies, the applications for which contained an agreement that no statement made by the person soliciting the application should be binding on the insurer, unless reduced to writing and presented to the insurer, and that the application and policy should constitute the entire contract, defendant could not show that plaintiff, in soliciting the insurance, represented that the policies would contain a certain provision which they did not contain; such evidence having the effect of varying the written contract. *Blanks v. Moore*, 139 Ala. 624, 36 So. 783.

§ 331 (10) Contracts of Carriage.

See, generally, the title **CARRIERS**.

Parol Contract.—Where freight is received and actually shipped under a parol contract, a subsequent receipt of a bill of lading does not preclude the shipper from relying on the parol contract, unless established custom makes the bill of lading the contract. *Williams v. Louisville, etc., R. Co. (Ala.)*, 58 So. 315.

Written Contract.—A bill of lading issued by a carrier contemporaneously with the acceptance of freight for transportation, and accepted by the shipper or his agent, is a contract of shipment binding on the shipper, though neither he nor his agent read it, and any agreement leading up to it can not vary its terms. *Williams v. Louisville, etc., R. Co. (Ala.)*, 58 So. 315.

"A bill of lading issued by the carrier upon receipt of the shipment and accepted by the shipper or his agent becomes the sole repository of the contract, and any transactions or agreements leading up to it can not avail to alter or vary the terms thereof. *Louisville, etc., R. Co. v. Fulgham*, 91 Ala. 555, 8 So. 803; *Tallassee Falls Mfg. Co. v. Western Railway*, 117 Ala. 520, 23 So. 139; *Hutchinson on Carriers*, § 167; *Elliot on Railroads*,

§§ 1415-1424. It is true the bill of lading is issued by the carrier, and is merely signed by the agent alone, but in the absence of fraud, if it is accepted by the shipper or his agent, it becomes binding on him as he is assumed to have read it, or, if he does not read it, it is his own fault, and, if he can not read it, he should ask that it be read to him. *Western Railway v. Harwell*, 91 Ala. 340, 8 So. 649; *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61; *Alabama, etc., R. Co. v. Little*, 71 Ala. 611; *Steele v. Townsend*, 37 Ala. 247. *Williams v. Louisville, etc., R. Co. (Ala.)*, 58 So. 315, 318.

"There is a well known exception, however, to the general rule that the bill of lading after acceptance becomes a special contract and binding on both parties, as recognized by the text writers and in the decisions of the courts. 'Where, however, the goods are received and are actually shipped under a parol contract, the subsequent receipt of the bill of lading does not preclude the shipper from showing the terms of the parol contract, unless it appears that between the shipper and the carrier the established custom has been for the former to receive bills of lading constituting the contract after shipment.' This exception has been recognized by our court in the case of *Louisville, etc., R. Co. v. Meyer*, 78 Ala. 597, wherein the court held that the shipper was not bound by the recitals in a bill of lading, which he did not read, and which was delivered to him a day after the delivery of the goods, and after the payment of the freight. It was said, however, in the opinion: 'If contemporaneously with the delivery of the goods to the railroad he had received the bill of lading containing such stipulation, he would be conclusively presumed to have read it, and to have acquiesced in it. *Goetter, etc., Co. v. Pickett*, 61 Ala. 387; *Dawson v. Burrus*, 73 Ala. 111. And this would have been no hardship, for he would then have it in his power to reject the terms. Failing to read the contract he was accepting might be fairly interpreted as an expression of full confidence and an agreement to accept the terms they would offer. That is not this case.' We may add that it was not the case as then considered, but the facts there hypothesized are

rather analogous to the case now before us and the case of *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, wherein said *Meyer Case*, supra, was referred to as standing upon its own peculiar principles, 'and is distinguished from this.' The bill of lading in the case at bar, being issued contemporaneously with the delivery of the cotton and accepted by the plaintiff's agent, whether he read it or not, became the sole repository of the contract of shipment, and either embraced, canceled, or modified all previous agreements or negotiations anterior to same. The court of appeals erred in holding that the telegraphic communications and negotiations constituted the real contract between the parties, instead of the bill of lading, and the said ruling was in conflict with some of the Alabama cases, supra." *Williams v. Louisville, etc., R. Co. (Ala.)*, 58 So. 315, 318.

Liability of Third Person for Freight.—A bill of lading, being a receipt of and agreement to carry and deliver goods, although making the shipper prima facie liable for the freight, does not prevent him from showing a parol agreement by the carrier to look to a third person for the freight. *Wayland's Adm'r v. Mosely*, 5 Ala. 430.

§ 331 (11) Receipts and Releases.

County Treasurer's Receipt.—A receipt given by the county treasurer to the tax collector, in the form of an I O U, is admissible against the sureties of the treasurer, and may be explained by parol evidence showing that it was given for county taxes received from the collector, to be accounted for on settlement at the end of the month. *Coleman v. Pike County*, 83 Ala. 326, 3 So. 755.

Receipt for Slaves.—Where one of the parties to an exchange of slaves gave the other a receipt acknowledging to have received from him a stated sum for the slaves which he gave the other in exchange, and warranted them to be sound, the receipt is open to explanation by parol to prove what the contract really was, where the other afterwards insists that one of the slaves is unsound, and demands the sum stated in the receipt. *Pettus v. Roberts*, 6 Ala. 811.

Receipt for Partial Payment.—If the

city council fix the extra compensation of the city physician for attending case of smallpox at a certain sum, which is less than his claim, and this sum is paid to the physician, the receipts given for the sums thus paid do not estop him from showing, in a suit on his account for extra services, that he did not consent to receive the sums thus paid in full satisfaction of his claim. *City of Selma v. Mullen*, 46 Ala. 411.

The declarations of a party at the time of receiving money to the effect that more was due him are admissible in evidence to repel the inference that he received the payment as in full of all demands. *Dillard v. Scruggs*, 36 Ala. 670.

A receipt discharging a demand due to a person is, after his death, evidence of payment, and of the person who made the payment. *Upson v. Raiford*, 29 Ala. 188.

Ward's Receipt to Guardian.—A receipt given by a ward to his guardian "as compromise and payment in full for all claims against him as guardian" can not be altered by parol proof. *Motley v. Motley*, 45 Ala. 555.

§ 332. — Completeness of Writing.

§ 332 (1) In General.

Incomplete Writings.—While a written contract can not be contradicted or varied by parol evidence, it is permissible, where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed. *Powell v. Thompson*, 80 Ala. 51, cited in note in 17 L. R. A. 270.

Where it is proved that an instrument in writing contains but a part of the agreement entered into by the parties, then parol proof may be received to prove the entire contract, but the parts of the agreement proposed to be proved by parol must not be inconsistent with or repugnant to the intentions of the parties as shown by the written instrument. *West v. Kelly*, 19 Ala. 353, cited in note in 43 L. R. A. 473.

"Where a writing has been executed by way of part performance merely of a parol agreement, it is said its incompleteness warrants the admission of extrinsic proof. This exception is familiarly illustrated where a chattel has been sold with

a warranty not in writing, and a note given for the purchase money. In such case, the note does not merge the parol contract. *Barlow v. Flemming*, 6 Ala. 146; *Shepherd v. Temple*, 3 N. H. 455; *Reab v. McAllister*, 8 Wend. 116." *Self v. Herrington*, 11 Ala. 489, 491.

When a writing is insufficient or incomplete parol evidence is admissible in aid of it. *Gunn v. Glendenin*, 68 Ala. 294.

Acknowledgment of Value.—Where the writing is incomplete, and does not profess to set out the entire contract, parol evidence has been received to prove the part omitted. So, if the writing merely contains an acknowledgment of value received, without stating what it was, it is competent for the party sued on it to show what the consideration was, and that it has failed either in whole or in part. *Brown v. Isbell*, 11 Ala. 1009.

Parol evidence is inadmissible to establish a term or condition of a written contract as to which the written contract is silent. *Beard v. White*, 1 Ala. 436.

Records of Municipal Council.—In ejectment, where the title of one of the parties depends on an assessment by the mayor and aldermen of the town, and neither the minutes of the city council nor the records of the city show that the meeting at which the assessment was alleged to have been confirmed was held, parol evidence is inadmissible to show that such meeting was held. *Parker v. Burgen*, 20 Ala. 251.

"It was evidently the intention of the legislature to require the city council to keep a record of all its proceedings, and it provides an officer, whose duty it shall be to make out and keep the records thus required. The language defining the duties of the clerk of the council is as strong in its import, as that employed in relation to clerks of courts. The importance, indeed the absolute necessity of recording the proceedings of all meetings of the council, held in pursuance of the twelfth section of the act of 1837, will readily be seen, when we advert to the object of such meetings, and the legal effect of their proceedings. No assessment of taxes can be perfect or complete until it has been passed upon by such a meeting; and its acts, when the assessment is corrected and adjusted by them, are

clothed with the authority of judgment and execution. Upon these, the tax collector can proceed to sell the real estate within the city limits, when the taxes remain unpaid, and to this record the plaintiff in error must resort to make out his title, for it is well settled, that when one claims title under execution sale, he is bound to show a judgment, or his title fails." *Parker v. Burgen*, 20 Ala. 251, 257.

"The views here expressed do not at all conflict with the ruling of the supreme court of the United States, in the case of the Bank of the United States *v. Danbridge* (12 Wheat. 64 [6 L. Ed. 552]) which was relied on by the plaintiff in error. The decision in that case was influenced by the consideration, that, the charter of the bank did not require it to keep a record of the acceptance and approval of the bonds of its officers; and as there was no such requisition in the charter, and the bond of Danbridge, as cashier, was filed among its papers, and he had acted in that capacity in the Branch at Richmond for a number of years, the court said, the acceptance and approval of the bond would be presumed. In this case, however, we have seen, the charter requires a record to be kept of the proceedings of the corporate authorities, and no presumption in favor of the acts of its officers in this respect can be indulged, in the absence of such record." *Parker v. Burgen*, 20 Ala. 251, 259.

Place of Payment.—Where a bond or note fails to designate the place of payment, parol evidence is admissible to show that it was, by agreement between the parties, to be paid at a place different from that of the contract. *Moore v. Davidson*, 18 Ala. 209.

§ 332 (2) Bills of Sale.

Complete Contract.—A writing executed and delivered, which reads as follows: "Received from A. A. Richards \$110.00 One Hundred and ten Dollars for 1 National Cash Register, 3 show cases, 1 plate glass ice box, 1 pr. Crombo scales, stored at N. E. Corner Warren & Dauphin Sts. W. A. Shriner"—must be presumed to be complete, and to disclose fully the contract upon which the parties intended to enter, and it can not be added to by parol. *Shriner v. Meyer*, 171 Ala. 112, 55 So. 156.

"When defendant sold to Richards, he executed and delivered a paper writing as follows: 'Received from A. A. Richards \$110.00 One Hundred and ten Dollars for 1 National Cash Register, 3 show cases, 1 plate glass ice box, 1 pr. Crombo scales, stored at N. E. Corner Warren & Dauphin Sts. W. A. Shriner.' This paper, though in form a receipt, was in legal effect a bill of sale evidencing the contract between the parties, and it was not permissible to add to it additional stipulations by parol; for it must be presumed that the writing was complete and fully discloses the contract upon which the parties intended to enter. *Bush v. Bradford*, 15 Ala. 317; *Whitman v. Revels*, 39 Ala. 121." *Shriner v. Meyer*, 171 Ala. 112, 55 So. 156, 157.

§ 332 (3) Contracts for Buildings and Other Works.

Parol Agreement to Furnish Lumber.

—Where a building contract required the contractor to furnish some material, evidence that the contractor verbally agreed to furnish the lumber was not objectionable as contradicting a written contract. *Gates v. O'Gara*, 145 Ala. 665, 39 So. 729.

§ 332 (4) Contracts of Sale or Exchange and Deeds.

A contract for sale of merchandise, which states that the trial order is composed of assorted patterns of jewelry, and which stipulates that the buyer waives the right to claim failure of consideration, or goods not according to order, unless he has exhausted the terms of the warranty and exchange, and which provides that the seller guarantees, if the retail sales from the jewelry do not equal a specified amount, it will buy back at the original invoice price to make up the deficiency, and which requests the seller to ship the goods on the conditions specified and no others, shows on its face that former conversations are merged in it and that it is the sole evidence of the agreement, and the buyer may not avoid paying the price by setting up other matters not provided for in the contract. *Roll v. Puritan Mfg. Co.*, 162 Ala. 416, 50 So. 354.

A written contract of sale of silverware, complete in itself, and providing that the sale was made "under inducements herein

expressed and no others," may not be varied by parol evidence that at the time of the negotiations it was orally agreed that the seller would not sell a similar line to competing local merchants, and that the seller would furnish a catalogue for the purpose of facilitating exchange, authorized by the contract. *Brennard Mfg. Co. v. Citronelle Mercantile Co.*, 148 Ala. 666, 41 So. 671.

"The fourth plea avers that as a part of the special contract of purchase, it was stipulated and agreed that plaintiff would not sell a similar line of jewelry to competing merchants in the town of defendants or neighboring points. In support of this plea the court admitted parol evidence, against the objections of plaintiffs, tending to support the plea. This evidence related to negotiations contemporaneous with the making of the written contract. It was not admissible. The obligations and rights of both parties were fixed by the contract. The evidence offered sought to interpolate into the contract a new obligation on the part of the seller. All such negotiations, when the contract was signed as the chosen memorial of the transaction, were merged in the contract or else waived. *Brewton v. Glass*, 116 Ala. 629, 22 So. 916; *Green v. Casey*, 70 Ala. 417, 418; *Wurtzbarger v. Anniston Rolling Mills*, 94 Ala. 640, 10 So. 129; *Crescent Brewing Co. v. Handley*, 90 Ala. 486, 7 So. 912." *Brennard Mfg. Co. v. Citronelle Mercantile Co.*, 148 Ala. 666, 41 So. 671.

§ 332 (5) Contracts of Carriage.

See ante, "Contracts of Carriage," § 311 (9).

In an action by a shipper against a carrier for delivery of the goods in a damaged condition, where the evidence was that the damage was caused by the negligence of defendant in reloading the goods into the car of the terminal carrier, evidence of the plaintiff that the agent of the defendant agreed with her that the goods should not be reloaded, but should be shipped on through, in the same car, was not inadmissible as modifying the contract of shipment; the bill of lading being silent in such respect. *Alabama Great Southern R. Co. v. Norris*, 167 Ala. 311, 52 So. 891.

§ 333. — Relation of Oral Agreement to Writing.

§ 333 (1) In General.

"We have already stated, that in the construction of written contracts, perfect upon their face, for the purpose of ascertaining whether it is consistent with the writing, its legal implications and incidents should be considered as written out and incorporated in it." *Nave v. Berry*, 22 Ala. 382, 394.

Agreement Not to Sell Goods to Others.—Where defendant signed an order for goods to be supplied by plaintiffs, parol evidence was inadmissible to show a contemporaneous parol agreement by plaintiffs not to sell their goods to any other party in the town wherein defendant was in business. *Main v. Radney* (Ala.), 39 So. 981.

Part of Written Contract.—A parol contract, made contemporaneously with a written one between the same parties, though in some sense on the same subject-matter, but which can be so separated from the written contract that it will not appear to have been intended to form a constituent part of it, and does not alter, contradict, or explain it, however it may depend on it for its very existence, may be upheld. *Garrow v. Carpenter*, 1 Port. 359.

"But if any contemporaneous contract be made, even in some sense on the same subject-matter, which can be so separated from the written one, as that it will not appear to have been intended to form a constituent part of it, and does not alter, contradict, or explain it, however it may depend upon it for its very existence, I can see no good reason, why such parol contract should not be upheld. Their mere juxtaposition, is surely no fatal objection." *Garrow v. Carpenter*, 1 Port. 359, 371.

Performance of Executory Agreement.

—An executory oral agreement, made contemporaneously with the execution of a note, is not available as a defense to an action on the note without proof of its performance, and this notwithstanding its performance is proved to be impossible. *Thompson v. Rawles*, 33 Ala. 29.

§ 333 (2) Inducement to Make Writing.

Compromise of Claim.—Where all the

creditors of an insolvent, except one, agree to except from one of them fifty cents on the dollar, and release the debtor, who, in compliance therewith, conveys all his estate to the promising creditor, a nonconsenting creditor, suing the debtor and garnishing such promising creditor, who denies indebtedness, may prove by parol that the latter, as a part of the consideration of the conveyance, promised to pay the nonconsenting creditor's debt in full, and that he joined in the conveyance on the faith of such promise. *Henry v. Murphy*, 54 Ala. 246, cited in note in 20 L. R. A. 110.

§ 334. — Condition Precedent to Obligation under Writing.

§ 334 (1) Contracts in General.

"The proposition that parol proof may be received to prove a stipulation or condition, as to which the written contract is silent, is inadmissible; it would in effect completely overturn the rule itself, and was so held by this court, in the case of *M'Coy v. Moss*, 5 Port. 88." *Beard v. White*, 1 Ala. 436, 439.

§ 334 (2) Contracts of Sale and Deeds.

Different Condition from Specified One.—Where a condition is annexed to a bill of sale, it is not competent to show by parol evidence that another and different condition was agreed to by the parties. *Adams v. Garrett*, 12 Ala. 229.

§ 334 (3) Bills and Notes or Indorsement Thereof.

A bill single can not be modified by showing a parol contemporaneous stipulation that it was not to be enforced till the obligee relieved the obligor from security debts for which he was then bound. *Standifer v. White*, 9 Ala. 527.

Conditional Liability.—A parol agreement, made when a right to vend a churn was sold, and notes were given for the price, that the maker of the notes need not pay them if he was unable to sell enough churns to do so, is inadmissible in an action on the notes. *Rice v. Gilbreath*, 119 Ala. 424, 24 So. 421.

Note for Legal Services.—In assumption on a note, purporting to be given for professional services to be rendered in future by the payees, as attorneys at law,

but payable at a day certain, parol proof is inadmissible to show that it was the agreement of the parties, that the note should not be paid unless the payees were successful in the suit, for the bringing of which it was given. *West v. Kelly's Ex'rs*, 19 Ala. 353, cited in note in 43 L. R. A. 455.

§ 334 (4) Contracts of Guaranty and Suretyship.

Agreement as to Ratification of Signature of Agent.—In an action on a guaranty of the payment of debts made by defendant and others, defendant could not show he signed the contract under an agreement that, if one of the parties to the contract failed to ratify a signature by his agent, the contract should not bind defendant, since that would be varying the terms of the written agreement. *Lefkovits v. First Nat. Bank*, 152 Ala. 521, 44 So. 613.

§ 335. Subsequent Agreements.

§ 335 (1) In General.

Varying Articles of Partnership.—Parol evidence that partners, subsequent to the execution of the articles of copartnership which gave the firm a designated name, mutually acquiesced in and actually employed another name for the firm in carrying on its business, was admissible. *Dorough v. G. M. Harrington & Son*, 148 Ala. 305, 42 So. 557.

"We proceed to consider such of the objections to evidence as seem worthy of discussion. There was no error in admitting in evidence the written articles of copartnership between the plaintiffs, and in allowing them to show when the articles were executed. The writing disclosed an agreement for the transaction of a lawful business, according to the terms of which there was to be a community of profit and loss between the contracting parties, each sharing in these mutually as associates in the undertaking; and hence the formation of a partnership was thereby shown. *McCrary v. Slaughter*, 58 Ala. 230; *Goldsmith v. Eichold*, 94 Ala. 116, 10 So. 80." *Dorough v. Harrington & Son*, 148 Ala. 305, 42 So. 557, 558.

Uncontradictory of Written Contract.—Though parol testimony is inadmissible

to alter the terms of a written contract, if the parties have entered into a collateral parol agreement concerning the same matter, it may be proved by parol testimony, if it does not contradict the written contract. *Roquemore v. Vulcan Iron Works Co.*, 151 Ala. 643, 44 So. 557.

"If it is apparent that the writing does not contain all the stipulations of the parties on the subject, parol testimony is admissible to show the entire contract, or, if the parties have entered into a collateral parol agreement concerning the same matter, that may be proved, provided it does not contradict the terms of the written contract. 21 Am. & Eng. Ency. Law (2d Ed.), pp. 1091, 1094; *West v. Kelly*, 19 Ala. 353; *Huckabee v. Shepherd*, 75 Ala. 342, 345; *Powell v. Thompson*, 80 Ala. 51, 55; *Sayre v. Wilson*, 86 Ala. 151, 5 So. 157; *Murphy v. Farley*, 124 Ala. 279, 27 So. 442." *Roquemore v. Vulcan Iron Works Co.*, 151 Ala. 643, 44 So. 557.

"Some other courts go further than our decisions, and even allow these contemporaneous verbal agreements to change the terms of the written obligation. *Juniata Building Ass'n v. Hetzel*, 103 Pa. 507, 511. It is also true that a written contract, in a case where the law does not require the contract to be in writing, may be modified or changed by a subsequent parol agreement. *Langford v. Cummings*, 4 Ala. 46, 49; *Robinson v. Bullock*, 66 Ala. 548, 554; *Badders v. Davis*, 88 Ala. 367, 6 So. 834; *Prestwood v. Eldridge*, 119 Ala. 72, 24 So. 729. It results that the court erred in sustaining the objections to the questions to Reid, on cross-examination, as to whether there was a contemporaneous verbal agreement in regard to the retention of possession of the 'Baby Shovel,' and also in sustaining the objection to the question as to whether there was a subsequent verbal agreement." *Roquemore v. Vulcan Iron Works Co.*, 151 Ala. 643, 44 So. 557.

§ 335 (2) Sales.

Sale of Real Property.—Defendant gave plaintiff a writing which recited that, having sold plaintiff a lot, and not being able at the time to procure a release of dower, he agreed "to procure the release within nine months, or forfeit the amount to his note, which will be due in

five years," etc. Held that, in an action on such instrument, it was competent for plaintiff to prove a subsequent promise by defendant to pay \$120 as the damages agreed on by the written instrument for not fulfilling it; there being no new consideration to support the new agreement, and no abandonment of the old one. *Phillips v. Longstreth*, 14 Ala. 337.

§ 335 (3) Bills and Notes or Indorsement Thereof.

Intention to Give Money as Advancement.—Where it is contended that money covered by notes given by a son to his father was intended as an advancement, parol evidence is admissible to show a subsequent agreement by which the father parted with all his interest in the money secured by the notes; such evidence not tending to modify the terms of the instrument itself. *Grey's Heirs v. Grey's Adm'rs*, 22 Ala. 233.

"It merely states that witnesses were offered to show that intestate intended the amount secured by the notes before mentioned as an advancement to Daniel. But the facts deposed to by them, by which such intention was evinced, or from which it was to be inferred, are not given. Whether they were of the class just named, or whether they related to matters occurring before or at the time the notes were made, we are wholly uninformed. If they were of the former class, there was no error in admitting them to be proved by parol; but if of the latter, they were inadmissible." *Grey v. Grey*, 22 Ala. 233, 237.

§ 335 (4) Contracts for Buildings or Other Works.

Action on Railroad Construction Contract.—In an action to recover the balance due under a railroad construction contract, it was proper to admit evidence tending to show that defendants orally agreed to the cessation of work by plaintiffs, and to pay them the balance due according to the original rates for the grading done, and that a payment was actually made under such oral agreement for the purpose of establishing a modification of the original contract in respect of the length of roadbed to be graded, and a waiver of defendants' part of unfulfilled stipulations concerning work theretofore

done. *Andrews v. Tucker*, 127 Ala. 602, 29 So. 34.

§ 335 (5) Extension of Time for Performance.

Extension of Time of Payment.—Parol evidence is admissible to show a subsequent agreement extending the time of payment of a note. *Ferguson v. Hill*, 3 Stew. 485.

A parol agreement by a creditor to extend the time of payment of a debt based upon a sufficient consideration is valid without the giving of any new obligation for the debt. *Starr Piano Co. v. Baker* (Ala.), 62 So. 549.

A parol agreement on sufficient consideration extending the time of payment under a mortgage is valid. *Moody v. Atkins*, 146 Ala. 684, 40 So. 305.

Redemption of Mortgaged Property.—The extension of time for redeeming mortgaged personal property may be proved by parol. *Deshazo v. Lewis*, 5 Stew. & P. 91.

(D) CONSTRUCTION OR APPLICATION OF LANGUAGE OF WRITTEN INSTRUMENT.

§ 336. Grounds for Admission of Extrinsic Evidence.

When there is no ambiguity apparent on the face of an instrument nor any intimation of a disclosure of a latent ambiguity, the refusal of an inferior court, to admit parol testimony to explain such instrument, is not error. *Johnson v. Ballew*, 2 Port. 29.

When a writing contains a term which it is impossible for the court to construe without the aid of evidence aliunde, parol evidence is admissible in aid of it. *Gunn v. Clendenin*, 68 Ala. 294; *Louisville, etc., R. Co. v. Higginbotham*, 153 Ala. 334, 44 So. 872, 876.

When a written contract, though complete in itself, contains a term which it is impossible for the court to construe without the aid of evidence aliunde, it is proper to resort to such evidence for that purpose. *Cowles v. Garrett's Adm'rs*, 30 Ala. 341.

Instrument Not Needing Construction.—Where a deed granted the right to use water out of one of the springs near the right of way of a railroad and to lay a

pipe to connect the spring with the water tank, a subsequent conversation, wherein grantor pointed out the spring from which he desired the water to be pumped and consented that water be pumped temporarily from another point until the designated spring could be walled up and made available, could not be a construction of the deed, as the deed was expressed in clear terms and needed no construction. *Louisville & N. R. Co. v. Higginbotham*, 153 Ala. 334, 44 So. 872.

Subsequent Acts and Declarations Immaterial.—Where a contract reduced to writing is unambiguous, subsequent acts and declarations of the parties are immaterial on the question of the construction of the contract. *Hubert v. Sistrunk* (Ala.), 53 So. 819.

Deed Definite and Certain.—A deed definite and certain in itself as to the description of the land conveyed cannot be qualified or explained by parol evidence. *Daniel v. Williams* (Ala.), 58 So. 419.

"Hence the grant of nine acres in the southwest corner as described in plaintiff's deed to the Worshams, and in the Worshams' deed to Mrs. Williams, was definite and uncertain in itself, and could not be aided, qualified, or explained by parol evidence. *Donehoo v. Johnson*, 120 Ala. 438, 24 So. 888; *Guilmartin v. Wood*, 76 Ala. 204. If it were conceded, for the argument, that the additional descriptive phrase in plaintiff's deed to the Worshams—'the same nine acres as described in my deed'—might be efficient to qualify the clear and wholly unambiguous description preceding it, and alter the grant to something different, nevertheless there is nothing in that deed to indicate that the tract conveyed was other than a square lot in the corner, since the two lots named are both referred to merely as being in said southwest corner. It is true that the actual location of sections by government surveys, as originally made, though erroneous, will govern the description by government numbers both in the patent and in subsequent deeds. *Billingsley v. Bates*, 30 Ala. 376. But that principle is obviously not applicable here." *Daniel v. Williams* (Ala.), 58 So. 419, 421.

Transactions to Be Considered Together.—The relinquishment of a lease, and defendant's obligation to pay for it,

being executed on the same day, each in consideration of the other, are to be construed as one transaction; and, in the interpretation of such agreement, the court may admit oral testimony to show that defendant acted as agent of the owner of the premises, who wished to obtain the relinquishment in order that he might sell and give possession. *Dexter v. Ohlander*, 89 Ala. 262, 7 So. 115.

§ 337. Nature of Ambiguity or Uncertainty in Instrument.

§ 338. — In General.

§ 338 (1) Writings in General.

Patent and Latent Ambiguity Distinguished.—"The law on this subject was thus stated by Stone, J., in delivering the opinion of the court in the case of *Chambers v. Ringstaff*, 69 Ala. 140: 'The distinction between latent and patent ambiguity has long existed, and the general rule applicable to each class of cases should not be disturbed. When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things, etc., this is a patent ambiguity, or ambiguity apparent. In such case, the rule is clear, and we do not wish to depart from it, that parol proof of what was intended by the contracting parties will not be received. Latent ambiguity exists where, on the face of the paper, no doubt or uncertainty exists, but by proof aliunde the language is shown to be alike applicable to two or more persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that by which it is made to appear.'" *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727, 729.

Railroad Rule.—An electric railroad rule provides that, when passing standing cars, the gong must be rung and car stopped with front "and" opposite the rear end of the standing car. Held, that the word "and" was a typographical error for "end," and evidence was competent to explain the error. *Birmingham Ry., Light & Power Co. v. Morris*, 163 Ala. 190, 50 So. 198.

Chattel Mortgage.—Where a mortgage conveys the "entire crop" of the mortgagor, "of every description, raised by him annually," until the debt is paid, parol evi-

dence is admissible to show what property is covered. *Varnum v. State*, 78 Ala. 28.

Certificate of Acknowledgment of Justice.—The joint deed of a husband and wife of the wife's land, dated May 16th, was followed by the certificate of the justice that on May 16th and 17th the husband and wife appeared and acknowledged "the above instrument to be their free act and deed, and this again by a relinquishment of dower dated May 17th, and fourthly a certificate of the same justice as to the private examination of the wife and her involuntary execution of" the foregoing instrument. Held, that it was not competent to prove by parol evidence that the latter certificate was intended to apply to the joint deed. *Hughes v. Wilkinson*, 35 Ala. 453.

§ 338 (2) Deeds.

Explanation of Words.—In the construction of deeds or other written contracts, parol evidence is inadmissible to establish an intention different from that which is expressed, but may be received to explain what is meant by the words used, and is available for the court as well as for the jury. *Jenkins v. Cooper*, 50 Ala. 419.

Explanation of Exception.—A deed containing an exception of certain lands, with a declaration that the conveyance embraces the eating house which is on such excepted grounds, if not expressly excluding the land, and carrying the house alone, presents such a case of doubt that, to remove it, evidence is admissible that the grantor did not own the land on which was such house, but erected it under a license securing him the right ultimately to remove it. *Moody v. Alabama G. S. R. Co.*, 124 Ala. 195, 26 So. 952.

§ 338 (3) Leases.

Furnishing House with Gas.—Parol evidence is not admissible to show that the words, "said house to be furnished with gas," in a lease, meant that the landlord should furnish fixtures, and not gas. *Thorpe v. Sughi*, 33 Ala. 330.

§ 338 (4) Contracts in General.

Showing True Meaning of Terms.—"Contracts must be interpreted in the light of the facts surrounding the parties when they were made. There can

not be a departure from the words of a written contract. They must have their full import and force. But to arrive at the true sense in which the parties employed them, courts of necessity consider the occasion which gave rise to the contract, the relation of the parties, and the object to be accomplished. *Pollard v. Maddox*, 28 Ala. 321." *McGhee v. Alexander*, 104 Ala. 116, 16 So. 148, 149.

Circumstances Attending Negotiations of Instrument.—To elucidate an ambiguity in a written contract, evidence of conversations and circumstances attending the negotiation of the agreement is admissible. *Drake v. Goree*, 22 Ala. 409.

§ 338 (5) Contracts of Employment.

Agreement to Collect Claim.—An agreement to collect a claim "for five per cent when not litigated, and ten per cent when litigated, on the amount recovered," is sufficiently indefinite to authorize the admission of parol testimony to show that the per cent agreed to be paid in case of litigation is on the amount collected, and not on the amount of the judgment recovered. *Gunn v. Clendenin*, 68 Ala. 294.

§ 338 (6) Contracts for Sale.

Sale of Flour.—A letter by a seller confirming a sale of flour at a stated price, to be shipped out within five months with the understanding that the price named is for shipment ordered out within thirty days, with five cents additional carrying charges for each thirty days or fraction thereof until the contract is completed, is so equivocal in respect to the character of right, whether of option or of condition to the seller's duty to deliver, created by the stipulation for ordering out the flour, and also in respect to the party to the contract for whose benefit the stipulation was provided, as to authorize the admission in evidence of the correspondence leading up to and forming part of the contract of sale. *Scruggs & Echols v. Riddle*, 171 Ala. 350, 54 So. 641.

§ 338 (7) Bonds.

Bond to Secure Performance of Contract.—Defendant sold plaintiff a house, and gave bond, with sureties, conditioned that he should remove it by a certain time to a lot owned by plaintiff. Held, that there was no ambiguity in the bond

to warrant the introduction of evidence to show that the land on which the house was situated was mortgaged, and the bond was given to bind defendant and his sureties for failure to remove the house against the protest of the mortgagee. *Vann v. Lunsford*, 91 Ala. 576, 8 So. 719.

§ 338 (8) Bills and Notes.

Identification of Settlement in Duebill.

—A duebill acknowledged that certain money was due a married woman as part of the purchase price of land deeded by the woman and her husband, and stated that it was to be paid "when we settle." Held, that parol evidence was admissible to show that the settlement referred to was one between the vendee and the husband. *McGhee v. Alexander*, 104 Ala. 116, 16 So. 148.

Ambiguity Sufficient for Parol Evidence.—A note was executed on April 1, 1841, for the payment of \$140 on the first day of January after, with a memorandum underwritten, "To be paid for when started." Held, that this was such an ambiguity as might be explained by extrinsic proof. *Lockhard v. Avery*, 8 Ala. 502.

Showing Time of Payment.—Where a note was drawn payable "25 after date," parol evidence of the length of time before maturity at which such paper was usually drawn in the city where the note was payable is admissible for the purpose of showing that the intention was to make the note payable twenty-five days after date. *Boykin v. Bank*, 72 Ala. 262.

Showing Amount of Note.—Where the figures in the margin of a note differ from the amount written in the body, parol evidence is inadmissible to prove that the note should be construed as one for the amount appearing in the margin. *Bell v. Birmingham (Ala.)*, 62 So. 971.

§ 339. — Patent Ambiguity.

Failure to Describe Land by Township and Range.—A description of lands by sections in a proceeding to incorporate, without mentioning the township and range and without other marks and calls to show what sections are meant, presents a patent ambiguity which can not be aided by parol proof as to the intention of the parties or as to the property intended to be embraced. *State v. Phil Campbell (Ala.)*, 58 So. 905.

"A description of land by sections, without mentioning the township and range, and without other marks and calls to show what sections are meant, presents a patent ambiguity which can not be aided by parol proof, as to the intention of the parties, or as to the property intended to be embraced. Therefore the plat is void. *Chambers v. Ringstaff*, 69 Ala. 140; *Brannan v. Henry*, 142 Ala. 698, 39 So. 92. It is not necessary to notice the insistence of the appellant that the verbal description in the plat renders it void. It follows, from what has been said and decided, that the court committed reversible error in admitting parol testimony to aid the plat." *State v. Phil Campbell (Ala.)*, 58 So. 905, 907.

Omission of County, State and Land District.—The description in a deed by sectional subdivision, township, and range, only (omitting county, state, and land district), may be cured by parol evidence that the grantor owned certain land corresponding to the description in the deed, that he and his grantee live near it, and that he never owned any other land. *Webb v. Elyton Land Co.*, 105 Ala. 471, 18 So. 178.

Circumstances Surrounding Execution of Deed.—Though an ambiguity, patent on the face of a deed, can not be made certain by parol proof as to what was the intention of the parties, the deed must be construed by the court, and it is entitled to the light of all the circumstances surrounding the parties in order to enable it to determine the property intended to be conveyed. *Reynolds v. Lawrence*, 147 Ala. 216, 40 So. 576.

Description in Tax Deed.—Where land sold for taxes is described as "two-thirds of square 39," in a certain tract, since it is uncertain whether it is intended to describe an undivided two-thirds or the entirety of two-thirds of the entire tract, the ambiguity is patent, and can not be explained by extrinsic or parol evidence. *Dane v. Glennon*, 72 Ala. 160.

Intent of Grantor in Deed.—Parol evidence of the intent of the grantor is inadmissible to explain a deed void on its face for uncertainty of description. *Gaston v. Weir*, 84 Ala. 193, 4 So. 258.

"There can be no question that the deeds, as offered, unaided by other identi-

fying testimony, are void on their faces, on account of the uncertainty of the description of the land intended to be conveyed. *Pollard v. Maddox*, 28 Ala. 321; *Wilkinson v. Roper*, 74 Ala. 140. An imperfect description of the subject of the conveyance may frequently be aided and made certain by oral proof of attendant explanatory facts; but proof of mere intention is always inadmissible. *Hughes v. Wilkinson*, 35 Ala. 453; *Chambers v. Ringstaff*, 69 Ala. 140; *Meyer Bros. v. Mitchell*, 75 Ala. 475; *Driggers v. Casady*, 71 Ala. 529; *Clements v. Pearce*, 63 Ala. 284." *Gaston v. Weir*, 84 Ala. 193, 4 So. 258, 259.

Description of Persons or Things.—Where a contract on its face equally describes two or more persons or things, parol proof of what was intended by the parties is inadmissible; but where the contract on its face is not doubtful, but by proof the language may be applicable to two or more persons or things, the uncertainty may be explained by parol evidence. *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

Contract of Carriage.—Where bills of lading for cotton shipped by plaintiff over defendant railroad read: "Consignee and destination: Name, G. & K. Place, West Point, Va. County, c/o Press. State, Selma, Ala."—there was an ambiguity on the face of the bills as to the place of delivery, rendering it competent for plaintiff to prove the existence of a custom to show the sense in which the parties intended the bills of lading should be understood in respect to the place of delivery. *Southern Ry. Co. v. Cofer*, 149 Ala. 565, 43 So. 102.

Patent Ambiguity in Contract.—Parol evidence is inadmissible for the purpose of explaining a patent ambiguity in written contract. *Johnson v. Johnson*, 32 Ala. 637.

Supplying Deficiency in Record.—Parol evidence can not be received to vary or contradict a record, but, where the record does not show on what ground the judgment was rendered, the deficiency may be supplied by parol. *Thomason v. Odum*, 31 Ala. 108.

§ 340. — Latent Ambiguity.

What Constitutes Latent Ambiguity.—Latent ambiguity exists where on the

face of the paper no doubt or uncertainty exists, but by proof aliunde the language is shown to be applicable to two or more persons or things, in which case the ambiguity may be explained by parol. *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

"There was no patent ambiguity in the contract sued on. No claim could well be made that it was rendered unenforceable by a failure of its terms to describe the subject of the sale agreed on. But if the twenty shares of stock mentioned might, because of the different circumstances attending separate and different issues of its stock by the corporation mentioned, mean either one thing or another, there lurked in the contract a latent ambiguity as to what its subject-matter really was. If the description of the subject dealt with found in the terms of the contract might apply to more than one thing, this fact, and also a statement or representation so made as to identify the particular thing intended to be contracted about, may be shown by parol evidence, without any violation of the rule against admitting such evidence to vary or contradict the terms of a written instrument. *Chambers v. Ringstaff*, 69 Ala. 140; *Watson v. Kirby*, 112 Ala. 436, 20 So. 624; *Brannan v. Henry*, 142 Ala. 698, 39 So. 92; *Jones on Evidence*, § 472. It follows that, if such a state of facts existed as the averments of the pleas in question undertake to disclose, those pleas are not rendered subject to objection by reason of their making it apparent that resort would have to be had to parol evidence to prove the matters of defense alleged. If those pleas do not, as suggested in the other proposition advanced in behalf of the appellee, undertake to base a defense on things which can not be recognized as legally possible, no rule of evidence stands in the way of the defendant's right to maintain them. The demurrers to the pleas in question can not be sustained on the grounds suggested by views of the law opposed to the conclusion just stated." *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727, 729.

Latent Ambiguity Explainable.—A latent ambiguity in a contract or writing may be explained by parol evidence. *Paysant v. Ware*, 1 Ala. 160; *Beard v. White*, 1 Ala. 436; *Guilmartin v. Wood*, 76

Ala. 204; *Vann v. Lunsford*, 91 Ala. 576, 8 So. 719; *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928, 929.

Parol evidence is admissible to explain a latent ambiguity in a written contract as otherwise the contract might be wholly inoperative. *Mead v. Steger*, 5 Port. 498.

"In the construction of written instruments, the general rule excludes any direct evidence of the intention of the parties, except such as is furnished by the writing itself. When considered in the light of the surrounding facts and circumstances. Parol evidence is admissible, to explain an ambiguity that does not appear on the face of the writing, but arises from some extrinsic, collateral matter—to point out, and connect the writing with the subject-matter, and to identify the object proposed to be described. 'Such evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and in its admission, the line which separates evidence which aids the interpretation of what is in the instrument, from direct evidence of intention independent of the instrument, must be kept steadily in view; the duty of the court being, to declare the meaning of what is written in the instrument, not of what was intended to be written.' *Hughes v. Wilkinson*, 35 Ala. 453. The oral evidence must not be inconsistent with the writing." *Guilmartin v. Wood*, 76 Ala. 204, 209.

Description in Deed.—Latent ambiguity in a deed describing land conveyed as beginning at the "north" corner of a certain lot, caused by its appearing that said lot had two north corners, may be removed by parol evidence that, taking the northeast corner as the commencement point, land owned by the grantor would be included, without altering descriptions, and that, with the northwest corner as the commencement point, land not owned by or in the possession of or claimed by him or the grantee would be included. *Hereford v. Hereford*, 131 Ala. 573, 32 So. 620; *S. C.*, 134 Ala. 321, 32 So. 651.

Where a deed describes a boundary line as running from a given point "due west to the northwest corner of the

southeast quarter of section twenty-one to a stake, from thence south," etc., there is no latent ambiguity so that it can be shown that there was no stake at this point, but that there was a stake at the N. W. corner of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 21, and that the line should have stopped there, and thence south, etc. *Donehoo v. Johnson*, 113 Ala. 126, 21 So. 70.

Forms of Measuring Lumber.—There being two well recognized forms of measuring lumber, a contract to saw at "\$2 per thousand feet," contains a latent ambiguity, explainable by parol evidence of the parties' intention. *Smith v. Aikin*, 75 Ala. 209.

Identity of Names.—An administration which would be deemed prima facie to be granted on the estate of a father may be shown to be granted on the estate of the son, the names of the two being the same. *Moseley's Adm'r v. Mastin*, 37 Ala. 216.

Misnomer of Court in Receipt.—In an action by a surety for contribution, the receipt from the creditor, reciting the sum paid to be in satisfaction of a judgment of the county court, may be explained to mean the circuit court. *Stallworth v. Preslar*, 34 Ala. 505.

Signature of Captain to Bill of Exchange.—A signature, "A. B., Captain," on a bill of exchange, not clearly importing a liability of the agent or of the principal, parol evidence by the plaintiff is admissible, the contract being unsealed, to show that it was intended to bind the owner, the principal, and that he had authorized the captain to bind him in that form. *May v. Hewitt*, 33 Ala. 161.

§ 341. Writing Illegible or Unintelligible.

Illegible Figures in Record.—Parol testimony of the clerk is admissible to explain illegible figures in a record. *Goldsmith v. Picard*, 27 Ala. 142.

§ 342. Meaning of Words, Phrases, Signs, or Abbreviations.

§ 343. — In General.

To Be Advertised until Sold.—In an action for goods sold and delivered, where the contract of sale contained a stipulation that the goods were to be advertised by plaintiff until sold by defendant, parol evidence as to the meaning of

the words "to be advertised until sold" was properly excluded. *Wikle v. Johnson Laboratories*, 132 Ala. 268, 31 So. 715.

Words Free from Ambiguity.—Parol evidence is inadmissible to explain the meaning of certain words in a written instrument, where they are free from ambiguity. *Mobile Marine Dock & Mutual Ins. Co. v. McMillan*, 31 Ala. 711.

§ 344. — Peculiar Sense of Terms in Common Use.

Payment of Land in Stock.—Where a contract for the sale of land provides that \$7,000 of the purchase price is to be paid in "original ground floor or treasury stock" of a corporation into which the land is to be put by the purchaser, parol evidence is inadmissible in a suit by the seller on the contract to show that it was agreed that the land should be put in at a certain price, and that if it was put in at a greater price the seller was to receive a greater amount of stock than \$7,000. *Williams v. Searcy*, 94 Ala. 360, 10 So. 632, cited in note in 25 L. R. A., N. S., 1208.

Thus, in *Williams v. Searcy*, 94 Ala. 360, 10 So. 632, cited in note in 25 L. R. A., N. S., 1208, it was held that it is not competent to prove by parol that a certain amount of stock recited as a portion of the purchase price of land was intended, under certain circumstances, to mean a greater quantity, such evidence contradicting the terms of the written instrument.

Dangers of the River.—Parol evidence is admissible to show that the words "dangers of the river," as used in a bill of lading for steamboat transportation, by custom and usage include dangers from fire. *McClure v. Cox*, 32 Ala. 617.

"It is settled in this state, that it is permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol, that the exceptive words, 'dangers of the river,' in a bill of lading, by custom and usage include dangers by fire. *Sampson v. Gazzam*, 6 Port. 123; *Hibler v. McCartney*, 31 Ala. 501." *McClure & Co. v. Cox, etc., Co.*, 32 Ala. 617, 620.

§ 345. — Technical, Trade, or Local Terms.

Contract Relating to Timber.—Parol

evidence is admissible to explain the meaning, among men engaged in the timber business, of the words "hewn timber, to average one hundred and twenty feet, and to class B. No. 1 good," as used in a written contract. *Jones v. Anderson*, 76 Ala. 427; S. C., 82 Ala. 302, 2 So. 911.

Subject to Louisville Terms.—Contracts should be construed so as to speak the intention of the parties when executed, and, in case of doubt as to the meaning of words used therein or their application to the particular circumstances, such meaning may be shown by parol evidence, and any uncertainty in the words "subject to Louisville terms," in a contract by which plaintiff agreed to sell defendant a certain amount of wheat at a certain price subject to Louisville terms, shipment to be made as stated, could be explained by extrinsic evidence. *Cassels' Mills v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969.

Expression "B. 913."—Where telegrams forming a contract for the transportation of cotton by a particular steamer contained the expression "B. 913," it could not be said, as a matter of law, that such term referred to a bill of lading subsequently to be issued, but it was ambiguous, and subject to explanation by parol. *Louisville, etc., R. Co. v. Williams*, 5 Ala. App. 615, 56 So. 865.

"It may be, as insisted by appellant in its application for a rehearing, that the expression 'B 913' contained in the above telegrams referred to a bill of lading subsequently to be issued, but if so, the evidence, all of which was agreed upon, does not indicate it. A railroad man, reading the telegrams, might so understand it, but a man of ordinary intelligence not acquainted with customs among railroads would not. The ambiguity could have been explained by evidence if the telegrams meant what appellant claims for them, but it failed to offer any evidence on that subject. *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 555, 56 So. 862." *Louisville, etc., R. Co. v. Williams*, 5 Ala. App. 615, 56 So. 865, 868.

Address in Bill of Lading.—Where a bill of lading for a car load of lumber contained, as a part of the address, "C/O Harder for dressing, Tuscaloosa, Ala-

bama," such provision was ambiguous, and parol evidence was admissible to explain the same. *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 555, 56 So. 862.

"Issue was joined on pleas one, four, and five. The bill of lading covering the shipment in question was identified, and offered in evidence by the plaintiff. In the body of this contract were the words and letters, '1 Car of Pine Lumber, C/O Harder for dressing.' The plaintiff, testifying as a witness in his own behalf, was asked by the defendant the question: 'What does this notation on bill of lading mean: "C/O Harder for dressing, Tuscaloosa, Alabama?"' The plaintiff objected to the question on numerous grounds; among them, the objection that the question sought to vary by parol the bill of lading. There was no merit in the objections assigned. The terms employed were technical and not of familiar or general use, and the court properly required the witness to answer the question. *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, 545, 29 So. 602." *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 555, 56 So. 862, 864.

Provision for Notifying Consignee.—In an action against a carrier for failing to deliver freight to plaintiff, who was both consignor and consignee, parol evidence was admissible to show that provision in the bill of lading for delivery to "only" D. meant, according to usage by carriers and shippers, that D. was to be notified of the arrival of the goods, but that they were to be delivered only on plaintiff's order. *Atlantic Coast Line R. Co. v. Dahlberg Brokerage Co.*, 170 Ala. 617, 54 So. 168.

Meaning of "f. o. b. cars."—Where a contract of sale names a price "f. o. b. cars" at a certain place, though evidence is admissible to show what these letters mean, it can not be shown by proof of custom or otherwise that these letters have a meaning or effect different from what would have attached to the full words if they had been inserted in the contract. *Sheffield Furnace Co. v. Hull Coal, etc., Co.*, 101 Ala. 446, 14 So. 672.

Construction of Term "Dollars."—In construing contracts made here during the late war, the courts will take judicial notice of the facts of public history as to

the condition of the country and its currency at that time; and in an action on a promissory note payable in "dollars," which was given for the price of personal property sold by an administrator under an order of the probate court in 1863, will receive evidence of a contemporaneous parol agreement between the parties, that it should be discharged in Confederate treasury notes. *Riddle v. Hill*, 51 Ala. 224, cited in note in 31 L. R. A. 231, overruling *Hill v. Erwin*, 44 Ala. 661, cited in notes in 9 L. R. A., N. S., 968, 31 L. R. A. 241.

Thus, parol evidence was held admissible to show that by the word "dollars," used in contracts made during the war, the parties meant Confederate currency. *Riddle v. Hill*, 51 Ala. 224, cited in note in 31 L. R. A. 231; *Hill v. Erwin*, 44 Ala. 661; *Whitfield v. Riddle*, 52 Ala. 467; *Hightower v. Maull*, 50 Ala. 495, cited in note in 31 L. R. A. 241.

C. O. D.—"It was held by the court of appeals that the admission of this evidence was erroneous; that 'while it was competent to give parol evidence to explain the meaning of the letters "C. O. D.," and thus remove all ambiguity, the contract, being thus made clear, could not be varied; that the additional words, being of familiar and ordinary, and not of technical, use, and having a well defined meaning, could not be explained or varied, or a different meaning given them, nor was it competent to prove a custom or usage inconsistent therewith.' *Collender v. Dinsmore*, 55 N. Y. 200. As has been indicated, our own opinion is that the meaning of the letters 'C. O. D.' in express carriage contracts, and 'f. o. b.' in contracts like that involved in the case at bar, is a matter of judicial knowledge, and that parol evidence is not needed or admissible in their interpretation. *State v. Intoxicating Liquors*, 73 Me. 278; *Express Co. v. Keefer*, 59 Ind. 263; *Moseley v. Mastin*, 37 Ala. 216. But, whether the words of which the letters are initials are filled in by drawing upon judicial knowledge or by extrinsic evidence, the effect and the result are the same. The perfected words, in either case, are inserted in the writing, instead of the letters, and the instrument is to be read and construed precisely as if the words had been originally

embodied in it." *Sheffield Furnace Co. v. Hull Coal, etc., Co.*, 101 Ala. 446, 14 So. 672, 681.

§ 346. Relation and Application of Language to Facts in General.

Deed Mentioning Other Deed.—Where a deed conveyed timber, but stated "it is understood that this deed is to be turned over to the H. L. B. Co.," and that the deed should be an extension of the deed then held by the company, the grantee having properly made a quitclaim deed to the company, it was admissible in evidence in an action against the company for cutting the timber. *Davis v. Miller Brent Lumber Co.*, 151 Ala. 580, 44 So. 639.

A deed to timber was not inadmissible to explain a subsequent deed to the same grantee, because it was made to the "H. L. B. Co.," while the subsequent deed was to "H. L. B. Lumber Co.," since, the subsequent deed referring to the company under both names, it must be presumed the same company was meant, notwithstanding the variance. *Davis v. Miller Brent Lumber Co.*, 151 Ala. 580, 44 So. 639.

Ratification and Extension of Subsequent Deed.—Though a deed to timber on a homestead was invalid for the absence of the wife's separate acknowledgment, in an action against the grantee for cutting the timber, rights under the deed having expired, it was admissible to explain a subsequent deed made by the husband and wife; the property then being her separate estate, and the subsequent deed ratifying and extending the original deed. *Davis v. Miller Brent Lumber Co.*, 151 Ala. 580, 44 So. 639.

§ 347. Identification of Parties.

§ 347 (1) In General.

Identity of Parties to Suit.—In a suit by joint executors against one as surety, whose principal is alleged to be one of plaintiffs, oral evidence is competent to prove the identity of these parties. *Chandler v. Shehan*, 7 Ala. 251.

Meaning of Words "Bodily Heirs."—Extrinsic circumstances can not be resorted to in order to show that the words "bodily heirs" in a deed were used to designate the grantee's children. *Edins v. Murphree*, 142 Ala. 617, 38 So. 639.

"There is nothing in the situation and relations of the parties as disclosed in the writing—and beyond the writing in a case of this character we can not look even for the circumstances attending its execution—that is inconsistent with a purpose on the part of the grantors to convey a fee tail or a fee simple to their daughter, Nancy Edins, and the word 'children' is not employed at all. In this respect the case is radically different from that of *Wikle v. McGraw*, 91 Ala. 631, 8 So. 341, relied on by appellants, and fails to measure up to any cause in which this court has construed the words 'bodily heirs' or 'heirs of the body' to mean children. *May v. Ritchie*, 65 Ala. 602; *Slayton v. Blount*, 93 Ala. 575, 9 So. 341; *Wilson v. Alston*, 122 Ala. 630, 25 So. 225." *Edins v. Murphree*, 142 Ala. 617, 38 So. 639.

Identity of Judgment Defendant.—In an action on a judgment, parol evidence is admissible to establish the identity of the judgment defendant and defendant in the action of the judgment, although the two names are not precisely the same. *Mobile & M. Ry. Co. v. Yeates*, 67 Ala. 164.

Relation of Parties to Bill of Exchange.—Where a bill of exchange exhibits the signature of one to whom it is not directed across its face, and another name in the lower left hand corner, where that of the drawee is usually placed, parol evidence is admissible to explain the relation of the parties to the bill, when sued on by the payee. *Walton v. Williams*, 44 Ala. 347.

Ownership of Money Deposited by Guardian.—Where a certificate of deposit is taken by a guardian in his own name, parol evidence is admissible, on a settlement of his account, to show that the money deposited belonged to the ward. *Beasley v. Watson*, 41 Ala. 234.

Name Inserted in Penal Bond.—A. and others, as his securities, executed a forthcoming bond payable to Jacob A. Toberney, conditioned to pay to the sheriff the amount of an execution in his hands in favor of Jacob A. Flournoy, or to deliver to him certain property on which it had been levied. Held, that parol evidence was inadmissible to show that the name inserted in the penal part of the bond was

intended for that of plaintiff in execution. *Flournoy v. Mims*, 17 Ala. 36.

Correction of Misnomer in Bond.—In an action at law on a bond payable to Jones, parol evidence is not admissible to show that one James was intended to be the obligee, and that the wrong name was inserted by mistake. *Gayle v. Hudson*, 10 Ala. 116.

Parties Obligated by Contract.—When it is doubtful from the face of a contract whether it is intended to operate as the personal engagement of the party signing it, or to impose an obligation on a third party, parol evidence is admissible to show the true character of the transaction, especially where the rights of a third person without notice do not intervene. *Lazarus v. Shearer*, 2 Ala. 718.

§ 347 (2) Personal, Official, or Representative Capacity.

See, also, post, "Individual or Firm," § 347 (3).

Signature of Agent.—A writing, signed by defendant, directed to "E., Agent," stating that he would pay a certain sum for property, and a fixed commission on the sale, being ambiguous as to whose agent E. was and as to whom the commission was to be paid, parol evidence was admissible to explain the instrument, and to show whether or not there was an agreement whereby defendant employed E. as his agent. *Hanna v. Espalla*, 148 Ala. 313, 42 So. 443.

Where a receipt states that money was paid by A., agent for B., parol evidence is admissible to show whether the contract was made by A. for himself or as agent for B. *Oakley v. State*, 40 Ala. 372.

Acting Trustee.—Where a note is signed by the husband, with the addition of the words "acting trustee," parol evidence is admissible to show that its consideration and purpose, with the character of the transaction, constitute it a charge on the separate estate of his wife. *Baker v. Gregory*, 28 Ala. 544, cited in note in 20 L. R. A. 708.

Parol evidence is admissible to show the consideration, intention, and purpose of a note, where it is signed by A. B., "acting trustee," and he intended to charge his wife's separate estate, where he was authorized to make such a contract. Ba-

ker v. Gregory, 28 Ala. 544, cited in note in 20 L. R. A. 708.

Note Payable to Commissioners.—

Where a note was made payable to certain commissioners, parol evidence is admissible to show that plaintiffs were the persons to whom the promise was made, and it is not necessary to produce the minutes of the company for whom the commissioners act to show that they were duly elected such commissioners, where no fraud is alleged. *Mundine v. Crenshaw*, 3 Stew. 87.

Mortgage for Benefit of Firm.—When a mortgagee is described as the president of a corporation, both in the mortgage and in the collateral note, and it is doubtful from the face of the papers whether they were intended for his benefit in his individual capacity, or in his official character as the representative of the corporation, parol evidence is admissible, in equity, to remove the uncertainty, and to show that they were intended for the benefit and security of the corporation. *Chambers v. Falkner*, 65 Ala. 448.

§ 347 (3) Individual or Firm.

See, also, ante, "Personal, Official or Representative Capacity," § 347 (2).

Signature as Secretary.—An agent signing a note "A. B., Sec'y," may show when sued that the note is a corporation debt and that it was the intention to hold the company and not the agent. *Drake v. Flewellen & Co.*, 33 Ala. 106, cited in note in 20 L. R. A. 709.

Stock Subscription Agreement.—In an action to recover the amount of a subscription to defendant's capital stock under an agreement reading, "In your subscribing for one thousand dollars of stock in the cotton mill, etc., you are to have your money back if the mill enterprise does not within one year from its organization establish a tiling plant likewise," and signed with the names of three individuals, parol evidence was inadmissible to plead or prove that defendant was intended to be bound by the instrument. *Russell v. Broadus Cotton Mills (Ala.)*, 39 So. 712.

"The written obligation declared upon for a recovery does not purport to bind the defendant. It is not signed by it, or by any one purporting to act for it and

in its behalf. On its face it is clearly the individual obligation of Broadus, Timberlake, and Washington. Such being its legal effect, it is not permissible to plead or prove that it was intended that defendant was to be bound by it. *Richmond, etc., Mach. Works v. Moragne*, 119 Ala. 80, 24 So. 834; S. C., 124 Ala. 537, 27 So. 240. And clearly, unless the plaintiff is legally entitled to establish the fact that the parties named above, who signed the instrument, intended to bind the defendant corporation, there could not be a recovery against it." *Russell v. Broadus Cotton Mills (Ala.)*, 39 So. 712, 713.

Effect of Words "Prest." and "Mgr."—

Though a note signed in the name of a corporation with the name of an individual and the words "Prest." and "Mgr." following, prima facie imposed a personal liability on the person so signing, the intent so to do might be altered by pleading and proof. *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808.

"The rule for such cases, which has long prevailed in this court, is that the note imposes, prima facie, a personal liability upon the defendant, subject, however, to be shifted by pleading and proof. *Lazarus v. Shearer*, 2 Ala. 718; *Baker v. Gregory*, 28 Ala. 544; *Drake v. Flewellen & Co.*, 33 Ala. 106; *May v. Hewitt, etc., Co.*, 33 Ala. 161; *Collins v. Hammock*, 59 Ala. 448. See, also, *Swarts v. Cohen*, 11 Ind. App. 20, 38 N. E. 536; *Brunswick-Balke Co. v. Boutell*, 45 Minn. 21, 47 N. W. 261. This rule does not at all impinge upon the other rule that the use of such words as 'president,' 'manager,' and the like, following individual signatures, there being nothing to indicate of what or whom they are officers or agents, nor anything in the body of the instrument to render it doubtful, does not open the way for evidence aliunde, but that such words are to be disregarded as being merely descriptive of the persons of the signers. In such cases the individuals are unequivocally responsible. *Richmond, etc., Mach. Works v. Moragne*, 119 Ala. 80, 24 So. 834. Section 4977 of the Code of 1907 is in accord with these doctrines of our adoption, and is declaratory of the law as it has always been in this state." *Briel v. Exchange Nat. Bank*, 172 Ala. 475, 55 So. 808, 809.

Business Managers of Corporation.

Where the legal effect of a note is to bind defendants alone, in the absence of any averment that the name of a company, for which defendants claimed to have acted as board of business managers in the execution of the note, appears on the face of the note as an obligor in such way as to render it doubtful, from the paper itself, which of them, the company or defendants, was intended to be bound, parol evidence is inadmissible to show it was the intention to bind the company, and not defendants. *Moragne v. Richmond Locomotive & Machine Works*, 124 Ala. 537, 27 So. 240.

Parol evidence is inadmissible to show that a note signed by the makers as "Board of Business Managers" was the obligation of a corporation of which they were the board of business managers, and not their individual note, the word used being mere descriptio personæ. *Richmond Locomotive & Machine Works v. Moragne*, 119 Ala. 80, 24 So. 834.

Deed of Partnership.—When land is conveyed by deed to a firm by their firm name, the deed may be aided by parol proof, showing the names of the particular individuals of which the partnership was composed. *Lindsay v. Hoke*, 21 Ala. 542.

Nature and Character of Partnership Business.—It being a material question whether certain acceptances in the name of a firm were binding on the partnership, or were the act of one partner individually, without the knowledge of his copartner, and for a consideration outside the scope of the firm business, evidence showing the nature and character of the general business in which the firm was engaged is admissible. *Saltmarsh v. Bower*, 34 Ala. 613.

§ 347 (4) Persons Having Same Name.**To Identify Letters of Administration.**

—Parol evidence is admissible to show which estate is to be administered on by a grant of letters of administration, when it appears that two persons bearing the same name had deceased, each leaving an estate in the county to be administered. *Moseley's Adm'r v. Mastin*, 37 Ala. 216.

§ 347 (5) Mistake or Variance in Name.

"Macom" for Malcolm.—In an action

for money had and received, it is admissible to prove, by the admission of the defendant, that a receipt given by the defendant to the plaintiff, for the collection of a note therein described, in which the plaintiff, Malcolm G., was described Macom G., was intended for the Christian name of the plaintiff. *Boyd v. Gilchrist*, 15 Ala. 849.

"Milburn" for "Milbra."—Where defendant, in his plea of another action pending, pleaded a probate record according to its supposed legal effect, and his proof showed a fatal variance from the record, parol evidence that letters of administration to one "Milburn" were intended for "Milbra" was incompetent to explain away the record, although the parties or subject-matter might be identified. *Milbra v. Sloss-Sheffield Steel, etc., Co.* (Ala.), 62 So. 176.

Middle Name.—Where a patent issued to "Sheppard S. Johnson," and a deed of the same land was made by "Spencer S. Johnson," it was held competent to prove that the patentee, at the time the patent was issued, was known as "Sheppard Spencer Johnson," and that the two names indicated the same person. *Lamar v. Minter*, 13 Ala. 31.

§ 348. Identification of Subject-Matter.**§ 348 (1) In Judicial Proceedings in General.**

Contest over Will.—Where, on a settlement of a will contest, defendant agreed to pay the other party's costs, in an action to recover them, parol evidence was admissible to show that the litigation in which the costs were paid related to the will contest; the evidence not tending to impeach or supply the place of the record, but being in aid thereof to identify the subject-matter. *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101.

"The thirty-seventh, thirty-eighth, thirty-ninth, and fortieth assignments of error relate to the overruling of the objections to the testimony of the witness Cooper, as detailed in the showing made. The objection is that it was incompetent to prove by the witness that the litigation in the United States courts, in which the costs were paid, related to the contest of the will referred to in the pleading. This suit is not on the judgment, and the

evidence did not tend to impeach or supply the place of the record. The evidence was only in aid of the record, to identify the subject-matter, and was properly admitted. 17 Cyc. 578, 579; *Rake v. Pope*, 7 Ala. 162; *Ex parte Nall*, 36 Ala. 299; *Strauss v. Meertief*, 64 Ala. 299, 300. The testimony of said Cooper identifies \$198.60 of the costs paid in the United States courts as being in a case growing out of the contest of the will of Mattie Lee Fennell, and the testimony of the witness Richardson identifies \$306.25 of said costs in the same way; and as to the witness Greenleaf, while he does not indefinitely say that the costs testified about grew out of the contest of the will of Mattie Lee Fennell, yet the references are so clearly to the same proceedings that, in the absence of any objection, it must be considered as undisputed that these costs refer to the same proceedings as those testified about by Cooper and Richardson." *Jordan v. McDonnell*, 151 Ala. 279, 44 So. 101, 102.

§ 348 (2) In Conveyances, Contracts, and Writings in General.

Parol evidence is admissible to identify the subject-matter to which a written instrument relates. *Holly v. Pruitt*, 77 Ala. 334.

Contract to Purchase Bank Stock.—A contract to purchase a specified number of shares of stock of a bank, which had originally issued \$25,000 worth of stock divided into shares of \$50 each, and which had subsequently and before the contract increased its capital to \$75,000, contains a latent ambiguity as to the subject-matter of the contract as to whether the original issue of the stock or the subsequent issue is involved, and parol evidence to identify the particular stock embraced in the contract is admissible. *Feore v. Avent*, 4 Ala. App. 551, 58 So. 727.

Justice's Certificate.—Whether parol evidence is admissible to apply and identify the reference of the words "foregoing instrument," as used in a justice's certificate of the wife's examination and acknowledgment, written on a sheet of paper containing both a relinquishment of dower by the wife and a deed signed by husband and wife, *quære*? If admis-

sible, it may be received at law. *McBryde v. Wilkinson*, 29 Ala. 662.

§ 348 (3) Of Real Property in General.

Failure to Name County in Deed.—Where a deed for land was defective, in that it did not recite the county where the land was situated, parol evidence is admissible to supply the defect. *Hawkins v. Hudson*, 45 Ala. 482.

Omission of State and County in Mortgage.—When a mortgage sought to be introduced in evidence is insufficient because the state and county are omitted in the description of the land intended to be mortgaged it may be identified by parol evidence, and the deficiency in the mortgage thereby supplied. *Barron v. Barron*, 122 Ala. 194, 25 So. 55.

Misdescription in Insurance Policy.—Where, in an action on a fire insurance policy, it appeared that the defendant's agent wrote the application himself, and that there was a misdescription of the property intended to be insured, it was not error to permit plaintiff to testify as to the property to be insured, and that a contract of insurance had been entered into. *Alabama Mut. Fire Ins. Co. v. Minchener*, 133 Ala. 632, 32 So. 225.

Demand Secured by Deed of Trust.—Parol evidence is admissible to identify a demand, secured by a deed of trust, in which it is described as consisting of one note, when in fact it consisted of two notes; and the deed itself is admissible, notwithstanding the misdescription, to show that the debt was secured by it. *Morrison v. Taylor*, 21 Ala. 779.

Mistake in Survey.—In ejectment by devisees in remainder against a purchaser from the tenant for life, the lands having been surveyed and divided among the devisees under authority of the will, and the survey so made accurately describing the lands, except that, in the designation of the quarter section in which they were situated, the letters "S. E." were used, instead of "N. E.," parol evidence is admissible to show the mistake in the recorded survey, and to identify the lands sued for as those embraced in the survey. *Pope v. Pickett*, 51 Ala. 584.

§ 348 (4) Application of Description to Subject-Matter.

Identity of Land Conveyed.—Where a

description of land is imperfect, but not void for uncertainty, the defect will be cured by parol evidence to identify the premises. *Bullock v. Malone*, Minor 400.

A description in a deed was as follows: "Certain lands situated in section 4, township 21, range 23, in the corporate limits of Dadeville, commencing at an oak tree above the old Jones blacksmith shop place on a road leading from Dadeville to Dudleyville, thence along said road until it strikes the corner of land now owned by John McCree, thence on a straight line to the tanyard spring, thence to a black gum tree, it being a line tree between said land and Mrs. Shephers' land, thence in a straight line to the Hatcher line, thence along said Hatcher line to a house formerly occupied by Gilbert Curry, thence in a straight line to the starting point, containing twenty acres more or less." Held sufficient to authorize parol evidence to identify the land conveyed. *Harrelson v. Harper*, 170 Ala. 119, 54 So. 517.

A deed conveyed "round timber for turpentine purposes for a term of three years from the date of boxing same, aggregating about thirty-five hundred acres (3,500), and covered by the following leases, which are hereby transferred." Following this were a large number of general descriptions, among them being "100 acres F. N. S. Co., Sec. 18, T. 1, R. 19." Held, that the description is void for uncertainty, and, as the ambiguity is patent, parol proof to identify the land described will not be received; there being no evidence as to the circumstances attending the execution of the deed to authorize the court in determining the intention of the parties as to any particular one hundred acres, and there being no averment that the one hundred acre tract claimed is the only one in the section that contains "round pine timber," and the court not having judicial knowledge that other one hundred acre tracts in the section did not contain "round pine timber," and there being no proof that the grantor owned and occupied the particular tract in question. *Elliott v. Coleman & Davis*, 170 Ala. 355, 54 So. 491.

"That the description is void for uncertainty we have no doubt. We judicially know that 'Sec. 18' containing 640 acres,

which is capable of division into several different tracts, five of which may contain one hundred acres each. The description in the deed would apply equally to any of the six different tracts as well as to the other. In *Chambers v. Ringstaff*, 69 Ala. 140, cited and relied on by counsel for appellant, it was said: 'The distinction between latent and patent ambiguity has long existed, and the general rule applicable to each class of cases should not be disturbed. When a contract or conveyance, on its face, or aided by judicial knowledge, equally describes two or more persons, things, etc., this is patent ambiguity, ambiguity apparent. In such case the rule is clear, and we do not wish to depart from it, that parol proof of what was intended by the contracting parties will not be received. Latent ambiguity exists when on the face of the paper no doubt or uncertainty exists, but by proof aliunde the language is shown to be alike applicable to two or more persons, things, etc. When this is the case, the uncertainty or ambiguity may be explained or cleared up by the same character of proof as that by which it is made to appear. These are familiar elementary principles. But there are cases involving principles which are scarcely referable to either of these heads. They may be styled exceptional shadings of patent ambiguity. They arise when on mere inspection there does appear to be an uncertainty or ambiguity. This frequently grows out of a careless use of language, and sometimes results from the many shades of meaning, usage, and provincial habit according to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguity, which Mr. Justice Story has characterized as an intermediate class, partaking of the nature both of latent and patent ambiguity.'" *Elliott v. Coleman*, 170 Ala. 355, 54 So. 491, 492.

Where land contracted to be conveyed was described as the subscriber's "five-acre tract of land at Arlington Station, Gate City car line," parol evidence was admissible to identify the land by showing that a particular five acres at Arlington Station was the land referred to, and was the only five acres owned by the vendor, so that the description was not

so uncertain as to render the contract unenforceable. *Bender v. Barton* (Ala.), 62 So. 732.

Where the rights of parties to land depended upon the interpretation of the description in a deed, which in part described the land as being off the southeast corner of the W. lot, and it did not appear what land was included in that lot, parol evidence was admissible to show what was meant by this clause by the parties. *Chatahoochie, etc., R. Co. v. Pilcher*, 163 Ala. 401, 51 So. 11.

Contradicting Description in Deed.—A description of the lot conveyed as commencing at a point on "P. or F. street, running thence south along said P. street to the two story house on lot owned by H.," and fixing the southwest corner of the lot at the corner of the "two story house on lot owned by H.," being unambiguous, can not be contradicted by parol evidence that such corner of the lot was twelve feet north of such corner of the building. *Foster v. Carlisle*, 159 Ala. 621, 48 So. 665; *Foster v. Reddick*, 159 Ala. 668, 48 So. 666.

In an action of ejectment, where it is shown that the defendant claimed under a deed which described the property conveyed therein as "one lot on Green street, in said Alexander City, about twenty-three feet front, and runs back thirty-six feet, and adjoins the brick store of Crayton Adams," it is competent for the defendant to introduce parol evidence tending to show that the description in said deed covered and conveyed the lands sued for; that there was never but one brick store on Green street, in Alexander City, known as "Crayton's Drug Store," and it was on the east side of said street; that there was never any other lot on Green street, fronting it and adjoining Crayton Adams' drug store, running back thirty-six feet, and owned by Crayton Adams, than the one mentioned in the deed. And after the introduction of such evidence, making certain the description of the lands embraced in said deed, such deed is admissible in evidence. *Pearson v. Adams*, 129 Ala. 157, 29 So. 977.

Identity of Property Named in Complaint.—In ejectment, where witness for plaintiff was shown to be county surveyor for about twenty years, and that he had

surveyed the land in dispute and made a map of it, which map was introduced in evidence, it was proper for plaintiff to hand the witness the deed under which plaintiff claimed, and ask the witness to state whether the land described in the complaint was a part of the land described in the deed. *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382.

Aiding Uncertainty of Description.—Parol evidence is admissible to aid uncertainty in description in a deed which reads: "60 acres Comida and canebottom; also 10 acres hillside woodland adjoining,"—a certain tract of land having been pointed out at the time of the sale, and the purchaser having been put in possession thereof. *Meyer Bros. v. Mitchell*, 77 Ala. 312.

Failure to Name State in Mortgage.—A mortgage describing land only by its survey numbers of section, township, and range, without reference to the state, county, or basis meridian, may be aided by oral evidence showing that, when the conveyance was made, the grantor owned and resided on lands in a given county known by the same numbers as those in the mortgage. *Chambers v. Ringstaff*, 69 Ala. 140.

It is not permissible for a party to a suit, who was also a party to a mortgage, to testify, as a witness, to the intention of the parties to such mortgage as to what lands were to have been thereby conveyed. In such cases, the interpretation of the conveyance and judgment upon its validity vel non, are questions for the court, while the finding of attendant facts and circumstances are functions of the jury. *Chambers v. Ringstaff*, 69 Ala. 140.

§ 348 (5) Property or Interest Included.

Failure to Include Certain Lands.—It was competent for a surveyor testifying as to the identification of lands covered by a deed in evidence to state, on comparing it with a map before him of a survey he had made, that the deed did not include certain land in suit. *Donehoo v. Johnson*, 120 Ala. 438, 24 So. 888.

Portion of Plantation Not Included.—A tract of land being described, in the instrument which appears as a receipt for the purchase money, and which also

contains an agreement by the vendor to give title to the land, as a certain "plantation," without other words designating its boundaries or the number of acres which it contains, parol evidence is admissible to show that the vendor did not claim and was not in possession of certain parts of that plantation which had been assigned as dower to the widow of the former owner. *Holly v. Pruitt*, 77 Ala. 334.

Two-Thirds of Frontage.—Where a deed described the premises as "lot No. 2, of square No. 8, in the town of R., being 20 feet in front and running back 110 feet," and it was shown that the lot was in fact thirty feet front, parol evidence was admissible to show that the part intended to be conveyed was the twenty feet front on the east side. *Sikes v. Shows*, 74 Ala. 382.

Ownership of Property Described.—Where a deed describes land as "part of lot number 70, fronting on Gallatin street 50 feet, and extending eastwardly 73 feet, being the property of A.," the dimensions of lot seventy being shown, extrinsic evidence is admissible to show that A. only owned a part of the lot corresponding with the dimensions given in the deed. *Humes v. Bernstein*, 72 Ala. 546.

§ 348 (6) Boundaries.

Bank of Stream as Boundary.—A deed conveyed land bounded by the bank of a mill race. The race had two banks, one which immediately formed the race, and another which was thrown up to prevent an overflow. Held, that parol evidence was competent to show which bank was meant by the description. *Stamphill v. Bullen*, 121 Ala. 250, 25 So. 928.

Street as Boundary.—Where premises are described as situated "on" a certain street, parol evidence is admissible to show on which side of the street they are; but, where they are described as bounded on the east by the street, parol evidence is not admissible to show that in fact the street was the western boundary. *Guilmartin v. Wood*, 76 Ala. 204.

Boundaries of Land Sold by Commissioner.—Where, notwithstanding indefiniteness and discrepancies in the description of the land in the petition, order of

sale, report of sale, and commissioners' deed, enough appears to show that the land conveyed by the commissioners was comprehended in the description contained in the petition and order of sale, parol evidence is admissible to fix the boundaries of the portion sold, according to the data furnished by the deed, so as to identify the land therein described. *Saltonstall v. Riley*, 28 Ala. 164.

§ 348 (7) Sufficiency of Description to Admit Parol Evidence.

Land Described as "the Douglas Gold Mine."—Parol evidence is admissible to identify land conveyed by a deed, where it is merely described as "the Douglas gold mine." *Baucum v. George*, 65 Ala. 259.

Description with Reference to Stream.

—A deed described the property as "all that part of the west half of the north-west quarter of section 19, township 17, range 3 west, that lies south of Black creek." Held, that while the omission of land district, state and county might create a patent ambiguity, the statement that the tract is bisected by Black creek introduces such a landmark as to allow testimony, as an identifying circumstance, that Black creek does in fact flow across this particular subdivision of land; also that before the deed was made the grantor, and afterwards the grantee, claimed and cultivated it. *Black v. Pratt Coal & Coke Co.*, 85 Ala. 504, 5 So. 89.

A deed, after reciting that it was made at Fish river, in the province of West Florida, described the land as "a certain tract of land being and lying at aforesaid place of Fish river, province aforesaid, commonly known as 'Ward's Old Place,' beginning at a creek which empties itself into the said Fish river, and known by the name of 'Alligator Creek;' thence south to a rock fronting on the bay of Mobile, calculating in said tract a superficies of 1,000 acres, or thereabouts." Held, that the description was not so indefinite and uncertain as to exclude evidence of extrinsic facts to identify the land. *Dorgan v. Weeks*, 86 Ala. 329, 5 So. 581.

Local Name of Tract.—A contract for the sale of land described as "sixty acres Comida and Cone bottom, also ten acres hillside woodland adjoining the Mitchell

tract," may be aided by parol evidence that a certain tract was pointed out. *Meyer v. Mitchell*, 75 Ala. 475, cited in note in 35 L. R. A. 321, 322, 325.

§ 348 (8) Of Personal Property in General.

Transfer of Judgments.—An assignment: "In consideration of certain notes made to me this day by W., I hereby transfer judgments to him on which he has acknowledged judgment as security of S., and authorize him to collect the same and receipt,"—may be shown by parol to be a transfer, not of the confessed judgments, but of the judgments against S. to secure which W. had confessed a second set of judgments. *Harper v. Columbus Factory*, 35 Ala. 127.

"The writing itself does not show, and in all such cases, parol evidence is admissible, to explain and apply the written instrument, and identify the particular matters intended to be embraced by the general terms employed. *Cowles v. Garrett*, 30 Ala. 341; *Casey v. Holmes*, 10 Ala. 776; *Lockhard v. Avery*, 8 Ala. 502." *Harper v. Columbus Factory*, 35 Ala. 127, 131.

§ 348 (9) In Sale of Personal Property.

Identity of Property.—Under a written contract for the sale of macadam, parol evidence is admissible to show what macadam was contracted for. *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563, 23 So. 798.

"It was competent in this case for the plaintiff to show by parol testimony the macadam which, according to the written agreement, was to be sold. 'As it is a leading rule in regard to written instruments that they are to be interpreted according to their subject-matter, it is obvious that parol or verbal testimony must be resorted to in order to ascertain the nature and qualities of the subject to which the instrument refers.' *Greenl. Ev.*, § 286." *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563, 23 So. 798, 801.

§ 348 (10) In Chattel Mortgage.

Mortgage on Crops.—A mortgage, expressed to be of "my entire crop of cotton and corn of the present year," is capable of being made sufficiently definite by extrinsic proof, and is valid. *Ellis v. Martin*, 60 Ala. 394.

Where property is described in a mortgage as "my entire crop of corn and cotton," parol evidence is admissible to show that the parties referred to the crop to be raised by the mortgagor on the plantation which he was then cultivating. *Smith v. Fields*, 79 Ala. 335.

Where, on trial of right of property, the claimant describes the property as belonging to him as mortgage in a mortgage conveying the interest of the mortgagor in crops grown on his land by a tenant, the property in suit may be identified by parol evidence as having been raised on the land by a tenant of the mortgagor during the mortgage period, and delivered to the mortgagor for rent. *Ballard v. Mayfield*, 107 Ala. 396, 18 So. 29.

Mortgage of Horse.—In trover for the conversion of a horse, which was described in a mortgage as "an iron gray colt," a witness testified that the horse in defendant's possession "was the same animal as that described in the mortgage," though he could not state of his own knowledge that it was the same; that the horse had no marks or distinct features whereby he could distinguish him from other gray horses, but he believed he was the same horse described in the mortgage, and was satisfied he was the same. Held, that the evidence was admissible, it not being shown, by a cross-examination or otherwise, that the witness was ignorant of the matter about which he was testifying. *Turner v. McFee*, 61 Ala. 468.

Drug Store Fixtures.—In an action of detinue for certain articles claimed by plaintiff under a mortgage executed by defendant, which conveyed certain land, "with the buildings thereon known as the 'drug store,' and all the fixtures and furniture thereto pertaining, plaintiff may prove, not what the parties orally agreed should be included in the word "furniture," but what things did in fact constitute the furniture of the building mortgaged. *Fore v. Hibbard*, 63 Ala. 410.

§ 348 (11) Of Debt or Obligation Collateral to Security.

Identity of Debt.—Parol evidence is admissible to identify the debt secured by a mortgage. *Duval's Heirs v. McLoskey*, 1 Ala. 708.

Where a mortgage recited that it was given to secure a specific sum, but was in fact given not only to secure such sum but future advances as well, parol evidence was admissible to show that such was the intention of the parties. *Kirby v. Raynes*, 138 Ala. 194, 35 So. 118.

"Parol proof is also admissible to show that the mortgage was given to secure advances. 1 *Jones on Mortgages*, §§ 374-377; *Wilkerson v. Tillman*, 66 Ala. 532, 537; *Lovelace v. Webb*, 62 Ala. 271; *Collier & Son v. Faulk*, 69 Ala. 58; *Lawson v. Alabama Warehouse Co.*, 80 Ala. 341; *Huckaba v. Abbott*, 87 Ala. 409, 6 So. 48." *Kirby v. Raynes*, 138 Ala. 194, 35 So. 118, 119.

Parol evidence is admissible to show that a particular bill of exchange was intended to be secured by a deed of trust, though generally or improperly described in the deed. *Posey v. Decatur Bank*, 12 Ala. 802.

Misdescription of Debt.—In an action to foreclose a deed of trust given to secure certain creditors and to enjoin proceedings at law on the part of other unsecured creditors, where it was insisted that a certain debt included in the deed was fictitious, proof of a debt corresponding in every respect, except as to amount, with the secured debt, may be received for the purpose of showing a misdescription of the debt, and thus repelling the inference of fraud, though it may not be sufficient to authorize a foreclosure as to the secured debt. *Alabama Life Ins. & Trust Co. v. Pettway*, 24 Ala. 544.

§ 349. Showing Intent of Parties as to Subject-Matter.

§ 349 (1) In General.

Proof of Surrounding Circumstances.—In construing contracts, the circumstances surrounding the parties and the object must be considered as bearing on the parties intent, and this must often necessarily be proved by parol. *Smith v. Webb* (Ala.), 58 So. 913.

"In the construction of contracts the judicial duty is to ascertain the intent of the parties, where, of course, that intent is not so clearly expressed as to exclude the necessity for construction. In order, where construction is necessary, to ascertain the intent of the parties, the cir-

cumstances surrounding them and the object secured by their engagement should be considered. Parol evidence is often the only means whereby the conditions and circumstances surrounding the parties, at the time of contracting, may be shown. *Lewman & Co. v. Ogden Bros.*, 143 Ala. 351, 42 So. 102; *McDonnell v. Jordan*, 142 Ala. 279, 38 So. 122." *Smith v. Webb* (Ala.), 58 So. 913, 914.

Conduct as Evidencing Intention.—In the interpretation of a contract of doubtful meaning, parol evidence of the conduct of the parties thereunder is admissible, as tending to show the intention of the parties. *Boykin v. Bank of Mobile*, 72 Ala. 262.

Meaning of Article and Thing.—Where an agreement between the widow and heirs of a decedent was to put the "things" up at auction and let the heirs purchase such as they desired, and that they would not bid against each other, but would give a fair price for each "article" bought, evidence of the person who drafted the agreement was inadmissible to show that the parties intended by "things" and "article" to include real estate. *Napier v. Elliott* (Ala.), 58 So. 435.

Extrinsic Proof Unnecessary to Construction of Term.—Where a written contract contains a term which may be easily construed without the aid of extrinsic proof, evidence is inadmissible to show the unexpressed intention of the parties by the use of such term. *Sullivan v. Louisville & N. R. Co.*, 138 Ala. 650, 35 So. 694.

"When a writing contains a term which it is impossible for the court to construe without the aid of evidence aliunde, it is proper to resort to evidence for that purpose, but, when a writing is complete in itself, it is the duty of the court to construe it without the aid of extrinsic proof. *Gunn v. Clendenin*, 68 Ala. 294." *Sullivan v. Louisville, etc., R. Co.*, 138 Ala. 650, 35 So. 694, 697.

Order for Lumber.—In an action for conversion of machinery sold, to be paid for in lumber, the written order not specifying the kind of lumber, parol evidence of the kind was admissible. *Avery & Co. v. Turner*, 3 Ala. App. 627, 57 So. 255.

"The purchaser's written order for the machinery provided for his cutting and

delivering lumber in payment of the deferred installments of the purchase price, but did not specify the kind of lumber to be shipped. It was competent for the defendants to show by parol testimony what was the understanding on this subject arrived at at the time between the purchaser and the agent of the seller who had charge of the negotiation. This was proper for the purpose of identifying the subject-matter of this feature of the contract. *Moore v. Barber Asphalt Paving Co.*, 118 Ala. 563, 23 So. 798; 2 Page on Contracts, § 1217." *Avery & Co. v. Turner*, 3 Ala. App. 627, 57 So. 255, 257.

Previous Transactions on Same Subject.—A written contract for the purchase of goods, purporting to be part of a continuing transaction in which the writer stated that he had not been able to sell much up to that time, but thought that he would do better in the future, and then authorized plaintiff to ship to him at once 2,000 pounds of white lead, if possible, "at five cents," was not a definite contract of sale, and parol evidence of previous transactions was competent to explain its nature. *Weir v. Long*, 145 Ala. 328, 39 So. 974.

"It is common knowledge that this is not an unusual transaction in the business world. This instrument does not in terms propose to purchase the goods, but shows a willingness to receive them, whether they are made to him at five cents or more, so that, in order to a proper understanding of the meaning of this writing, it is necessary to take into consideration the surrounding circumstances and prior transactions. 'If there be ambiguity in the contract, resort may be had to the situation of the parties and the circumstances under which it was entered into, for the purpose, not of changing the writing, but of furnishing the light by which to ascertain its actual significance.' *Walker v. Brown*, 165 U. S. 654, 668, 17 Sup. Ct. 453, 41 L. Ed. 865; *Oel Ricks v. Ford*, 23 How. 49, 63, 16 L. Ed. 534, 24 Am. & Eng. Ency. Law (2d Ed.) 1039; *Mobile, etc., Mut. Ins. Co. v. McMillan*, 31 Ala. 711, 721. Hence there was no error in admitting evidence of the fact that the prior transactions had been on consignment basis. This disposes of the third, fourth, and fifth assignments

of error." *Weir v. Long*, 145 Ala. 328, 39 So. 974, 975.

§ 349 (2) In Construction of Deeds in General.

Interpretation of Acknowledgment.—Evidence, in aid of the interpretation of the acknowledgment, that the signers of a deed, other than one, were all of the children of the other grantor, excepting the grantee, is admissible; it not controverting the rule against direct parol evidence of intenton. *Bowles v. Lowery* (Ala.), 62 So. 107.

§ 349 (3) In Description of Property.

Identity of Tracts Described.—Where a deed conveyed land described as the "S. ½ and N. E. ¼ of the N. W. ¼, Sec. 29," etc., parol evidence was admissible to show that the land intended to be conveyed was the S. ½ of the N. W. ¼ and the N. E. ¼ of the N. W. ¼ of the section. *Reynolds v. Lawrence*, 147 Ala. 216, 40 So. 576.

"The only ambiguity which is claimed to exist is from the description of the land as 'the S. ½ and the N. E. ¼ of N. W. ¼ of Sec. 29,' and the amendment seeks to make it clear that the S. ½ referred to the S. ½ of the N. W. ¼ and not the S. ½ of the section. While it is a correct general principle of law that, if an ambiguity is patent on the face of the deed, it can not be made certain by parol proof as to what was the intention of the parties, but the instrument must be construed by the court, yet the court is entitled to the light of all the circumstances surrounding the parties, in order to enable it to determine the property intended to be conveyed by the deed. This has been called an intermediate class, partaking of the nature of both patent and latent ambiguities; and this court, speaking through Justice Stone, had clearly expressed this distinction, in a case where lands were described by government numbers, yet failed to state in what county or state they were situated, and proof was permitted to be made of the fact that the party making the deed was living in a certain county in Alabama, on lands answering to said description. *Chambers v. Ringstaff*, 69 Ala. 140. See, also, *Moody v. Alabama, etc., R. Co.*, 124 Ala. 195, 26 So. 952; *Webb v.*

Elyton Land Co., 105 Ala. 471, 18 So. 178." *Reynolds v. Lawrence*, 147 Ala. 216, 40 So. 576.

Identity of Township.—Where a tax deed describes the land conveyed as being in a section, township, and range of a certain county, but fails to indicate whether the township is north or south, and whether the range is east or west, but further, recites the advertisement of the lands for sale to pay taxes due from the owner thereof, naming him, parol evidence may be received to aid the description contained in the deed, and show what land was intended to be embraced therein, and the deed is admissible in evidence to show color of title. *Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

§ 350. Showing Purpose of Writing.

Purpose of Indorsement.—It may be shown by parol that an indorsement in blank by the payee of the note in suit, and its delivery to plaintiff's collector, were in fact a transaction in which the latter was to act as the agent of payee to get the note discounted, and to apply a portion of the proceeds in payment of a debt due to plaintiff. *Avery v. Miller*, 86 Ala. 495, 6 So. 38.

Purpose of Bill of Exchange.—A woman who drew a bill of exchange accepted by a firm may show by parol that it was drawn by her to secure a debt of her husband, who was a member of the firm. *First Nat. Bank v. Leland*, 122 Ala. 289, 25 So. 195.

Intention of Executing Deed.—Parol testimony of the intention with which a deed is executed is inadmissible. *Morris v. Robinson*, 80 Ala. 291.

Assignment of Mortgage.—Parol evidence is admissible to show that the assignment of a mortgage to one by name intended for the benefit of another as well as himself. *Locket v. Child*, 11 Ala. 640.

(E) SHOWING DISCHARGE OF PERFORMANCE OF OBLIGATION.

§ 351. Estoppel or Waiver.

Knowledge of Defect of Title.—In a suit to rescind a contract for the exchange of lands, it is competent for defendant to prove by parol that plaintiff knew of the defect of title at the time

of entering into the contract. *Beck v. Simmons*, 7 Ala. 71.

§ 352. Performance.

Contract to Complete Road.—Where a note given by subscriber to railroad stock provides that it shall be payable whenever the directors decide that the road has been finished "to a point within one mile of the center of the city," and the published notice required of the directors states that it was finished to a point within "one mile of the city," parol evidence is admissible to show that it was actually finished within one mile of the center of the city. *Garner v. Hall*, 114 Ala. 166, 21 So. 835.

§ 353. Payment.

Payment of Judgment.—Parol evidence is admissible to show payment of a judgment. *Clemens v. Prout*, 3 Stew. & P. 345.

Payment by Order.—In an action on a certificate of indebtedness, an order drawn by plaintiff, prior to the date of the certificate, on defendant, for the payment of a sum of money to a third person, is inadmissible in evidence, if unaccompanied by proof that it was accepted and paid after the date of the certificate. *Alabama & M. R. Co. v. Sanford*, 36 Ala. 703.

Payment of Note.—When a note has been paid and delivered up, it will not be presumed that the maker afterwards retains it in his possession; and hence parol evidence is admissible to prove payment, when it becomes a material inquiry, without calling on the party to whom the note was delivered to produce it. *Mead v. Brooks*, 8 Ala. 840.

XII. OPINION EVIDENCE.

(A) CONCLUSIONS AND OPINIONS OF WITNESSES IN GENERAL.

§ 354. Grounds for Admission.

Rule and Exceptions.—"The opinion of a witness is not in general admissible—he must narrate facts. But on questions of science and some few others, persons of skill may speak, not only as to facts, but are allowed to give their opinions in evidence." *Washington v. Cole*, 6 Ala. 212, 213.

"The general rule is conceded, that a witness must testify as to facts, and facts only; but to this rule there are several well established exceptions, and it is often extremely difficult to define the line which separates opinion from fact. Evidence as to personal identity,—the value of property, and handwriting, must always, to a certain extent, be matter of opinion; and yet, in these cases, the witness is allowed to state his conclusions. 1 Greenl. Ev., § 440; so, also, as to time, and distance. The question propounded to the witness we regard, in substance, as simply whether an object was visible from a certain point, and are inclined to consider it as a matter of fact, rather than of opinion. There is no inference to be drawn—no circumstances to be weighed. It depends upon the exercise of a physical sense. But, if it were matter of opinion, we should hold it admissible, upon the principle which obtains in the other instances we have referred to." *Gibson v. Hatchett & Bro.*, 24 Ala. 201, 206.

Parol evidence can not be received in reference to a contract which the statute of frauds require should be in writing. *Lecroy v. Wiggins*, 31 Ala. 13.

Jury as Capable of Forming Opinion as Witness.—The opinions of witnesses as to matters concerning which the jury are as competent to form an opinion, from the facts proven, as are the witnesses, are inadmissible. *Reeves v. State*, 96 Ala. 33, 11 So. 296.

Data from Which Jury May Draw Conclusions.—Where the question was whether a warehouse was fireproof, witness having been allowed to state how a certain other warehouse, which was fireproof, and which had been on fire, was built, and the special efforts made to save it, he can not be asked, on cross-examination, if it was not with great difficulty that the warehouse was saved, as the witness, having furnished the jury with the data on which to found a conclusion, should not be permitted to express his opinion. *Hatchett v. Gibson*, 13 Ala. 587.

Subject Incapable of Adequate Description.—Where the nature of a subject is such that it can not be described in language accurately informing the judgment of the jury, opinions of ordinary witnesses

may be received. *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315.

"And in *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813, it was said that: 'While it would be a matter of common knowledge how far one could ordinarily see an object as large as a horse, and therefore not the subject of an opinion, the jury being as competent to judge of this fact as a witness, this inquiry assumed a different aspect when applied to the particular locality on the railroad track, or right of way going from the depot towards the scene of the injury. It may have been impracticable to lay before the jury all the details upon which such a collective fact was found. The soundness of the conclusion could be tested by the right of cross-examination.' It was of vital importance in this case that the jury should know whether odors issued from the tanks in such volume and intensity as to affect plaintiff's well-being and the value of her property one-half a mile away, or on the public road on which the plaintiff lived." *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315, 319.

"The books abound in examples, and there are a number of cases in our reports which illustrate the relaxation of the general rule against the reception of nonexpert opinions. For example, it was held in *McVay v. State*, 100 Ala. 110, 14 So. 862, that a witness might answer, 'It was a still night, and in my opinion they could have heard it.' In *Rollings v. State*, 136 Ala. 126, 34 So. 349, a witness was allowed to testify that in his judgment females were near enough to hear certain language; this being considered to be the statement of a collective fact based on a knowledge of the manner of the utterances and of the situation of the females." *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315, 319.

Opinion as to Decency of Dance.—The statement of a witness that a certain dance was indecent, being merely the expression of an opinion, is not admissible in evidence. *Brinkley v. State*, 89 Ala. 34, 8 So. 22.

Judgment and Observation from Conceded Facts.—"In general it is not allowable for a witness to state his opinions, but it is sometimes permissible for him to testify to the result of his judgment

and observation upon conceded facts. Thus, where a witness stated, that from his knowledge of the debtor's circumstances, the latter was able to pay a certain amount, and that during a certain time after his escape, he must have spent from \$800 to \$1,000, as deponent believed, the testimony was considered admissible—not being an abstract opinion merely. *Griffin v. Brown*, 2 Pick. 304. In questions of the value of property, witnesses have often been permitted to testify to their opinions, as there is no unerring and certain standard in such cases, to which reference can always be had. *Kellogg v. Krauser*, 14 Serg. & R. 137, 16 Am. & Am. Dec. 480; *Rochester v. Chester*, 3 N. H. 349; *Morse v. Connecticut*, 6 Conn. 9; 1 Greenl. Ev., § 488, et seq.; *Chenault v. Walker*, 14 Ala. 151." *Rembert v. Brown*, 14 Ala. 360, 366.

§ 355. Conclusions and Matters of Opinion or Facts.

§ 355 (1) In General.

General Rule and Exceptions.—Witnesses must state facts, and not opinions. *Jones v. Hatchett*, 14 Ala. 743; *Thomas v. De Graffenreid*, 27 Ala. 651; *Gregory v. Walker*, 38 Ala. 26.

"The general rule, of course, is that witnesses must depose to facts, and can not be allowed to give their opinions founded on these facts, or the inferences or deductions which they draw from them. To this general rule, however, there are many exceptions, as where the subject involves expert evidence, questions as to value, etc. 1 Greenl. Ev., § 440 et seq.; 1 Whart. Ev., § 509 et seq." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

Discussion of Admissibility of Opinion.—"Mr. Wharton says: 'When we enter on the discussion of the admissibility of opinion, we strike a topic which is embarrassed by much ambiguity of terms.' Any one who will attempt to examine the texts and adjudicated cases on this subject will be overwhelmed not as to 'ambiguity of terms,' but also as to the direct conflict of opinions and decisions upon the subject. The condition of the authorities on the subject is little better than a state of anarchy. There are, however, some abstract principles of law and of

evidence as to which the authorities all agree, and which may be looked to in passing upon the question of opinion evidence in concrete cases. Among these are that, when the opinion sought is a mere 'shorthand rendering' of the facts, then the opinion can be given, subject to cross-examination as to the facts upon which it is based; that when language is inadequate to state the facts of a concrete case to the jury, and they can be described only by the effect produced upon the mind of the witness, his opinion may be rendered. A witness may testify that he loaned a slave. A loan is a fact, a compound one, and not a conclusion. *Cole v. Varner*, 31 Ala. 244, 249. Likewise, it is not necessary for a witness to be an expert, to enable him to give his opinion as to a matter depending upon special knowledge, when he states the facts upon which he bases his opinion. But the rule, as before stated, is different as to matters upon which the jurors themselves can form opinions if the facts or data are given them." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

Basis of Rule Allowing Opinion Evidence.—"Mr. Greenleaf says that the 'opinion rule' of evidence is based on the thought that the opinion is superfluous and unnecessary and should not be brought into the case, because, if the opinion of that witness is allowed, then all persons having the same knowledge as the witness could be brought in to state their opinion, and the trial would thus be incumbered, without adding any essential data not ready before the jury." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

Opinion Embracing All Merits.—Opinions of witnesses embracing all the merits of a case and leaving nothing for the jury to decide can not be given. *Stuckey v. Bellah*, 41 Ala. 700, cited in note in 38 L. R. A. 741.

Membership in Insurance Association.—In an action on a mutual benefit certificate, whether insured was a member in good standing at his death being a jury question, a question to an officer of the association as to whether insured was a member in good standing was improper as calling for a conclusion. *United Order*

of the *Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354.

Failure to Designate Party.—The testimony of a witness that the matter inquired about related to one of two or three parties, and he could not designate the party out of this number, is not inadmissible as a supposition. *Merriweather v. Sayre Mining & Mfg. Co.*, 161 Ala. 441, 49 So. 916.

False Imprisonment.—In an action for false imprisonment, the plaintiff was properly allowed to testify that he was detained against his will, since it was the statement of a fact, and not the expression of an opinion. *C. N. Robinson & Co. v. Green*, 148 Ala. 434, 43 So. 797.

Action of Railroad Conductor.—In an action against a railroad for the wrongful death of his intestate, who had been allowed to ride on a pass, a question as to whether the conductor, after the accident, was trying to find the pass, was objectionable as calling for a conclusion. *Neyman v. Alabama, etc., R. Co.*, 174 Ala. 613, 57 So. 435.

Person with Whom Another Was Dealing.—Evidence as to whom witness thought he was dealing with is improper. *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 739, cited in note in 23 L. R. A., N. S., 371.

Opinion as to Facts Proved.—The opinion of a witness as to what the facts proved is not admissible. It is the province of the jury alone to draw conclusions. *Perry v. Graham*, 18 Ala. 822.

"It is for the jury, not for a witness, to say what conclusions are to be drawn from the evidence in the case. The questions referred to in the sixth and seventh assignments of error were subject to the objections made to them, as they called, not for statements of fact proper to be deposed to, but for deductions or conclusions of the witness from the evidence adduced. Responsive answers to those questions would have been invasive of the exclusive province of the jury. *Union Painless Dentists v. Dement*, 6 Ala. App. 505, 60 So. 421; *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482." *Roden Grocery Co. v. Gipson (Ala.)*, 62 So. 388, 390.

Purpose of Endorsement.—A question as to why plaintiff required a certain in-

dorsement of defendants' note is objectionable as calling not for a fact, but merely for a reason. *Lytle v. Bank of Dothan*, 121 Ala. 215, 26 So. 6.

Existence and Contents of Deed.—A question which calls for evidence of the existence, execution, and whereabouts of a deed is improper where it also calls for oral statements of conclusions as to its contents. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

Experts and Nonexperts May Testify.—"Experts can testify to opinion, and there are many questions upon which a nonexpert may express his judgment or opinion. *Pollock & Co. v. Gantt*, 69 Ala. 373." *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 12.

§ 355 (2) Opinions and Conclusions in General

Answer a Guess.—A witness, though entitled to give his best judgment or opinion on matter under inquiry, may not give an answer which is a mere guess. *Bachelor v. Morgan (Ala.)*, 60 So. 815.

Charges in Books of Account.—A merchant's clerk and bookkeeper, who testifies that he made all the entries on the books, and that he charged nothing as sold which was not sold, may further testify that he is satisfied and believes that all the items charged in the defendant's accounts were sold, though he can not recollect them. *Wright v. Bolling*, 27 Ala. 259.

Correctness of Verified Account.—A defendant, sued on a verified account, which is offered in evidence, may be asked, as a witness, to state generally whether the account is correct. *Shrimpton v. Brice*, 109 Ala. 640, 20 So. 10.

Agreement to Run Line of Stages.—Although it may not be allowable for a witness to state a conclusion of law, instead of the facts on which it is predicated, it is competent for one informed upon the subject to answer whether certain persons did, at a time and place designated, enter into an agreement to run, as a company, a line of stages; for, though the question whether a partnership existed may involve a legal inquiry, it is a distinct fact whether an agreement was entered into with a view to its creation. *Anderson v. Snow*, 9 Ala. 247.

Legal Conclusion Stated by Consent.—A witness may, with the consent of the opposite party, state a legal conclusion. *Sterne v. State*, 20 Ala. 43.

Evidence of Law Merchant.—It is irregular to permit a witness to give evidence of the general law merchant. *Hogan v. Reynolds*, 8 Ala. 59.

Control of Business after Attachment.—In attachment against an assignor for benefit of creditors the assignee interposed a claim to the attached property. Held, that the statement of a witness that "it seems" the assignor was in control of the business after the assignment was inadmissible. *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. 283, cited in note in 23 L. R. A., N. S., 368, 372.

Citizenship of Indian.—It is not allowed to ask of a witness whether an Indian of the Choctaw tribe became a citizen of Alabama after the laws of the state were extended over the Choctaw territory. A direct answer to such a question is a conclusion of law, which the court should decide from the facts proved. *Wall v. Williams*, 11 Ala. 826.

Ability of Decedent to Detect Fraud.—It is not allowable to inquire of a witness whether a person with whom the intestate was unacquainted, or in whom he did not have confidence, could or could not take advantage of him in a trade. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

Power to Save Property.—In an action against the owners of a steamboat for the loss of a stage occasioned by a collision between the steamboat and a ferry flat on which was the stage, the statements of a witness, who saw the collision that he thought, had the steamboat returned to the assistance of the flat when call for assistance was made, the stage could have been saved, was inadmissible, being mere matter of opinion. *Otis v. Thom*, 23 Ala. 469.

Probability of Defendant Communicating Fact to Witness.—A statement by a witness "that the habits of business and intimacy between himself and defendant were such that witness had no doubt, if said defendant had received notice of protest of said bill, it would at once have been communicated to witness," is inadmissible evidence for the defendant in a

suit on the bill, being a mere expression of opinion, and not the statement of a fact within the knowledge of the witness. *Coster v. Thomason*, 19 Ala. 717.

Exit of Passengers from Overturned Car.—A witness who has stated that after the accident he went to the car in which plaintiff had been riding to assist the passengers in getting out, and found no one there but a lady, and that a man could not have gotten out after the accident without assistance, testified, "I think they were all out of the car before it turned over." Held, that this was properly excluded as being but a mere conclusion. *Montgomery & E. Ry. Co. v. Mallette*, 92 Ala. 209, 9 So. 363.

Commissioner's Opinion as to Regularity of Entries.—A letter from the land commissioner, stating that certain entries are good, and others bad, is not evidence of anything except the commissioner's private opinion, and is inadmissible. *Jeans v. Lawler*, 33 Ala. 340.

Partition Fence.—In an action to recover damages for the removal of a partition fence, although the evidence does not show that the fence was a statutory partition fence (Rev. Code, § 1292), a witness may testify that it "was a partition fence," if he knows the fact that it was erected by agreement between the parties who owned the lands; and the statement is not objectionable, as a conclusion of law. *Avary v. Searcy*, 50 Ala. 54.

Effect of Failure to Resent Treatment.—Testimony, "If I had not resented it, it would have ruined me," is a mere conclusion of the witness. *Ferdon v. Dickens*, 161 Ala. 181, 49 So. 888.

Answer to Anticipated Question.—In an action against a constable for refusal and failure to execute certain writs for the seizure of personal property, it was not permissible to inquire of a witness whether he would have told the constable he had the property, if the constable had inquired of him concerning it. *Reeder v. Huffman*, 148 Ala. 472, 41 So. 177, cited in note in 23 L. R. A. 369, 371.

Benefit from Services.—Where defendant claimed a credit for plaintiff's board, and plaintiff an offset for personal services, evidence of defendant's witness on cross-examination that, to the best of his judgment, the services of plaintiff were

a benefit to defendant and his family, was incompetent, as calling for a conclusion of the witness. *Minniece v. Jeter*, 65 Ala. 222.

Scheme to Double Stock of Company.

—In quo warranto to forfeit the charter of a corporation for fictitious increase of stock, a question asked a witness, "Was there any scheme to double the stock of the company?" was incompetent as calling for a conclusion or opinion of the witness. *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

Cause of Reduction of Wages.—In a personal injury action, questions asked a witness as to the cause of reduction of plaintiff's wages were properly excluded as calling for an opinion. *Scales v. Central Iron & Coal Co.*, 173 Ala. 639, 55 So. 821.

Delivery of Telegram.—Testimony of the sender of a telegram that he delivered it to the company for the benefit of the addressee is objectionable, as being the conclusion of the witness. *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117.

Application of Brakes to Train.—The statement of a witness, who was a passenger on a railroad train, that he knew that the brake was applied because of the sudden stopping of the train, is objectionable, as being a conclusion. *Alabama G. S. R. Co. v. Burgess*, 114 Ala. 587, 22 So. 169.

Statement to Attorney.—Testimony, in an action for malicious prosecution, that defendant's agent made a full and fair statement of the facts to an attorney before instituting the prosecution, was a conclusion, as the facts themselves should have been detailed. *Abingdon Mills v. Grogan*, 167 Ala. 146, 52 So. 596.

Dragging of Person by Street Car.—In an action for death of a traveler by being struck by defendant's street car, evidence, "You could see where he dragged along," was a mere shorthand rendering of a collective fact, and was not objectionable as a conclusion. *Birmingham R., etc., Co. v. Fuqua*, 174 Ala. 631, 56 So. 578.

Judgment That Company Would Pay.

On an issue as to whether defendant railroad company was directly liable to certain subcontractors for construction work done by them, the assistant engineer was

asked who the chief engineer stated would pay for the work. Held, that an answer to such question, that "I judge the company would pay it," was incompetent. *Huntsville, Belt Line & M. S. Ry. Co. v. Corpening*, 97 Ala. 681, 12 So. 295.

Keeping Water from Injuring Stock.

—In an action by a tenant against his landlord for injuries to the tenant's stock of goods, occasioned by water leaking from bursted pipes above the tenant's store, a question to a witness as to whether it was practicable for the water to have been caught in tubs so as not to injure the goods called for a mere conclusion of the witness. *Werten v. Koosa & Co.*, 169 Ala. 258, 53 So. 98.

Official Conduct.—Evidence in assumption to recover a sum deposited in bank by mortgagor and claimed by plaintiff mortgagee after rescinding the mortgage that plaintiff's business dealings with mortgagor as a county official had been the subject of criticism was objectionable as opinion evidence. *Batson v. Alexander City Bank (Ala.)*, 60 So. 313.

§ 355 (3) Facts in General.

Right to State Facts.—A witness may not give his opinions and conclusions as to matters on which he is not shown to be qualified or competent to state an opinion, but he may merely state the facts and let the jury draw the conclusions. *Tennessee Coal, Iron & R. Co. v. Kelly*, 163 Ala. 348, 50 So. 1008.

Transpiring of Fact.—The expression of the belief of a witness that he saw a fact transpire is not matter of opinion, so as to authorize the court to reject the evidence. *Head v. Shaver*, 9 Ala. 791.

Gentleness of Mule.—Where a witness was asked whether a mule with which he was acquainted was ordinarily gentle, his answer, that from what he had seen he would say it was a gentle mule, was not objectionable as an opinion or a conclusion of the witness. *Alabama, etc., Iron Co. v. Cowden*, 175 Ala. 108, 56 So. 984.

"There is no merit in the other grounds of the objection to the question to the witness Orr. While the answer sought and given, viz., 'I would say that from what I have seen it was a gentle mule,' savored, in a sense, of a conclusion of the witness, yet it was not of that class of

opinion evidence which the law holds inadmissible. *Whittier v. Franklin*, 46 N. H. 23, 88 Am. Dec. 185; *Sydeleman v. Beckwith*, 43 Conn. 9; *Patterson v. South, etc., R. Co.*, 89 Ala. 318, 7 So. 437; *Mattison v. State*, 55 Ala. 224; *Jones on Ev.* (2d. Ed.), § 360." Alabama, etc., *Iron Co. v. Cowden*, 175 Ala. 108, 56 So. 984, 988.

Consent to Act.—Testimony of a witness that a person "consented" to an act is not the statement of an opinion. *Street v. Sinclair*, 71 Ala. 110.

Destruction of Property by Fire.—The testimony of a party suing for the destruction of his property by fire set by the adverse party, that the latter acknowledged that his fire destroyed the property, is inadmissible as a conclusion, the proper way being to state the conversation so that the jury may draw the conclusion. *Edwards v. Massingill*, 3 Ala. App. 406, 57 So. 400.

"The evidence in many particulars was in conflict as to appellant's connection with the fire, and the appellee should not have been allowed to testify that appellant 'acknowledged that his fire burned the fence.' The statement was a conclusion or impression made on the mind of the witness from what was said, and he should have been required to state the conversation and allow the jury to draw the conclusion, unaided by the conclusion or inference drawn by the witness. *Knight v. State*, 160 Ala. 58, 49 So. 764; *Atlanta, etc., Railway v. Brown*, 158 Ala. 607, 48 So. 73; *Anniston v. Ivery*, 151 Ala. 392, 44 So. 48; *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355; *Western Union Tel. Co. v. Merrill*, 144 Ala. 618, 39 So. 121." *Edwards v. Massingill*, 3 Ala. App. 406, 57 So. 400, 401.

Understanding as to Ownership of Mule.—In detinue for a mule claimed by plaintiff under a mortgage, plaintiff testified that he sold the mule to the mortgagor, who had had possession prior to the sale and execution of the mortgage, and that the mule was his up to the time that the mortgage was executed, and that it was "so understood." Held, that it was not error to refuse to exclude the expression "it was so understood," since as used it should be taken as synonymous with "agreement" and the statement of a fact, and not an opinion or conclusion. *Holman v. Clark*, 148 Ala. 286, 41 So. 765.

Manner of Leaving Car.—The question, "Did you step off the car, or were you thrown off?" does not necessarily call for a conclusion, but a fact. *Selma St. & S. Ry. Co. v. Campbell*, 158 Ala. 438, 48 So. 378.

Voltage of Electric Current.—Where decedent was killed by an electric shock from wires connecting a lamp and fan inside a boiler where he was working, and the limit of voltage that could be conveyed to the fan and lamp and not burn out the fuse and stop the fan or explode the lamp was shown, and that they both continued to perform their respective functions without an increase of current after intestate's death, evidence that there was not more voltage on the wires than the limit previously testified to at the time intestate was killed was not objectionable as a conclusion of the witness, though he admitted he had not taken the voltage scientifically. *Williams v. Anniston Electric & Gas Co.*, 164 Ala. 84, 51 So. 385.

Effort to Stop Car.—A question asked a witness, whether any effort was made to stop the car, did not call for a mere conclusion, but for a fact open to any one who saw the motorman. *Birmingham R., etc., Co. v. McLain*, 162 Ala. 656, 50 So. 149.

Possibility of Standing in Another Place to Perform Work.—In an action for injuries to a servant while standing on a pipe working on a casting placed thereon, by reason of the casting slipping and injuring his foot, a question to plaintiff whether he could have stood on the ground and done the work was proper as calling for a statement of fact. *United States Cast Iron Pipe & Foundry Co. v. Driver*, 162 Ala. 580, 50 So. 118.

Duty to Inspect Mine.—A question asked a coal mine miner as to whose duty it was to inspect and keep up the roof of the entry of the mine is not objectionable as calling for a conclusion. *Sloss-Sheffield Steel & Iron Co. v. Green*, 159 Ala. 178, 49 So. 301.

Commission of Violence.—In an action for assault and battery, a question as to whether witness saw any violence committed on the person of the plaintiff by the defendants was not objectionable as calling for an opinion. *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657.

"The question asked witness Burton on cross-examination, 'Did you see any violence committed on the person of the plaintiff by the defendants?' was a proper one, and the objection thereto should have been overruled. The question called for a concrete fact, and not an opinion. *Southern Car, etc., R. Co. v. Bartlett*, 137 Ala. 234, 34 So. 20; *Birmingham R., etc., Co. v. Jackson*, 136 Ala. 279, 34 So. 994. It makes no difference that the witness did not testify to any acts of violence in the examination in chief. The evidence sought to be elicited pertained to a fact embraced in the averments of the complaint. The authority cited by the appellee to sustain the proposition that it is within the discretion of the court to allow or not allow a witness, on cross-examination, to be interrogated about matters to which no reference was made in the examination in chief, does not support the proposition. The extent of the holding is that the matter of permitting one to propound leading questions to his own witness is confided to the discretion of the court. *Huntsville, etc., R. Co. v. Corpening & Co.*, 97 Ala. 681, 12 So. 295." *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657, 658.

Adaptability of Wagon for Work.—A witness' testimony that the wagons were not made for hauling telegraph or electric light poles, being merely descriptive of the wagons and not conclusions, was properly admitted in an employee's action for injuries from the breaking down of a wagon on which he was riding. *Citizens' Light, Heat & Power Co. v. Kendrick*, 6 Ala. App. 423, 60 So. 526.

Giving Appeal Bond.—Though it was conceded that, if the appeal bond in issue was given, it was lost, it was not competent for a witness to state as a conclusion that an appeal bond was given, it being a question for the court to determine whether the contents of the paper, which the witness could testify to, constituted such bond. *Lacey v. Hendricks*, 164 Ala. 280, 51 So. 157.

Lending or Payment of Money.—It is permissible to ask a witness whether money was "lent or paid" by one party to a contract to the other, when the fact is material. *Birmingham, etc., Roofing Co. v. Gillespie*, 163 Ala. 408, 50 So. 1032.

Signing of Note.—Statement of a maker, as to whether he signed a note as

surety, is not a conclusion. *Compton v. Smith*, 120 Ala. 233, 25 So. 300.

Weight of Iron Rails.—A question as to whether rails are ordinarily laid on switch tracks leading to and from mines and for slate dumps as heavy as rails on the main line of a railroad was not objectionable as calling for an opinion of the witness. *Redus v. Milner Coal & R. Co.*, 148 Ala. 665, 41 So. 634.

Duty to Oil Machinery.—The testimony of an employee, suing for injuries received while operating a stationary engine, that he had to oil parts he was oiling at the time of the accident, was not objectionable as a conclusion of the witness, but was admissible as a narration of a part of his duties. *Sloss-Sheffield Steel & Iron Co. v. Hutchinson*, 144 Ala. 221, 40 So. 114.

Knowledge Derived from Declarations of Others.—That is not matter of opinion, a knowledge of which may be derived from the declarations of others. *Olds v. Powell*, 10 Ala. 393.

Identification of Copy of Destroyed Deed.—When a witness testifies to the existence and subsequent destruction of a deed which he has seen, and further testifies that he believes a writing shown him to be a true copy of the deed, such statement is not an expression of opinion, and is admissible. *Elliott v. Dyche*, 80 Ala. 376, cited in note in 52 L. R. A. 565, 605.

Identity of Horse.—In trover by a mortgagee for an "iron-gray colt" it was not error to admit the testimony of a subscribing witness to the mortgage, who testified that the horse in defendant's possession was the same animal as that described in the mortgage, but that he could not state of his own knowledge that it was the same, and that the horse had no marks or distinct features whereby he could recollect him, but he believed and was satisfied that he was the same horse described in the mortgage. *Turner v. McFee*, 61 Ala. 468.

Control of Land.—It is competent for a witness to testify on the question of adverse possession that defendant took possession of the land, and afterwards "controlled" it; the word "control" being a statement of collective facts involving management and acts of ownership, and not expressing the opinion of the witness.

Woodstock Iron Co. v. Roberts, 87 Ala. 436, 6 So. 349, cited in note in 14 L. R. A., N. S., 291.

Operation of Steam Shovel.—In an action against a railroad for personal injury caused by a steam shovel, it is proper to ask the man who operated the shovel, though not shown to be an expert, whether, after it had started, any human effort could have prevented it from swinging around; such question not calling for an opinion, but merely for a summary of a number of involved facts. *Alabama G. S. R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447.

Interest in Subject-Matter of Action.—A witness can only testify as to facts within his personal knowledge, but his statement that he had no interest in the subject-matter of the action, and derived no benefit therefrom, is unobjectionable as matter of opinion. *Ware v. Morgan*, 67 Ala. 461.

Protection of Part of Steamboat.—In a deposition relative to the destruction of a steamboat and its cargo by fire, the witness stated that "all the cotton under the boiler deck was protected from the weather and from sparks." Held, that the statement was not the expression of an opinion, the context of the deposition showing that the word "protected" was used in the sense of "covered." *Grey's Ex'r v. Mobile Trade Co.*, 55 Ala. 387.

Habits of Persons.—Whether a person is "a man of known and temperate habits" is a question of fact to which a witness may depose. *Stanley v. State*, 26 Ala. 26, cited in note in 15 L. R. A., N. S., 584.

In *Stanley v. State*, 26 Ala. 26, cited in note in 15 L. R. A., N. S., 584, it was held competent for witnesses who were acquainted with the person in question to state that such person was a man of known intemperate habits, the court saying: "It is true that the general rule forbids the opinions or legal conclusions of witnesses from being given in evidence; but the question as to intemperate habits is purely one of fact, and it can make no difference in principle, that being the case, that the matter in relation to which the witness is required to speak is made up of more than one fact. That it is a conclusion is true; but it is no more so than that a man is embarrassed with debt, which

we have held to be competent evidence. * * * There are legal conclusions which the law alone is authorized to draw, but this is not one of them." It is probable that in this case the court did not place any emphasis on the word "known," and merely intended to decide that a witness could testify that, to his own knowledge, the person in question was of intemperate habits. A different interpretation, however, was placed upon the foregoing decision in *Smith v. State*, 55 Ala. 1, where a person was brought to trial for selling liquor to a man of known intemperate habits, and it was held that, although it might be proper for a witness to state that a person was of intemperate habits, yet it could not be permissible for him to state that these facts were known, the court expressly stating that it could not concur in the opinion expressed in the *Stanley* case.

"The first question presented upon the record is, as to the action of the court in refusing to exclude from the jury the statement of one of the witnesses, that Russell, the party to whom the liquor was sold, was a person of known intemperate habits. It is true, that the general rule forbids the opinions or legal conclusions of witnesses from being given in evidence; but the question as to intemperate habits is purely one of fact, and it can make no difference in principle, that being the case, that the matter in relation to which the witness is required to speak is made up of more than one fact. That it is a conclusion, is true; but it is no more so than that a man is embarrassed with debt, which we have held to be competent evidence. *Massey v. Walker*, 10 Ala. 283. There are legal conclusions which the law alone is authorized to draw, but this is not one of them. It follows, that as the evidence to the fact to which we have referred was proper, and the objection general, the court did not err in overruling it." *Stanley v. State*, 26 Ala. 26, 28.

"Understanding" and "Agreement" Synonymous.—When a witness speaks of an "understanding" between himself and others that they were to do a particular thing, the term used is to be taken as synonymous with "agreement," and is the statement of a fact, not the expression of an opinion. *Griffin v. Isbell*, 17 Ala. 184;

Saltmarsh v. Bower & Co., 34 Ala. 613; *Shafer & Co. v. Hausman*, 139 Ala. 237, 35 So. 691; *Holman v. Clark*, 148 Ala. 286, 41 So. 765, 766.

Condition of Cross Tie.—The testimony of a witness that to the best of his judgment the short quarter of a rail where it was broken was on a rotten cross tie, but that he would not be positive, is but a statement of the best of his recollection of the fact, and is properly received. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, cited in note in 42 L. R. A. 753, 757, 766.

Loan of Property.—It is permissible for a witness to prove in general terms that he loaned property to another person. *Cole v. Varner*, 31 Ala. 244.

Quality of Graphite.—Where a witness, referring to certain graphite, testified that an iron building had been painted with it several years ago, and on that stated that it was good, his stating that he "knew it was good" was not objectionable as an opinion. *Birmingham, etc., Roofing Co. v. Gillespie*, 163 Ala. 408, 50 So. 1032.

Consent to Taking Property.—A statement by a witness on the trial of an action of trespass de bonis asportatis, that the plaintiff consented to the taking of the property by the defendant, is the assertion of a fact, and not of a mere opinion, and is, therefore, admissible evidence. The nature of such consent may be shown on cross-examination. *Street v. Sinclair*, 71 Ala. 110.

§ 355 (4) Reasons Given for Other Statements.

Failure of Flagman to Precede Engine.—In an action against a railroad for the death of one killed at a crossing, evidence of certain witnesses that a flagman did not precede the engine for the reason that the engine expected to stop just on the other side of the crossing was properly stricken out. *Southern Ry. Co. v. Shelton*, 136 Ala. 191, 34 So. 194.

Number of Persons Using Railroad Crossing.—In an action for injuries at a railroad crossing, a question as to whether "many" or "few" people used the particular crossing was not objectionable, as calling for a conclusion of the witness, but merely for the statement of a collective fact. *Southern Ry. Co. v. Weatherlow*, 153 Ala. 171, 44 So. 1019.

§ 355 (5) Conversations in General.

Opinion or Recollection of Conversation.—In an action for malicious prosecution, defendant claiming that L., its agent, had acted on the advice of counsel, P., and it appearing that plaintiff's employer made out and sent to defendant, surety on his bond, a statement of forty-eight items which it claimed he embezzled, and that defendant placed this in plaintiff's hands, requesting him to explain any or all of the items, if he could, and that he made answer thereto in writing, explaining each item in various ways, and it being fairly inferable from the testimony of L. that he did not remember precisely what plaintiff had said in reference to the items, or what he had told P. that plaintiff had said to him, objection was properly sustained to the questions asked L. whether he stated to P. that plaintiff had told him that there were a number of items making up \$267.70, which he had not collected, and which were improperly charged to him; whether he stated to P. what M. had stated to him denying his liability; and whether he remembered whether he repeated to P. what plaintiff had said to him—these questions being an effort to have him state his view or opinion of the effect of what plaintiff had said to him, rather than his recollection of the particular statement that plaintiff made. *National Surety Co. v. Mabry*, 139 Ala. 217, 35 So. 698.

Conclusion from Conversation.—It is not competent to inquire of a witness, who heard a conversation between the plaintiff and defendant, whether the parties "disputed" or "agreed" in respect to the subject-matter of the conversation, as such question calls for a conclusion. *Fields v. Copeland*, 121 Ala. 644, 26 So. 491.

"To ask whether a person accepted or refused an offered proposition; whether he admitted, confessed, or denied a statement made by another person in his presence; whether he acquiesced, objected, or protested—of necessity called for some kind of a construction of the conversation by the witness, and is all that can be obtained. *Higdon v. Kennemer*, 112 Ala. 351, 20 So. 470; *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. 283; *Richmond, etc., R. Co. v. Hammond*, 93 Ala. 181, 9

So. 577; *Wright v. State*, 136 Ala. 139, 34 So. 233, and cases cited." *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37, 43.

What Was Said in Conversation.—The question, "What instructions did you give H. in regard to filing this paper?" does not call for a conclusion, but a statement of what was said. *Mobile, J. & K. C. R. Co. v. Odom*, 169 Ala. 507, 53 So. 765.

§ 355 (6) Conversations Concerning Contracts.

Negotiations to Purchase of Property.—A question whether the witness made any further negotiations concerning the buying of certain property was objectionable, as calling for a conclusion. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770.

§ 355 (7) Meaning of Letters.

Amount of Compensation.—In an action for breach of a contract of employment contained in a letter, which was in evidence and which made no reference to the compensation, and both plaintiff and the writer having testified that nothing was said between them, in connection with the making of the contract, as to the salary, plaintiff could not testify that it was his understanding that his salary was to remain as before. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

§ 355 (8) Knowledge of Other Person.

Knowledge of Particular Fact.—A witness should not be allowed to state that another person does or does not know a particular fact, this being a mere conclusion. *Louisville, etc., R. Co. v. Williams* (Ala.), 62 So. 679.

Knowledge of Railroad Employees.—In an action against a railroad company for injuries to a locomotive engineer owing to his train having run into a standing train of another company, the affirmative answer of a witness to a question as to whether the operatives of the standing train would have known that they were on the schedule time of plaintiff's train was a mere conclusion, and reversible error. *Central of Georgia Ry. Co. v. Martin*, 138 Ala. 531, 36 So. 426.

"Assuming that evidence of knowledge, on the part of those in charge of defendant's train, that they were on the schedule time of plaintiff's train, was compe-

tent as accentuating the duty that was upon them to protect both trains from collision, and as aggravating their fault in not discharging their duty, the trial court yet erred in overruling defendant's objection to the question propounded to the witness White, viz: 'Would they have known that?' This obviously called for a mere conclusion of the witness, and his affirmative response was a conclusion, pure and simple. It could not be other than a conclusion, indeed, since the witness could not know as a fact what defendant's trainmen would know. *Green v. State*, 96 Ala. 29, 11 So. 478; *Bailey v. State*, 107 Ala. 151, 18 So. 234; *Reeves v. State*, 96 Ala. 33, 11 So. 296; *Whetstone v. Bank*, 9 Ala. 875, 886; *Baldwin v. Walker*, 94 Ala. 514, 10 So. 391. We are unable to affirm that this error did not prejudice the defendant, and for that the judgment of the city court must be reversed. The cause will be remanded." *Central, etc., R. Co. v. Martin*, 138 Ala. 531, 36 So. 426, 432.

Claiming Title to Land.—It was error to allow a witness to testify that F. knew that C. was in possession of the land sued for, and claimed it as her own, as such was a palpable conclusion of fact. *Ashford v. Ashford*, 136 Ala. 631, 34 So. 10.

Knowledge of Defective Trestle.—A witness was incompetent to testify that plaintiff, at the time of his injury, had knowledge concerning the defective condition of the trestle by which he was injured. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348.

Knowledge of Pending Suit.—One can not testify whether another person knew whether a suit was pending. *Louisville & N. R. Co. v. Perkins*, 165 Ala. 471, 51 So. 870.

"The court erred in overruling the objections to the questions to the witness, Shade Henderson, as to whether Oscar Darley knew that this suit was pending, etc. A witness can not testify as to the cognitions of another. *Bailey v. State*, 107 Ala. 151, 18 So. 234; *Ashford v. Ashford*, 136 Ala. 631, 34 So. 10; *Central, etc., R. Co. v. Martin*, 138 Ala. 531, 36 So. 426; *Braham v. State*, 143 Ala. 28, 38 So. 919; *Delaney v. State*, 148 Ala. 593, 42 So. 815; *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348." *Louisville, etc., R.*

Co. v. Perkins, 165 Ala. 471, 51 So. 870, 871.

Sister's Knowledge.—In a passenger's action for failure to stop, a question asked of a witness referring to plaintiff, "Your sister knew," etc., was inadmissible. *Louisville, etc., R. Co. v. Seale*, 172 Ala. 480, 55 So. 237.

Knowledge of Conductor as to Passenger's Destination.—In a passenger's action against a carrier for failure to stop, questions as to how the conductor would know that he had a passenger for a particular station were not objectionable as asking a witness to testify as to the cognitions of another. *Louisville, etc., R. Co. v. Seale*, 172 Ala. 480, 55 So. 237.

"The questions as to how a conductor would know that he had a passenger for Dean's do not infringe upon the point in *Louisville, etc., R. Co. v. Perkins*, 165 Ala. 471, 51 So. 870, 871, and others, as to testifying to the cognitions of another, but merely go to a statement as to the facts—what means of knowledge he had." *Louisville, etc., R. Co. v. Seale*, 172 Ala. 480, 55 So. 237, 238.

Dangerous Condition of Railroad.—Though decedent's knowledge of the dangerous condition of defendant's road, resulting in the derailment which caused his death, was relevant, testimony that he did or did not know of it was not admissible. *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111.

"Whether or not the deceased knew of the dangerous condition of the defendant's road was, of course, a relevant inquiry under the pleadings; but the witness could not testify that deceased did or did not know of it—a rule of evidence many times declared by this court. *Bailey v. State*, 107 Ala. 151, 18 So. 234; *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348; *Layton v. Campbell*, 155 Ala. 220, 46 So. 775. The statement was properly excluded." *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111, 114.

§ 355 (9) Motive and Intent.

Rule Stated.—An uncommunicated belief, motive, or intention can not be testified to by a party to a civil suit, when examined as a witness. *Burke v. State*, 71 Ala. 377; *Herring v. Skaggs*, 62 Ala. 180; *Wheless v. Rhodes*, 70 Ala. 419;

Whizenant v. State, 71 Ala. 383; *McCormick v. Joseph*, 77 Ala. 236; *Stewart v. State*, 78 Ala. 436; *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497; *Ball v. Farley*, 81 Ala. 288, 1 So. 253; *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364; *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615, 8 So. 349; *Toliver v. State*, 94 Ala. 111, 10 So. 428; *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. 283; *Martin v. Tally*, 102 Ala. 25, 15 So. 722; *Dean v. State*, 105 Ala. 21, 17 So. 28; *Mobile Furniture Comm. Co. v. Little*, 108 Ala. 399, 19 So. 443; *Williams v. State*, 123 Ala. 39, 26 So. 521; *Barker v. State*, 126 Ala. 83, 28 So. 589; *Hurst v. State*, 133 Ala. 96, 31 So. 933; *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662; *Lawrence v. Alabama State Land Co.*, 144 Ala. 524, 41 So. 612; *Smith v. State*, 145 Ala. 17, 40 So. 957; *Vest v. Speakman*, 153 Ala. 393, 44 So. 1017; *Patterson v. State*, 156 Ala. 62, 47 So. 52, cited in note in 23 L. R. A., N. S., 368.

The rule of the Alabama cases is that motive or intention is an inferential fact, to be drawn by the jury from the facts and circumstances in evidence. *Alexander v. Alexander*, 71 Ala. 295; *Burke v. State*, 71 Ala. 377; *Wheless v. Rhodes*, 70 Ala. 419; *Whizenant v. State*, 71 Ala. 383; *McCormick v. Joseph*, 77 Ala. 236; *Stewart v. State*, 78 Ala. 436; *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364, cited in note in 23 L. R. A., N. S., 368.

Attempt to Bulldoze Conductor.—In an action by a passenger for an assault by the conductor, questions whether the passenger abused the conductor and tried to bulldoze him were improper, as asking for mere conclusions. *Alabama City, G. & A. Ry. Co. v. Sampley*, 169 Ala. 372, 53 So. 142.

Intention of Leaving State.—In an action on an attachment bond sued out on the ground that she was about to leave the state, the statement of a witness that he knew that plaintiff was not about to leave the state was a mere opinion, and should have been excluded. *Baldwin v. Walker*, 94 Ala. 514, 10 So. 391, cited in note in 23 L. R. A., N. S., 371.

For Whom Property Was Purchased.—Defendant, who was claimant's husband, having appeared as a witness for claimant, and having admitted on cross-examination that he bought the property,

was asked on redirect examination for whom the property was bought. Held, that the question was objectionable, as calling for a conclusion which embraced a secret intention at the time of the purchase. *Arnold v. Cofer*, 135 Ala. 364, 33 So. 539.

Fraudulent Sale of Horse.—On an issue of whether a sale of a horse and wagon was in fraud of creditors, a witness was properly not permitted to testify as to the purpose of either party, for it would have been, at most, her opinion. *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 So. 284.

"The court did not err in sustaining objections to the other questions propounded to the plaintiff on cross-examination, since each of them asked the witness to disclose Gillette's purpose in making the sale. If plaintiff was a bona fide purchaser for value of the property without notice, it is immaterial what the purpose of Gillette was in making the sale. His answers to such questions would have also been his mere conclusions." *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 So. 284, 286.

Knowledge as to Thickness of Safe.—In an action against a safe manufacturer by a purchaser, through an agent who warranted the safe to be burglar proof, to recover as part of the damages money lost by burglars breaking open the safe, the purchaser can not testify that, had he known the thickness of the safe, he would not have risked his money in it, as such testimony relates to a secret and uncommunicated motive on his part. *Herring v. Skaggs*, 62 Ala. 180, cited in note in 23 L. R. A., N. S., 368, 370.

Motive in Loaning Money.—The testimony of one who has loaned money on the faith of a letter of recommendation, to the effect that he would not have loaned the money but for the letter, is inadmissible, as being a mere inference. *Baker v. Trotter*, 73 Ala. 277, cited in note in 23 L. R. A., N. S., 370, 371.

Sale of Goods to Agent.—A witness testifying for plaintiff in an action on an account for goods sold, which were ordered by an agent whose authority is disputed, can not be allowed to state that plaintiff would not have sold the goods to the agent on his individual credit,

knowing his insolvency. *Garrett v. Tra-bue*, 82 Ala. 227, 3 So. 149.

What Another Person Is Trying to Do.—A witness should not be permitted to testify what another person seemed to be doing or trying to do. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770.

Purpose in Guarding Goods.—An uncommunicated purpose of a witness in keeping guard over certain goods was incompetent. *Montgomery-Moore Mfg. Co. v. Leeth*, 2 Ala. App. 324, 56 So. 770.

Reason for Failure to Pay Taxes.—So, a person seeking to recover land in ejectment can not be asked, while testifying as a witness in his own behalf, why he did not pay the taxes on the land. *Lawrence v. Alabama State Land Co.*, 144 Ala. 524, 41 So. 612, cited in note in 23 L. R. A., N. S., 371.

§ 355 (10) Ability to See or Hear.

Ability to See Objects from Given Point.—While a witness may testify whether certain things could have been seen from a given point, it is essential that he shall actually know whether the things could have been thus seen, and that his testimony be not a mere expression of opinion. *Republic, etc., Steel Co. v. Passafume (Ala.)*, 61 So. 327.

Witnesses can testify whether or not a person could have seen a thing. *Central of Georgia Ry. Co. v. Hyatt*, 151 Ala. 355, 43 So. 867.

"It has been repeatedly held by this court that a witness who is shown to have a personal knowledge as to the facts inquired about may testify as to whether certain things inquired of could have been seen or heard from one given point to another. *Southern R. Co. v. Bonner*, 141 Ala. 517, 37 So. 702; *Alabama, etc., R. Co. v. Moody*, 92 Ala. 279, 9 So. 238; *Cox v. State*, 76 Ala. 66; *McVay v. State*, 100 Ala. 110, 14 So. 862; *Alabama, etc., R. Co. v. Linn*, 103 Ala. 134, 15 So. 508; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813." *Mayfield, J.*, dissenting in *Republic, etc., Steel Co. v. Passafume (Ala.)*, 61 So. 327, 329.

Emission of Sparks from Engine.—In an action against a railroad company for injuries resulting from a fire set by defendant's engine, testimony of witnesses

that they had seen defendant's engines emit sparks "of unusual size or in unusual quantities" was admissible. *Birmingham R., etc., Co. v. Martin*, 148 Ala. 8, 42 So. 618.

"It was not improper to allow witnesses to testify that they had seen defendant's engines emit sparks 'of unusual size or in unusual quantities.' *Birmingham R., etc., Co. v. Hinton*, 141 Ala. 606, 37 So. 635. If it be true that this evidence should more properly have been offered as a part of the plaintiff's case, yet the trial court had the right, in its discretion, to allow its introduction in rebuttal." *Birmingham R., etc., Co. v. Martin*, 148 Ala. 8, 42 So. 618, 620.

View of Obstruction on Track.—In an action for the death of an engineer from an obstruction on the track, it was proper to allow a nonexpert witness to state how far the obstruction could be seen, being a matter of common observation. *Louisville & N. R. Co. v. Fitzgerald*, 161 Ala. 397, 49 So. 860.

View of Approaching Train.—Where plaintiff was injured while she, in company with witness, was attempting to cross railroad tracks, the question to witness, "Was there any way for you all to see that train before you passed that string of box cars that you say was on one side of the tracks?" was not objectionable, as calling for a conclusion. *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562.

Question asked a witness suing for injuries received at a railroad crossing, "Where was the first point at which the train could be seen, on account of the bushes there at the point?" was not objectionable as calling for a conclusion. *Kansas City, M. & B. R. Co. v. Weeks*, 135 Ala. 614, 34 So. 16.

View of Car.—Where there was an obstruction, shutting a car out of view while at a certain point, an answer that a person could not see the car was not objectionable as involving a conclusion, but was a statement of a fact. *Wallace v. North Alabama Traction Co.*, 145 Ala. 682, 40 So. 89.

View of Aperture in Walls.—In assumption for advances made on cotton which had been destroyed by fire while in plaintiff's warehouse, defendant sought to re-

coup, alleging that plaintiff contracted to store the cotton in a fireproof warehouse. To show defendant's assent to the storing of his cotton in a warehouse not fireproof, plaintiff asked defendant's witness whether an aperture in a side wall, through which the fire entered, was not visible to defendant from a certain point; it appearing that defendant had entered and examined the warehouse after his cotton was stored in it. Held, that the question was proper, since it did not call for a conclusion, but a fact. *Gibson v. Hatchett*, 24 Ala. 201.

Failure to See Person.—Testimony that witness did not see what plaintiff did at the moment, but, from his position afterwards, he must have remained sitting, is but a conclusion, and not a statement of fact. *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808.

Observance of Animal.—In an action for the killing of a mule, a witness was asked: "Might not a bruise or scratch have been there without your observing it?" to which he responded, "Well, there could have been bruises on him that I never noticed; I didn't notice him that close." Held not objectionable. *Southern Hardware & Supply Co. v. Standard Equipment Co.*, 165 Ala. 582, 51 So. 789.

Place Person Was Dragged.—Evidence that it could be seen where deceased dragged along after being struck by defendant's street car held not objectionable as a conclusion. *Birmingham Ry., Light & Power Co. v. Fuqua*, 174 Ala. 631, 56 So. 578.

§ 355 (11) Knowledge of Witness.

Knowledge as to Movements of Car.—The testimony of witness that he was not aware the car was moving towards him before it struck him is not the statement of a conclusion, but of a concrete fact. *Birmingham Ry. & Electric Co. v. Jackson*, 136 Ala. 279, 34 So. 994.

Effect of Injury.—It was not error to permit a witness who apparently testified from her own knowledge to state that plaintiff was confined to her bed for three weeks immediately after being injured, and that plaintiff had never recovered from her injuries. *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562.

Recognition of Walk.—A witness may

testify as a fact that he "knew and recognized the walk" of another person. *Beale v. Posey*, 72 Ala. 323.

§ 355 (12) Personal Identity and Characteristics.

Wide-Awake Attentive Boy.—A question as to whether an alleged incompetent servant was a wide-awake, attentive boy during the time he was engaged in his duties was not objectionable as calling for the opinion of a witness who was not an expert. *First Nat. Bank v. Chandler*, 144 Ala. 286, 39 So. 822, 113 Am. St. Rep. 39, cited in note in 14 L. R. A., N. S., 759, 765, 766, 768.

§ 355 (13) Bodily Appearance or Condition.

"Appeared" to Be Weak.—A statement by witness, in speaking of plaintiff's physical condition, after he was injured by defendant's street railway, that "he seemed to be very weak," was merely equivalent to saying that he "appeared" to be weak, and was admissible as a statement of fact. *Birmingham Railway & Electric Co. v. Franscomb*, 124 Ala. 621, 27 So. 508.

"The first assignment insisted upon by appellant, the witness Dyer, in speaking of plaintiff's physical condition while in the hospital, stated that 'he seemed to be very weak.' This was objected to by the defendant, and motion made to exclude the same, which was overruled. This was but an equivalent of the expression that 'he appeared to be very weak,' and consequently was nothing more than the statement of a fact, or, at most, a conclusion of fact. If the adverse party wished to know the foundation upon which the witness rested his conclusion, the facts could have been drawn out upon a cross-examination. This ruling of the court was without error. *South, etc., R. Co. v. McLendon*, 63 Ala. 266, 270; *Jenkins v. State*, 82 Ala. 25, 2 So. 150; *Thornton v. State*, 113 Ala. 43, 21 So. 356." *Birmingham R., etc., Co. v. Franscomb*, 124 Ala. 621, 27 So. 508.

Disabled to Work.—Evidence by plaintiff, in an action for personal injuries, that he was disabled to work, is not inadmissible as a conclusion. *Alabama Steel & Wire Co. v. Tallant*, 165 Ala. 521, 51 So. 835.

Appearance of Injury.—Testimony,

"Looked like he fell powerful hard and got hurt," is but a statement of a fact, in the judgment of the witness, from what he saw. *Alabama City, G. & A. Ry. Co. v. Bullard*, 157 Ala. 618, 47 So. 578.

A question whether a driver struck by a street car showed any evidence of being injured is proper, as there are many injuries patent to the observation of any one. *Birmingham R., etc., Co. v. McLain*, 162 Ala. 656, 50 So. 149.

§ 355 (14) Mental Condition or Capacity.

See, generally, the title **WILLS**.

Mental Status of Another.—"It has been held that a witness may not testify to the mental status, the cognition, of another. *Bailey v. State*, 107 Ala. 151, 19 So. 234." *Anthony v. Sturdivant*, 174 Ala. 521, 56 So. 571, 572.

Capacity to Make a Will.—The unsupported opinions of witnesses other than physicians and the subscribing witness to a will as to the capacity of a person, considered merely as opinions, are not admissible in evidence. *State v. Brinyea*, 5 Ala. 241; *McCurry v. Hooper*, 12 Ala. 823.

Opinion of Sanity.—An opinion of a witness, that a testator was insane at the time of making his will, is not competent testimony, he admitting at the same time, that he knew no fact or circumstance on which his opinion was founded. *Bowling v. Bowling*, 8 Ala. 538.

And the rule is laid down generally that opinions of non-expert witnesses on the question of sanity or insanity are admissible in evidence where they state the facts and circumstances upon which the opinions expressed by them are predicated. *Ford v. State*, 71 Ala. 385; *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, cited in note in 39 L. R. A. 721.

Ability to Take Down and Assemble Automobile.—Questions as to whether "a man of the experience testified to" could take an automobile apart and put it together without disarrangement called for conclusions. *Roden Grocery Co. v. Gipson (Ala.)*, 62 So. 388.

§ 355 (15) Pecuniary Condition.

Embarrassed with Debts.—A witness may be allowed to state that a party was largely embarrassed with debts, that being a statement of facts and not of con-

clusions. *Massey v. Walker*, 10 Ala. 288.

"We think with the plaintiff's counsel that to say one is in debt, is just as much a conclusion as to say that one is embarrassed with debts. From the course this notion of conclusions as distinguished from facts seems to be taking, it is as well to state that the decisions upon this point, refer to conclusions of law, to be deduced from facts which may or may not exist. Such was the decision in *Parker v. Haggerty*, 1 Ala. 632, where we held that whether one was or was not a tenant is a legal conclusion. So in *Lawson v. Orear*, 7 Ala. 784, it is said, the condition of insolvency is a legal conclusion. There is no matter which involves a combination of facts, that is not liable to be called a conclusion, if this term is properly applied to the knowledge by one individual that another is embarrassed with debt. There seems to be nothing in this point which requires a more extended consideration." *Massey v. Walker*, 10 Ala. 288, 290.

§ 355 (16) Handwriting.

The mark of a party to an instrument, like his handwriting, may be proved by a witness, who is sufficiently acquainted with it, as to be able to testify that he believes it to be his. *Strong v. Brewer*, 17 Ala. 706, cited in note in 64 L. R. A. 314.

"And the true rule seems to be laid down in *Strong v. Brewer*, 17 Ala. 706, cited in note in 64 L. R. A., 314, where it was held that the signature on an instrument, made simply by a mark, was capable of proof like an ordinary signature, by the evidence of a witness who swore that he knew the mark of the person whose signature it purported to be, and believed it to be his. In this case the court declared: 'The general rule which admits of proof of the handwriting of a party is founded on the reason that in every person's manner of writing there is a peculiar prevailing character which distinguishes it from the handwriting of every person, and therefore that one who knows the handwriting of the party is competent to testify to it. This kind of evidence, too, like all other probable evidence, admits of every degree from the lowest presumption to the highest moral

certainty. * * * The degree of weight to be attached to it depends, not only upon the character of the witness, but also upon the opportunity he has had of acquiring a knowledge of the party's handwriting. It may be more difficult to acquire a knowledge of a simple mark by which an illiterate man executes a deed, than the knowledge of the handwriting of one who can write his name in full; but we can not perceive why it may not be done. In some instances the peculiarity may be as strong as that which marks the characters of one who can write, and in other instances, not perhaps so great; yet in all we apprehend which would enable one who had frequently seen the party make his mark to know it. We can, therefore, see no reason why one who has frequently seen a party make his mark to deeds or other writings, and who can testify that he believes that he knows it, may not be permitted to prove the execution of a deed thus subscribed."

§ 355 (17) Due Care and Proper Conduct.

See, generally, the titles CARRIERS; NEGLIGENCE; RAILROADS.

Negligent Handling of Train.—In an action for death of a person on a railroad track, question asked of the engineer "whether or not the train had been negligently handled" was properly excluded as calling for a conclusion, and invading the province of the court and jury. *Louisville, etc., R. Co. v. Bogue* (Ala.), 58 So. 392.

Careful Handling of Engine.—In an action against a railroad company for injuries resulting from a fire set by defendant's engine, the engineer of the train causing the fire was properly refused permission to answer a question inquiring if he handled the engine carefully as he went along by and left the place where the injury occurred, such question being one for the jury. *Birmingham R., etc., Co. v. Martin*, 148 Ala. 8, 42 So. 618.

"There was no error in refusing to allow the engineer, Weaver, to answer the question whether he handled the engine carefully as he went along by and left Twenty-Fourth Street. The witness should be called on to state what he did and how he handled the engine. Whether the

handling was careful was one of the questions the jury had to decide, if they found the engine operated by the witness set out the fire which destroyed the plaintiff's property. *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621, 642. The question was improper. *Louisville, etc., R. Co. v. Boul-din*, 110 Ala. 185, 20 So. 325; *Birmingham R., etc., Co. v. Baylor*, 101 Ala. 488, 13 So. 793." *Birmingham R., etc., Co. v. Martin*, 148 Ala. 8, 42 So. 618, 620.

In an action by a brakeman for personal injuries received while he was coupling a freight car, plaintiff's evidence, that the engineer "backed the tender against the car with more force than necessary," is not incompetent as being an inference and not a statement of fact. *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. 249.

"We do not think that the court erred in overruling defendant's motion to exclude from the jury plaintiff's statement, made as a witness, that the engineer 'backed the tender against the car with more force than was necessary.' This was but an inference necessarily involving the facts that the tender was to be moved, or that the space between the cars was only a few inches, and that the momentum imparted to the locomotive and tender carried them beyond that distance; and the form of the statement is only a shorthand rendering of those facts. *South, etc., R. Co. v. McLendon*, 63 Ala. 266; *Carney v. State*, 79 Ala. 14; 1 *Whart. Ev.*, § 510. We have examined all the rulings of the city court upon which errors are assigned, and discussed in the foregoing opinion such of them as are insisted upon in argument. We find no error in the record, and the judgment is affirmed." *Louisville, etc., R. Co. v. Wat-son*, 90 Ala. 68, 8 So. 249, 251.

Looking and Listening Carefully.—Question, asked of a witness as to whether he looked and listened "carefully" before traversing a railroad crossing, was not objectionable as calling for a conclusion. *Southern Ry. Co. v. Stollenwerck*, 166 Ala. 556, 52 So. 204.

"The question here merely called for the personal observation of the witness—whether or not he looked carefully and listened carefully at a particular place and particular time. It was not even a short-

hand rendering of collective facts, based upon personal observation, and which has been justified by this court, *Alabama, etc., R. Co. v. Yarbrough*, 83 Ala. 238, 3 So. 447, but was the mere narration of a single fact that he looked carefully and listened carefully at a particular place and time. If he did not look or listen carefully, he could have been and was tested upon the cross-examination. Moreover, he had already stated, upon the direct examination, as to the surrounding conditions and the directions that he looked, and we do not think the trial court committed reversible error in permitting him to state that he looked and listened carefully after his train stopped and before proceeding to cross the defendant's track. This was a fact which the plaintiff had the right to prove, and there was no other or better way to have done so. The application is overruled." *Southern R. Co. v. Stollenwerck*, 166 Ala. 556, 52 So. 204, 206.

Failure to Stop at Crossing.—In an action for death caused by the train of which decedent was engineer colliding with a train of defendant at a point where the tracks crossed, a brakeman on defendant's train testified that he thought decedent's train would surely stop for the crossing, that witness' engineer must have put on his air just about the time of the collision, and that the position of the engines showed that defendant's train was the one struck. Held, that it was proper to exclude the testimony, since the first statement was a mere mental operation, and the other two conclusions. *Southern Ry. Co. v. Bonner*, 141 Ala. 517, 37 So. 702.

Negligence in Crossing Bridge.—In an action for injuries to a servant caused by a fall while he was crossing the trestle of defendant's bridge, where a witness testified that he walked on one stringer of the bridge and plaintiff walked on the other, and he was further asked as to whether plaintiff could not have crossed at the same place the witness walked, if the purpose of such question was to show that the way witness traveled was safer than that plaintiff selected, the question was objectionable as calling for the witness' opinion. *Virginia Bridge & Iron Co. v. Jordan*, 143 Ala. 603, 42 So. 73.

Care of Appliances.—What witness

would do with reference to certain appliances by which work was done is inadmissible. *United States Cast Iron, Pipe & Foundry Co. v. Granger*, 162 Ala. 637, 50 So. 159.

"There was no error in sustaining the objection to the question to the same witness on cross-examination: 'Do you mean to tell that jury that you would trust the whole business of seeing that the chain and hook, by which this work was done, was in proper condition, and you would turn your back on it, and never pay any more attention to it, from that time on?' It was not shown that the witness prescribed the duties of the 'shakeouts,' it was irrelevant what he would do. Besides, the witness practically answered the question, in so far as it was not abstract, by saying that it was his duty 'to leave the matter of looking after the chains and hooks, and its being in repair, entirely to the "shakeout."'" Also, he subsequently answered the question further." *United States, etc., Foundry Co. v. Granger*, 162 Ala. 637, 50 So. 159, 160.

Lack of Time to Prevent Killing of Cattle.—In an action against a railroad for the killing of cattle on the track, testimony of the engineer, in charge of the locomotive which killed the animals, that he did not have time to make any effort to prevent the killing, was but the conclusion of the witness on a question of fact, and was properly excluded. *Western Ry. of Alabama v. Stone*, 145 Ala. 663, 39 So. 723.

Duty to Employees.—A witness need not state whether a third person had discharged his duties to his own employees. *Travis v. Sloss-Sheffield Steel & Iron Co.*, 162 Ala. 605, 50 So. 108.

Effect of Presence of Switchman on Running Board of Engine.—There was no error in refusing to allow the engineer to answer whether, if a switchman had been standing on the footboard of the tender, his presence would have prevented the engine from coming in contact with decedent, as the question called for a conclusion of the witness, and the effect, without more, of the bare presence of the switchman on the board. *Louisville & N. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573.

Failure to Procure Proper Life Saving Appliances.—In an action for causing the

suffocation of an employee, while 400 feet below a fire in a mine, by smothering the fire by bratticing a slope and air course, there was evidence that the employee could have lived a few days, until the employer could have procured appliances for extinguishing the fire with water. Held, that a witness' testimony that he was satisfied that the return air course was on fire, and the testimony of the superintendent that at the time he bratticed up the mine there was nothing he could have done to save the employee, were properly rejected as being mere conclusions. *Bessemer Land & Improvement Co. v. Campbell*, 121 Ala. 50, 25 So. 793.

Duty of Engineer.—A question whether it was an engineer's duty to do a certain thing, to make the engine work better, is objectionable as calling for a conclusion. *Alabama Steel & Wire Co. v. Thompson*, 166 Ala. 460, 52 So. 75.

Injury from Falling from Hand Car.—In an action for injuries to a section hand by being thrown from a hand car, a question, asked of defendant's foreman, as to whether it was possible for plaintiff to have fallen as he did if he had been riding behind the lever of the car, was improper, as calling for a conclusion. *Western Ry. of Alabama v. Arnett*, 137 Ala. 414, 34 So. 997.

Injury Resulting from Standing in Certain Position.—Where plaintiff was injured by falling from a hand car when riding backwards, the court properly sustained an objection to a question whether or not he would have been injured if he had been standing in a different position, since this was calling for the conclusion of the witness. *Southern Ry. Co. v. McGowan*, 149 Ala. 440, 43 So. 378.

Necessity for Going on Street Car Track.—Plaintiff's testimony, in an action against a street car company for injuries at a street crossing, that he had to get on the electric car track, or right at it, in order to cross a railroad track that an engine was on, is objectionable as a conclusion. *Birmingham Ry. & Electric Co. v. Jackson*, 136 Ala. 279, 34 So. 994.

"The testimony of the plaintiff that he 'had to get on the electric car track, or right at it, in order to cross the A. G. S. track that that switch engine was on,' was open to the objection interposed to

it by the defendant. It was, in form and substance, a mere conclusion of the witness upon facts which were capable of being fully laid before the jury. The court's action in allowing it to be adduced was erroneous. *Bullock v. Wilson*, 5 Port. 338; *Gibson v. Hatchett & Bro.*, 24 Ala. 201; *Jones v. Hatchett & Bro.*, 14 Ala. 743; *Otis v. Thom*, 23 Ala. 469; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621, 643; *Birmingham R., etc., Co. v. Baylor*, 101 Ala. 488, 13 So. 793; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Reeves v. State*, 96 Ala. 33, 11 So. 296; *McCutchen v. Loggins*, 109 Ala. 457, 19 So. 810; *Alabama, etc., R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236; *Baker v. Trotter*, 73 Ala. 277; *Carney v. State*, 79 Ala. 14." *Birmingham R., etc., Co. v. Jackson*, 136 Ala. 279, 34 So. 994, 996.

Jerking of Street Car.—In an action for the death of a person attempting to board a street car, where a witness testified that the car did not slow up as deceased attempted to get on it, his further statement that deceased was not thrown from the car by any jerking in its movement was not objectionable as a conclusion of the witness. *Smith v. Birmingham Ry., Light & Power Co.*, 147 Ala. 702, 41 So. 307.

Where plaintiff claimed to have been injured by the sudden jerking and stopping of a street car as she got on, a question to another passenger, "Did you see anything happen there that would have a tendency to hurt anybody?" was properly excluded as not calling for facts, but for the witness' opinion. *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

Care in Delivering Telegraph Message.—In an action against a telegraph company for failure to deliver a message it was not competent for the company's agent, whose duty it was to receive the message from the sender and deliver it to the operator for transmission, to testify that he did all in his power to get the message off, and that everything was done by the operator and other agents in the office to get it off. *Western Union Telegraph Co. v. Merrill*, 144 Ala. 618, 39 So. 121.

Proper to Drive on Street.—One suing for injuries on a defective street may not

be required, over his objection, to state his bare conclusion as to whether it was safe to drive along the street at the point where the accident happened. *City of Montgomery v. Wyche*, 169 Ala. 181, 53 So. 786.

§ 355 (18) Nature, Condition, and Relation of Objects.

Dangerous Condition of Tracks.—In an action against a railroad company for the death of plaintiff's testator, the question as to whether the track would have been pretty bad if worn half an inch in some places, and whether it would not have been dangerous, was improperly allowed, since it called for the opinion of the witness. *Louisville & N. R. Co. v. Tegnor*, 125 Ala. 593, 28 So. 510.

"Under the authority of *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Walker v. Walker*, 34 Ala. 469, 473, and *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216, the questions propounded to witness Duffey, 'That would have been a pretty bad track, if it had been worn a half of an inch in some places, wouldn't it?' and, 'Make it dangerous, wouldn't it?' which were allowed to be answered against the objection of defendant, were improper." *Louisville, etc., R. Co. v. Tegnor*, 125 Ala. 593, 28 So. 510, 512.

Effect of Excavation.—On an issue whether an excavation caused the walls of a ditch to break in, thereby flooding land, a question to a witness as to whether he left enough bank to hold the water in the ditch, etc., held properly stricken, since it called for the opinion of the witness. *Southern Ry. Co. v. Lewis*, 165 Ala. 555, 51 So. 746.

Appearance of Mail Crane.—In an action against a railroad for injuries to a traveler sustained by his mule taking fright at a mail crane erected at a crossing, a question asking a witness as to whether there was anything unusual about the mail crane called for the witness' opinion or conclusion. *Western Ry. of Alabama v. Cleghorn*, 143 Ala. 392, 39 So. 133.

Operation of Machinery.—Testimony that certain machinery used in defendant's mill, under plaintiff's management, did not operate as well as the same machinery had done under the management of one H., when run by him for another

company, was properly excluded, witness not having been shown to be an expert machinist. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46.

§ 355 (19) Value.

Testimony of value of property can only be matter of opinion. *Curtis v. Hunt*, 158 Ala. 78, 48 So. 598.

Value of Slave.—A witness may give his opinion as to the value of a slave personally known to him, although it is not shown that he possesses any peculiar skill requisite to qualify him as an expert; and the word "suppose," when used by him in answer to a question as to the value of a slave, will be held synonymous with the expression of his opinion. *Ward v. Reynolds*, 32 Ala. 384.

A witness, in testifying to the value of a slave, may state that he "was considered a good hand," when the other parts of the deposition show that the witness knew the slave personally, and was expressing his own judgment, predicated on his observation, as to the qualities of the slave. *Ward v. Reynolds*, 32 Ala. 384.

Value of Logs.—"There was no error in admitting the testimony of the witness Bolen as to the value of the logs. His testimony shows that he had sufficient experience and knowledge to testify to values." *Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533, 534.

§ 355 (20) Quantity, Space, or Distance.

Distance Horse Was Dragged.—In an action against a railroad for the destruction of a wagon and the killing of a horse by a collision, testimony as to how far the horse had been dragged along the track was not subject to the objection of calling for the conclusion of the witness, and was competent on the issue of the circumstances of the collision, and how rapidly the car which struck the horse was running. *Louisville & N. R. Co. v. Pearce*, 142 Ala. 680, 39 So. 72.

"After the portion of the answer, in which the witness had stated that the mare had been dragged, was stricken, there was nothing of the answer remaining except, that there was wreckage of the harness and some pieces of the wagon and wheels on the ground, and nothing about any thing having been dragged. The question that followed, assumed that

something had been dragged, but it was not objected to on this ground. The objection was that 'it called for a conclusion,' and was incompetent. If something had been dragged, it was not a conclusion of the witness in so stating, but was a fact to which he was competent to testify, and it was competent to be so stated, as tending to show the circumstances of the collision and how rapidly the car was running at the time of the collision. *Watkins v. State*, 89 Ala. 82, 8 So. 134." *Louisville, etc., R. Co. v. Pearce*, 142 Ala. 680, 39 So. 72, 74.

Depth of Ditch.—In an action for one-half the cost of digging and enlarging a ditch through the property of adjoining landowners pursuant to agreement between them, the witness for plaintiff testified that the place where the new ditch was more than three feet deep was where it started from the old ditch near the edge of a hillside, and that the new ditch was to meet the old ditch, and, as the water stood where they came together, it was necessary to make the new ditch deeper. Witness was further asked, "Was that ditch dug any deeper than was necessary in order to make it take off the water?" Held, the question was proper, not calling for a conclusion, but for a matter of observation as to whether the ditch was made any deeper than was required to flow the water into the old ditch. *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104.

"In the course of his examination as a witness the plaintiff testified: 'The place where the ditch is more than three feet deep is down near where it started from the old ditch, near the edge of a hillside. The swamp is right under the edge of a hillside. The new ditch was to meet the old ditch. We dug the new ditch first in the summer, and in the fall went back to deepen it. When we came up the new ditch and the water stood there where the new ditch and the old ditch came together, and the new ditch had to be made deeper. The water in the ditch was the only level we had.' In this connection the witness was asked the question: 'Was that ditch dug any deeper than was necessary in order to make it take off the water?' The court was not in error in overruling the defendant's objection to this question. The question called, not

for a mere conclusion of the witness, but for a mere matter of observation as to whether at that point, where there was an elevation of the surface, the ditch was made any deeper than was required to let the water flow from it into the old ditch with which it was to connect. Besides, the witness was shown to be qualified by knowledge and experience to give an opinion on the subject inquired about which was admissible as evidence." *Alexander v. Smith*, 3 Ala. App. 501, 57 So. 104, 107.

§ 355 (21) Time.

Length of Time Necessary for Passengers to Alight.—In an action for injuries to a passenger while endeavoring to alight, evidence that the car on the occasion specified did not stop long enough for a person sitting in the car to get to the side and get down and off was in effect a comparison of two periods of time, and was not objectionable as a conclusion of the witness. *Birmingham R., etc., Co. v. Glenn* (Ala.), 60 So. 111.

"Plaintiff's witness, T. H. Chambers, who was also on the car at the time, was allowed against defendant's objection to state that the car did not, on the occasion specified, 'stop long enough for a person sitting in the car to get to the side and get down and get off.' The objection was that this was but a conclusion of the witness. The statement is, in effect, but a comparison of two periods of time, either of which might be difficult to estimate in minutes or seconds, and the affirmation that the time required for a passenger (any passenger) to get from his seat (any seat) to the ground is longer than was the period of this particular stop. This must be regarded as the statement of a collective fact, although it involves a conclusion also, and its allowance was not reversible error. A strikingly analogous case will be found in *Kroell v. State*, 139 Ala. 1, 36 So. 1025. It may be that the witness was not qualified by observation or experience to state the time ordinarily required by a passenger for a complete debarkation, but the objection did not take this point. *Birmingham R., etc., Co. v. Glenn* (Ala.), 60 So. 111, 113.

Time Mine Could Have Been Made

Safe.—In an action for injuries to a miner by the collapse of a portion of the roof, a question as to the time within which the roof could have been propped and made secure was not objectionable as calling for a conclusion. *Tutwiler Coal, Coke & Iron Co. v. Farrington*, 144 Ala. 157, 39 So. 898.

Time Person Could Travel Certain Distance.—The question, asked a witness, whether, if a telegram had been delivered to her at a certain time, she could have come to a certain place to see her brother, does not call for a conclusion or mental operation of witness. *Western Union Tel. Co. v. Heathcoat*, 149 Ala. 623, 43 So. 117.

Lack of Time to Stop Car.—In an action against a street railway company for death of plaintiffs' intestate, who was thrown in front of a car by a frightened horse which he attempted to hold by the bridle while a car passed, testimony that the motorman had no time to stop the car, etc., was properly excluded as stating conclusions. *Alabama, etc., R. Co. v. Heald* (Ala.), 59 So. 461.

§ 355 (22) Rate of Speed.

Speed of Car.—In an action for injuries to plaintiff in a collision between her buggy and a street car, it was not error to permit plaintiff to testify as to the speed of the car—"it looked very fast to me"—it not being an opinion. *Montgomery St. Ry. Co. v. Shanks*, 139 Ala. 489, 37 So. 166.

In an action for injuries to a passenger by a collision between a street car and a railroad train, an answer to a question as to the rate of speed at which the car approached the railroad crossing that it would be hard for the witness to judge because the car had just started and could not have been running very fast, was properly stricken for vagueness and as a conclusion of fact from another fact. *Birmingham Ry., Light & Power Co. v. Rutledge*, 142 Ala. 195, 39 So. 338.

In an action for injuries to a street car passenger, questions asked a witness whether the car was not running slowly enough for a woman to get off in safety, and if plaintiff did not change her mind about alighting, were properly excluded, as calling for the witness' opinion. *North*

Alabama Tract. Co. v. Taylor, 3 Ala. App. 456, 57 So. 146.

"There was no error in allowing the plaintiff, when testifying as to the speed of the car, to say 'it looked very fast to me.' This expression was but a statement indicative of the speed as it appeared to her, and not a statement of her opinion. Birmingham R., etc., Co. v. Franscomb, 124 Ala. 621, 27 So. 508." Montgomery St. R. Co. v. Shanks, 139 Ala. 489, 37 So. 166, 170.

§ 355 (23) Cause and Effect.

Cause of Suicide.—In an action on a mutual benefit certificate, it was not error to refuse to allow a question asked of plaintiff, who was not present when deceased was killed, whether he had not killed himself to keep some one else out of trouble. Woodmen v. Wright (Ala.), 60 So. 1006.

Injury from Obstruction of Road.—In an action by a physician to recover for injuries caused by an obstruction in a road, the opinion of the physician as to what per cent. his ability to practice his profession had been decreased is inadmissible. Dunn, etc., Bros. v. Gunn, 149 Ala. 583, 42 So. 686.

Overflow of Drain.—In an action for damages to plaintiff's property by the overflow of a drain, a question asked plaintiff as a witness to state the effect of the overflow on plaintiff's houses and lots was not objectionable as calling for the opinion or conclusion of the witness. Central of Georgia Ry. Co. v. Keyton, 148 Ala. 675, 41 So. 918.

In an action for damages to plaintiff's property by the overflow of a railroad drain, questions asked of plaintiff as to whether the overflow necessitated any repairs and whether it affected the property "as tenant property" was objectionable as calling for the conclusion of the witness. Central of Georgia Ry. Co. v. Keyton, 148 Ala. 675, 41 So. 918.

"The plaintiff as a witness was asked by his counsel to 'state to the jury the effect of the overflow on your houses and lot.' We think this was a proper question. It did not necessarily call for an opinion of the witness, and it was the right of the plaintiff to prove all actual damage he knew he had sustained as a

proximate result of the overflow, and as a predicate for this he could prove the condition the water left his premises in, and this would have been responsive to the question. The defendant could protect himself from any illegal evidence given by the answer by proper motion to exclude. O'Grady v. Julian, 34 Ala. 88. Answering the question the plaintiff stated: 'The effect of the overflow on my property was to damage it a very great deal.' The answer, we are constrained to hold, should have been excluded on the motion made by the defendant. It was not only the mere expression of an opinion by the witness, but it invaded the province of the jury. Whether or not the property was damaged was one of the questions of fact to be determined by the jury. Hames v. Brownlee, 63 Ala. 277; Young v. Cureton, 87 Ala. 727, 6 So. 352." Central, etc., R. Co. v. Keyton, 148 Ala. 675, 41 So. 918, 922.

"The questions: 'Did the overflow necessitate any repairs? And 'did the overflow affect the property as tenant property?' would seem to fall in the same category with the question, 'state if your property was damaged by the overflow.' Hames v. Brownlee, 63 Ala. 277, and Young v. Cureton, 87 Ala. 727, 6 So. 352. By following the rule laid down in Hames v. Brownlee with respect to the manner of proving damages, the plaintiff may avoid error on another trial. While damages caused by overflow other than the one complained of in the complaint are not recoverable in this action, yet evidence of other overflows before the suit was commenced, but after the defendant began the maintenance of the sewer, was competent as affording the jury information of the consequences of the overflow or backing of the water under similar circumstances. Burden v. Stein, 27 Ala. 104; Polly v. McCall, 37 Ala. 20; Central, etc., R. Co. v. Windham, 126 Ala. 552, 28 So. 392. This evidence was also competent as tending to show the defendant had knowledge of the condition of the sewer. Central, etc., R. Co. v. Windham, supra." Central, etc., R. Co. v. Keyton, 148 Ala. 675, 41 So. 918, 922.

Construction of Embankment.—Testimony by an eyewitness, that the construction of a certain embankment, which

spanned a stream with a culvert underneath caused water to back up and overflow a lot, is not opinion evidence. *City of Jasper v. Barton*, 1 Ala. App. 472, 56 So. 42.

§ 355 (24) Performance of Breach of Contract.

Construction of Railroad.—Testimony of a witness as to whether certain work in the construction of a railroad had been done according to the specifications therefor is incompetent, as calling for the conclusion of the witness. *Lafayette Ry. Co. v. Tucker*, 124 Ala. 514, 27 So. 447.

§ 355 (25) Title and Ownership.

Ownership a Fact.—Ownership of property is a fact to which a witness may always testify. *Hunnicut v. Higginbotham*, 138 Ala. 472, 35 So. 469.

Ownership is a fact, and a witness knowing that a certain person has owned the property in controversy may properly state that fact in the deposition. *Nelson v. Iverson*, 24 Ala. 9.

It is competent for a person to testify that he never had any interest or title in certain land. *Florence Land, Mining & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384.

Purchase of Property.—In ejectment a question asked of a witness, "Are you the purchaser of the property in dispute in this case?" was not objectionable, as calling for a conclusion. *Driver v. King*, 145 Ala. 585, 40 So. 315, cited in note in 14 L. R. A., N. S., 291.

Possession of Title to Real Property.—In ejectment, it was proper to exclude evidence of a witness that he was in possession of the title. *McCreary v. Jackson Lumber Co.*, 148 Ala. 247, 41 So. 822.

"Therefore, if the plaintiff acquired a prior possession through their grantors, they would be entitled to recover as against a mere trespasser on the land or one claiming only under a later possession. 'And according to the prevailing rule the plaintiff's right of recovery in such case can not be resisted by showing that there is or may be an outstanding title in another.' 10 Am. & Eng. Ency. Law, 487; *Green v. Jordan*, 83 Ala. 220, 3 So. 513; *Hefin v. Bingham*, 56 Ala. 566." *McCreary v. Jackson Lumber Co.*, 148 Ala. 247, 41 So. 822, 823.

When Real Estate Was Acquired.—A question asked a witness as to when one acquired certain real estate is objectionable as calling for a conclusion of the witness. *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725.

Extent of Adjoining Owner's Land.—A statement by one in possession of land that, if the adjoining owner would begin measuring from a proper point, he would get all the land he was entitled to, was, at most, an expression of opinion as to where the point was located, and was properly excluded. *Lecroix v. Malone*, 157 Ala. 434, 47 So. 725.

Claim of Land at Specified Time.—In ejectment in which the issue was as to the delivery of deeds to the property claimed to or for the plaintiff, a witness could not testify whether at two specified times the plaintiff was claiming the land in suit, as it would have been but a conclusion. *Napier v. Elliott (Ala.)*, 58 So. 435.

"It was not competent for defendants' witness, Mrs. Baxley, to state whether or not, at the two times specified, plaintiff was claiming the land, since it would have been but a conclusion on her part. *Ashford v. Ashford*, 136 Ala. 631, 34 So. 10." *Napier v. Elliott (Ala.)*, 58 So. 435, 437.

Amount of Land Claimed.—Where plaintiff in ejectment claimed title by deed and also by adverse possession, a question put to her as to the amount of land she had been claiming to own during the time she had been living on the premises since the execution of the deed was proper, as calling for the statement of a fact. *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382.

Land Included in Map.—In such a case, where an agent of the plaintiff testified as to his being employed by the plaintiff to overlook the latter's land and to prevent trespassing thereon, and that at the time of his employment the plaintiff gave him a map which showed the lands owned by the plaintiff, it is not competent, for said witness to further testify that said map showed that the lands sued for were included in those owned by the plaintiff. *Anniston City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61.

Exercise of Acts of Ownership.—In an action of ejectment, where the plaintiff

bases his right of recovery upon adverse possession, it is not competent for a witness to state that the plaintiff, or the agent or representative of the plaintiff, exercised "such acts of ownership over the land [sued for] as the nature and character of the land was susceptible of." *Anniston City Land Co. v. Edmondson*, 127 Ala. 445, 30 So. 61.

Ownership after Deed.—The question, "After you deeded that lot to F. and the other lot to P., did you then have a strip of land remaining there?" calls for a conclusion of the witness. *Middlebrooks v. Sanders* (Ala.), 61 So. 898.

Claim of Ownership.—In ejectment, it was error to exclude from the testimony of a witness the statement: "I knew that Mrs. C. claimed the property as her own, and she claimed it continuously to her death as her own." *Hays v. Lemoine*, 156 Ala. 465, 47 So. 97.

Ownership of Personal Property.—A witness may properly testify as to who is the owner of personal property. *Daffron v. Crump*, 69 Ala. 77; *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365.

That a person never had a title or color of title to a particular article of property is not a legal conclusion, but the negation of every fact that would constitute a title, and as such is admissible evidence. *Norton v. Linton*, 18 Ala. 690.

In an action on a constable's bond for an alleged wrongful levy on personal property, a question asked of a witness, "Whose property was that?" was not objectionable as calling for the conclusion of the witness. *Rasco v. Jefferson*, 142 Ala. 705, 38 So. 246.

"The defendants should have been permitted to ask witness Rasco, 'Whose property was that?' Ownership of personal property is a fact to which a witness may testify. *Steiner v. Trantum*, 98 Ala. 315, 13 So. 365; *Daffron v. Crump*, 69 Ala. 77; *Nelson v. Iverson*, 24 Ala. 9." *Rasco v. Jefferson*, 142 Ala. 705, 38 So. 246, 248.

Ownership of Cow.—Testimony that witness knew that deceased owned at his death a cow and a calf, and that he did not know of any other personal property owned by him, is of a fact, and not an opinion. *Curtis v. Hunt*, 158 Ala. 78, 48 So. 598.

Purchase of Property by Partnership.

Where a chattel mortgagee suing a partnership for conversion of the mortgaged property testified that one of the partners told him that he brought the property from the mortgagor, and that it was his understanding that "defendant" got the property, this last statement was not mere hearsay or an opinion of the witness, but some evidence that the partnership purchased the property. *Kilgore & Son v. Shannon & Co.*, 6 Ala. App. 537, 60 So. 520.

§ 355 (26) Possession.

Possession of Land.—It is not error to overrule an objection to a question asked a witness as to who was in actual possession of certain land, since possession is a fact to which a witness may testify. *Cooper v. Slaughter*, 175 Ala. 211, 57 So. 477.

"Possession is a collective fact to which a witness may testify; hence there was no error in overruling defendants' objection to the question to E. M. Slaughter, 'Who was in actual possession of § 46,' etc.?" *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349; *Carl v. State*, 125 Ala. 89, 28 So. 505, 509. Moreover, the witness had already stated that the plaintiff was in possession, and this question was only cumulative." *Cooper v. Slaughter*, 175 Ala. 211, 57 So. 477, 480.

In *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369, cited in note in 14 L. R. A., N. S., 290, in an action upon the case to recover for damages to land caused by diverting water from its natural channel, it was held that possession, actual occupancy of land, is a fact, and not a conclusion of law or fact; and may therefore be testified to.

Length of Time Person Lived on Land.

—In ejectment, a question to a witness, inquiring how long a certain person lived on the land "claiming to hold" it for another, was proper. *Henry v. Frohlichstein*, 149 Ala. 330, 43 So. 126.

"The question to the witness, Leroy Kimball, 'How long did he live on it claiming to hold for Frohlichstein?' was proper, and the objection to it properly overruled. The court holds that this is not equivalent to the question as to whether a third party knew a thing, as

in the case of *Ashford v. Ashford*, 136 Ala. 631, 34 So. 10, but has been recognized as allowable under previous decisions of this court. *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369. The same question to the witness Cox comes under the same category. Besides, he did not answer it." *Henry v. Frohlichstein*, 149 Ala. 330, 43 So. 126, 128.

Character and Extent of Possession.—In *Steed v. Knowles*, 97 Ala. 573, 12 So. 75, cited in note in 14 L. R. A., N. S., 290, in an action of ejectment it was held that possession of land was a fact to which a witness might testify, and not strictly a conclusion of law; and that the character of possession, its extent, or whether there was, in fact, any possession, might be brought out in cross-examination.

It is permissible for a witness to testify as a fact that he is in possession of land, and he may also testify that he derived his possession from one formerly in possession claiming title to lands. Such continuous possession under claim of title creates a presumption of ownership, which will support ejectment, until a better title is shown. *Eagle, etc., Mfg. Co. v. Gibson*, 62 Ala. 369, cited in note in 14 L. R. A., N. S., 290.

Opinion as to Actual Condition of Property.—Where the character of possession of land in controversy is in issue, it can not be proved by general reputation, nor by the opinion of witnesses as to the actual condition of the property. *Ashford v. McKee* (Ala.), 62 So. 879.

Occupancy and Control.—Where a witness was asked whether he knew anything about the occupancy of certain land in controversy prior to the making of a survey, his answer that he knew nothing except that the land was recognized as the land of plaintiff, and that he exercised ownership over it, was objectionable as not responsive, and as involving a conclusion of the witness. *Ashford v. McKee* (Ala.), 62 So. 879.

In ejectment a question whether plaintiff was in "exclusive" possession of the land down to a specified line was objectionable as calling for a conclusion, since, though possession is a fact to which a witness may testify, he may not testify that a person was in open and notorious

possession of land. *Ashford v. McKee* (Ala.), 62 So. 879.

Possession at Specified Time.—In ejectment, a question whether A. was in control of the land at a specified time was proper. *Ashford v. McKee* (Ala.), 62 So. 879.

Exclusive Control.—A question to a witness in ejectment whether plaintiff's predecessor in title was in exclusive control of the land was improper, as calling for a conclusion. *Ashford v. McKee* (Ala.), 62 So. 879.

"The fourth assignment of error relates to the sustaining of an objection to a question as to whether plaintiff's predecessor was in 'exclusive control' of the land, and for like reasons this question also was improper. Control, like possession, is a statement of collective fact, which is permissible, but when qualified by such terms as 'open and notorious,' 'exclusive,' etc., the realm of mere opinion is entered, and the function of the jury usurped. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349." *Ashford v. McKee* (Ala.), 62 So. 879, 882.

Open and Notorious Possession.—Evidence in ejectment that a person was in open and notorious possession of the land in controversy was inadmissible as a statement of opinion. *Driver v. King*, 145 Ala. 585, 40 So. 315, cited in note in 14 L. R. A., N. S., 291.

In *Driver v. King*, 145 Ala. 585, 40 So. 315, cited in note in 14 L. R. A., N. S., 291, the question in issue was that of adverse possession, the court saying that, while possession is a fact to which a witness may testify, the question of open and notorious possession is one for the jury, and upon which a witness can testify only as to the facts.

In *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349, cited in note in 14 L. R. A., N. S., 291, it was held competent, on the question of adverse possession, for a witness to testify that the defendant went into possession of the property, and controlled it, since this was not the opinion of the witness, but his conclusion of a fact.

Possession of Lumber.—Where lumber shipped under a dressing in transit arrangement was burned at the planing

mill, questions as to the possession of the lumber after delivery to the planing mill called for a collective fact, and were not objectionable as calling for an opinion or conclusion of a witness. *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 535, 56 So. 862.

"The several questions asked the witnesses by the defendant as to the possession of the lumber after the same was delivered to the Harder planing mill were unobjectionable. Possession is a collective fact, and not an opinion or conclusion; and it was therefore competent for the witnesses to state who was in possession of the lumber at the time it was burned. *Wright v. State*, 136 Ala. 139, 34 So. 233; *Higdon v. Kennemer*, 112 Ala. 351, 20 So. 470." *Barron v. Mobile, etc., R. Co.*, 2 Ala. App. 555, 56 So. 862, 864.

Ownership of Land Containing Timber.

—A statement by a witness that he, as agent of a purchaser of standing timber, was in possession of the timber, though not in possession of the land, that being in possession of the vendor, is properly excluded as a mere conclusion. *Christopher v. Curtis-Attalla Lumber Co.*, 175 Ala. 484, 57 So. 837.

In *Morningstar v. State*, 59 Ala. 30, cited in note in 14 L. R. A., N. S., 290, in an indictment for larceny, it was held that the question of who was in possession of land upon which was a stick of timber which was the subject of the crime was an inquiry concerning a fact, and not a legal conclusion, and was properly admitted.

Possession of Slave.—A witness, testifying to a parol gift of a slave, was asked, on cross-examination, whether control and possession passed to the grantee at the time of the gift, or whether the grantor still retained possession; and answered, "I considered that the control and possession of the slave did pass to the grantee at the time, and the slave was known as his property from that time." Held, that the answer was properly suppressed, because it was not responsive to the interrogatory, and because it stated mere opinion and legal conclusion instead of facts. *Thomas v. De Graffenreid*, 27 Ala. 651.

§ 355 (27) Contractual Relation.

On the issue whether a third person

was a member of a firm a witness may not state his judgment that the third person was a partner. *Brandon v. Progress Distilling Co.*, 167 Ala. 365, 52 So. 640.

In an action by a physician to recover for injuries caused by an obstruction in a road, the complaint did not allege damages because of loss of business. Held, that evidence as to the decrease in his practice and impairment of ability to practice was inadmissible. *Dunn, etc., Bros. v. Gunn*, 149 Ala. 583, 42 So. 686.

In a suit for breach of a contract under which plaintiff was to render services for defendant, where there was an issue as to whether D., who hired plaintiff, had any authority to do so, defendant claiming that D. had been discharged, it was proper to allow D. to answer whether or not he accepted the discharge, or admitted the authority of defendant's president to discharge him, or whether he declined to be discharged; the question not calling for a gratuitous opinion or conclusion as to a conclusion of law, but calling for a conclusion of fact, or a shorthand rendering of the fact, to be derived from certain other facts. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

"There was also no error in allowing the witness Dewey to answer the question whether or not he accepted the discharge, or admitted the authority of Mr. Robertson to discharge him, or whether he declined to be discharged, etc. This answer did not call for a gratuitous opinion or conclusion as to a conclusion of law, but it inquired as to a conclusion of fact, or a shorthand rendering of fact, to be derived from certain other facts; consequently there was no error in overruling plaintiff's objection to the question, nor in declining to exclude the evidence of answers. These were manifestly questions of fact, and not of law. *Thornton v. State*, 113 Ala. 43, 21 So. 356; *Morrissett v. Carr*, 118 Ala. 588, 23 So. 795." *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37, 43.

In an action on an insurance policy, where plaintiff claimed the statutory penalty on the ground that defendant was a member of a tariff association, testimony by an employee of the tariff association that he thought defendant was a member

of the association, but did not think the agency which issued the policy was within the jurisdiction of any stamping office, was not a mere conclusion, but tended to show that defendant was connected with the tariff association, so that the court properly refused to exclude it. *Firemen's Fund Ins. Co. v. Hellner*, 139 Ala. 447, 49 So. 297.

In order to show the relation of landlord and tenant between two persons, a witness will not be allowed to say that one is the tenant of the other, but he must state the facts which constitute the relation. *Parker v. Haggerty*, 1 Ala. 632.

§ 355 (28) Construction and Effect of Contract or Instruments.

In an action by the assignee of a claim under fire insurance policies, a clerk of the local agent of defendant was examined as to the circumstances attending the attaching of slips on the face of the policies, and the making of certain indorsements on them, and was asked for what purpose the policies were put in his possession. Held, that the question was properly ruled out as calling for conclusion of the witness, and that the facts should have been brought out, leaving the jury to determine the purpose and effect. *Cosmopolitan Fire Ins. Co. v. Gingold*, 3 Ala. App. 537, 57 So. 266.

In an action on a contract for installing a heating plant, where defendant claimed damages for failure to properly perform the work, he could not as a witness be interrogated concerning his construction of the contract. *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325.

In an action on insurance policies, the statement of a clerk of defendant's local agent as to why the policies had been left with him held inadmissible, as being opinion evidence. *Cosmopolitan Fire Ins. Co. v. Gingold*, 3 Ala. App. 537, 57 So. 266.

Testimony of an officer before whom an acknowledgment of an instrument was made that he understood from both the grantors that they were executing it as security for the indebtedness of one of them, was a mere conclusion, derived from ex parte statements of the grantors, and was not legal evidence. *Henderson v. Brunson*, 141 Ala. 674, 37 So. 549.

In detinue against a sheriff for goods

levied on as those of another, in whose possession they were at the time of the levy, plaintiff claimed that he had purchased them from such person, and introduced a bill of sale, which recited that the seller might retain possession until the purchaser demanded possession; and the court excluded the evidence of the one who drew the bill of sale, to the effect that the sale was an absolute one, without reservation of any interest. Held, proper; the question as to reservation of interest depending on the terms of the bill, and deductions to be drawn from the subsequent acts of the parties. *Ward v. Shirley*, 131 Ala. 568, 32 So. 489.

§ 355 (29) Agency in General.

Transactions Through Brokers.—In an action for goods sold, testimony of plaintiff that defendants contracted with him for the goods through brokers who act on behalf of and bind both parties is inadmissible, where it appears from the evidence of the witness himself to have been merely his conclusions and inferences of fact and law from the fact that the broker had written him that he had made a sale of such goods to defendants. *Goddard & Sons v. Garner*, 109 Ala. 98, 19 So. 513.

General Agent of Corporation.—One's testimony that he regarded a certain person as the general agent of defendant corporation, connected with statements of the means of his knowledge, held admissible. *Talladega Ins. Co. v. Peacock*, 67 Ala. 253.

Acting under Agent's Direction.—In an action for work claimed to have been done for defendant, acting through an agent who employed plaintiff, testimony of the latter that "no work was ever done by me under instructions from any one else" was not to a conclusion as to the agency, but merely as to a fact, which showed only that whatever plaintiff did was under the agent's direction, leaving other testimony to show his authority. *Alabama Security Co. v. Dewy*, 158 Ala. 530, 47 So. 55.

Where plaintiff, while testifying to work claimed to have been done by him for defendant company, referred to a certain person, with whom he claimed to have conferred in regard to it, as representing

the defendant, there was no error in refusing to exclude the statement, on the ground that it was a conclusion of the witness, and because it was not shown that the person in question was connected with defendant, as the latter could have cross-examined as to the facts on which he based the statement, and shown whether it was warranted. *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55.

"The only questions presented for review by the assignments of error arise upon the evidence and charges. The plaintiff, while testifying to the work done by him, was asked, 'Did you, or did you not, correspond with the Alabama Security Company in regard to it?' and replied: 'I had very little correspondence with them. I had conferences at various times with Mr. Stratton, representing the Alabama Security Company.' 'The defendant moved to exclude this last sentence, 'because it was a conclusion of the witness, and because it had not been shown that Mr. Stratton had any connection with the defendant.' There was no error in the refusal to exclude this statement. The defendant could have cross-examined the witness as to the facts upon which he based the statement, and thus shown whether or not he was warranted in saying that Stratton was representing said company. *McGrew v. Walker*, 17 Ala. 824." *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55, 58.

"Nor was the statement of the plaintiff, that the money was loaned originally in 1860, through his agent, and renewed annually until 1863, objectionable as hearsay. The only indication that the knowledge of the witness was derived from hearsay was the subsequent statement that in the meanwhile he had been in Texas. This may have been true, and he may have had direct personal knowledge of the loan, and its renewals. If his knowledge was derived wholly from hearsay, it could easily have been shown by a cross-examination on the point, to which he was not subjected." *Talladega Ins. Co. v. Peacock*, 67 Ala. 253, 264.

"The appointment of the officers or agents of a corporation, strangers can not be compelled to prove by written evidence. It may, or not, rest in writing; it

may be inferred from the recognition, and continuous acquiescence by the corporation in the acts of such officers or agents. *Alabama, etc., R. Co. v. Kidd*, 29 Ala. 221." *Talladega Ins. Co. v. Peacock*, 67 Ala. 253, 261.

"The opinion of a witness, or a conclusion drawn by him from facts, as a general rule, is not admissible evidence. We do not think the statement of the witness that he regarded Huey as the general agent of the company, falls within this rule of exclusion. If it stood alone, disconnected from the evidence given previously and subsequently by the witness, it might be objectionable. When considered in connection with that evidence, it is a statement in a guarded form of the fact that Huey was the general agent of the company, accompanied by a statement of the witness' means and sources of knowledge of the fact. *McGrew v. Walker*, 17 Ala. 824." *Talladega Ins. Co. v. Peacock*, 67 Ala. 253, 264.

§ 355 (30) Authority.

Authority of Officer of Corporation.—

In an action against a corporation for breach of a contract of employment, defended on the ground that the officer who made the contract was without authority to do so at the time he acted, testimony by the president that such officer was without such authority to so contract after a date specified was properly excluded as a conclusion of the witness. *Mobile, etc., R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Authority of Traveling Salesman.—

A witness may testify that the authority of a traveling salesman of a corporation was limited to his taking orders subject to approval by the corporation. *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675.

"The witness Cates testified (and it was competent evidence under *Bensberg v. Harris*, 46 Mo. App. 404) that Smathers was plaintiff's traveling salesman, with authority to take orders on commission subject to plaintiff's approval. In the case of *Simon v. Johnson*, 101 Ala. 368, 13 So. 491, one phase of the authority of a traveling salesman was considered and determined by this court; the precise question there determined being that a traveling salesman of merchandise, making sales by sample on a credit or for cash to be

paid on receipt of the goods or the invoice of them, has no implied authority to collect the money agreed to be paid from the purchaser." *Gould v. Cates Chair Co.*, 147 Ala. 629, 41 So. 675, 676.

§ 355 (31) Partnership.

Supposition of Partnership.—Testimony that the witnesses supposed defendants to be partners is inadmissible. *Rabitte v. Orr*, 83 Ala. 185, 3 So. 420.

Fact of Partnership.—Whether a partnership existed between two or more persons is, after the facts are ascertained, a question of law; but a witness who knows the fact may nevertheless state, in so many words, that they were partners. *McGrew v. Walker*, 17 Ala. 824.

Effect of Contract as Creating Partnership.—In an action to recover from a partner a debt of the firm, the written agreement under which he and his fellow were doing business having been shown, the testimony of his fellow as to whether they were partners was inadmissible, being an expression of opinion as to the effect of the contract, whose construction was for the court. *Alexander v. Handley*, 96 Ala. 220, 11 So. 390.

§ 355 (32) Indebtedness.

Indebtedness to Witness.—The statement of a witness that another was indebted to him on a particular day is admissible as to the statement of a fact. *Richards v. Herald Shoe Co.*, 145 Ala. 657, 39 So. 615.

Liability for Telegraph Charges.—In an action against a telegraph company for failure to deliver a message, a question asking the sender of the message whether he considered plaintiff liable for the charges was objectionable as calling for the opinion of the witness on a question of law. *Western Union Telegraph Co. v. Merrill*, 144 Ala. 618, 39 So. 121.

§ 355 (33) Damages.

Condition of Property.—In an action for injuries to property, witnesses should not in general be allowed to state that the property was or is damaged, but should state its condition and leave the conclusion to the jury. *Sloss-Sheffield, etc., Iron Co. v. Mitchell (Ala.)*, 61 So. 934, 938.

"Witnesses should not in general be allowed to state that property was or is

damaged, but should state its condition and leave the conclusion to the jury. *Gosdin v. Williams*, 151 Ala. 592, 44 So. 611; *Central, etc., R. Co. v. Keyton*, 148 Ala. 675, 41 So. 918; *Atlanta, etc., Railway v. Brown*, 158 Ala. 607, 48 So. 73. In the present case, however, plaintiff's statement that the lumber in the houses was damaged was followed by a statement of the actual conditions resulting from the overflow, and hence the error was harmless." *Sloss-Sheffield, etc., Iron Co. v. Mitchell (Ala.)*, 61 So. 934, 937.

Worthless Condition of Goods.—In an action for damages to a stock of goods, a witness was asked, "What was the condition of the goods?" and he answered, "The goods were almost worthless." Held, that a motion to exclude the answer on the ground that it was not responsive and was a conclusion of the witness was properly denied. *Werten v. Koosa & Co.*, 169 Ala. 258, 53 So. 98.

Failure to Obtain Profits.—A witness should not be permitted to testify as to what would have been plaintiff's profits if they had been allowed to perform a contract, it being a mere conclusion; but he should have been confined to a statement of fact showing what it would cost to do the work. *Hardaway-Wright Co. v. Bradley Bros.*, 163 Ala. 596, 51 So. 21.

Damage from Filling Millpond.—In an action for partially filling up a millpond with dirt, a witness may not testify as to how much the property would be depreciated by half filling up the pond or entirely filling up the pond, where there was no evidence that these conditions existed. *Atlanta & B. Air Line Ry. v. Wood*, 160 Ala. 657, 49 So. 426.

Damages to Abutting Owner.—In an action to recover consequential damages to abutting property by the construction of a street railway in the street, a question as to how much plaintiff was damaged was properly excluded as calling for a conclusion, which was for the jury. *Bragan v. Birmingham Ry., Light & Power Co.*, 163 Ala. 93, 51 So. 30.

Damage from Overflow of Drain.—In an action for injuries to plaintiff's property by the overflow of a drain, evidence that the effect of the overflow was to damage plaintiff's property a very great deal was objectionable as an opinion of the

witness. *Central of Georgia Ry. Co. v. Keyton*, 148 Ala. 675, 41 So. 918.

"This brings us to consideration of the questions presented by the bill of exceptions. The evidence for plaintiff tended to show that his houses mentioned in the complaint were located as there alleged; that on the fifteenth of August, 1904, his lot overflowed, and the water backed over the lots and rose in the houses on the lots over the floors to a depth of six or eight inches; that he did not live in the houses, but had them rented to tenants. The evidence further tended to support plaintiff's case as made by the complaint. The plaintiff testified, among other things, that there were closets on the ditch; that on the day of the overflow the water stood on his lot from one and one-half to three hours; and that when the water receded a stench was left in the houses. The bill of exceptions recites that the answer, 'A stench was left in his houses,' was given as answer to a question propounded by plaintiff's counsel, 'State the condition of the houses after the rain.' We can see no legitimate objection to the answer. It was entirely competent to prove the condition of the property after the overflow, and it was open to the jury to say whether or not the stench was a result of the rain or the overflow; also it might be a matter to be considered in fixing the damages. Any proximate result of the overflow that would tend to make the houses less desirable as tenant houses—as places for habitation—would depreciate their rental value, and diminution in rental value is an element of damages in such cases. *Tennessee, etc., R. Co. v. Hamilton*, 100 Ala. 252, 14 So. 167; *Rouse v. Martin*, 75 Ala. 510, 515; *Hundley v. Harrison*, 123 Ala. 292, 26 So. 294." *Central, etc., R. Co. v. Keyton*, 148 Ala. 675, 41 So. 918, 922.

Overflow of Water.—A question asked plaintiff, "State if your property was damaged by the overflow" of certain water, was improperly allowed as calling for the witness' conclusion. *Central of Georgia Ry. Co. v. Keyton*, 148 Ala. 675, 41 So. 918.

Damage from Stock.—In an action for trespass committed by cattle, questions asked plaintiff as to "What amount of cotton was destroyed by defendant's stock?" "What was the value of your

melilotus destroyed by defendant's stock?"—call for facts, and not for the opinion of the witness, and are proper. *Ryall v. Allen*, 143 Ala. 222, 38 So. 851.

Damage from Construction of Railroad.—A question referring to several blocks in a platted survey, and untouched by the right of way sought to be condemned whether such property was damaged by the construction and operation of the railroad along the right of way, calls for an opinion and conclusion of the witness. *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424, 53 So. 1009.

"The court erred in allowing the witness B. Musgrove, over the objection of the defendant that the question asked called for a conclusion, to be asked the question, 'Is the property on the lots above described damaged by the construction and operation of the railroad along there on the west side of it over this right of way?' This question was asked in reference to several blocks in the platted survey introduced in evidence and untouched by the right of way sought to be condemned, and, of course, could only refer to consequential damages in the taking of other and different lots. While, under the principles above laid down, the question is not likely to arise on another trial, still it is not improper to state that this question, under the circumstances, clearly called for an opinion and conclusion of the witness. *Hames v. Brownlee*, 63 Ala. 277; *Bragan v. Birmingham R., etc., Co.*, 163 Ala. 93, 51 So. 30." *Alabama Cent. R. Co. v. Musgrove*, 169 Ala. 424, 53 So. 1009, 1011.

§ 356. Matters Directly in Issue.

§ 356 (1) In General.

Mere opinions of witnesses as to questions for the jury to decide on consideration of facts in detail are inadmissible. *Weller & Co. v. Camp*, 169 Ala. 275, 52 So. 929.

Existence of Facts.—While a witness may state his judgment as to the existence vel non of facts, where the facts stated are collective facts and the judgment is based on knowledge of the constituent elements, a witness may not state his conclusion as to the very fact in issue between the parties. *Brandon v.*

Progress Distilling Co., 167 Ala. 365, 52 So. 640.

Character of Possession of Land.—

Where the character of possession of land in controversy is in issue, it can not be proved by general reputation, nor by the opinion of witnesses, as to the actual condition of the property. *Ashford v. McKee* (Ala.), 62 So. 879.

§ 356 (2) Damages.

Damages a Jury Question.—A witness may not give his opinion as to the amount of damages, this being a question for the jury. *Seaboard Air Line Ry. Co. v. Brown*, 158 Ala. 630, 48 So. 48; *Atlanta & B. Air Line Ry. v. Brown*, 158 Ala. 607, 48 So. 73.

"A witness can not give his opinion as to the amount of damages. This would be substituting his judgment for that of the jury. *Donnell v. Jones*, 13 Ala. 490, 510; *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83, 88; *Chandler v. Bush*, 84 Ala. 102, 4 So. 207; *Dushane v. Benedict*, 120 U. S. 631, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; *Hames v. Brownlee*, 63 Ala. 277; *Young v. Cureton*, 87 Ala. 727, 6 So. 352; 4 Ency. Ev., pp. 12, 13. The evidence with regard to damage to crops was excluded by the court." *Seaboard, etc., R. Co. v. Brown*, 158 Ala. 630, 48 So. 48, 49.

"But this rule has limitations or exceptions. It does not exclude all evidence as to the amount or damages in all cases. The case at bar is clearly not within the rule above announced, and, if it were, the evidence complained of was obviously rendered harmless by the subsequent answers of the witness, and consequently it affirmatively appears that no injury resulted. While some of the questions propounded to the plaintiff, as to the damages suffered, were improper and subject to the objections assigned, and some of the answers thereto (or, at least, parts thereof) may have been subject to defendant's objections thereto, yet all of the questions and all of the answers, as to this matter of damages, taken together, show that no possible injury resulted from the improper question, or from the answer, or a part thereof." *St. Louis, etc., R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81, 82.

The rule that a witness can not testify as to his opinion of the amount of damages from a breach of contract or a wrong, but that the witness must testify to the facts, is subject to the exception that a shipper, suing for injury to goods delivered to a carrier for shipment, may give his opinion as to the amount of the damages. *St. Louis & S. F. R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81.

"The court erred in allowing the witness (plaintiff) to testify as to what the amount of the damage done to the fruit trees was. A witness can not give his opinion as to the amount of damage. The province of the jury is to ascertain the amount of damage, and the witness must testify to facts, upon which the jury must base its findings. *Donnell v. Jones*, 13 Ala. 490, 510; *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83, 88; *Chandler v. Bush*, 84 Ala. 102, 4 So. 207; *Dushane v. Benedict*, 110 U. S. 631, 647, 7 Sup. Ct. 696, 30 L. Ed. 810; *Hames v. Brownlee*, 63 Ala. 277; *Young v. Cureton*, 87 Ala. 727, 6 So. 352, 4 Enc. Ev., pp. 12, 13. For the same reason the question to said witness, 'In your judgment, what was the injury or damage done to the land?' and the question, in the same words, to the witness Green, plainly, on their face, called for illegal testimony; and the questions and answers should have been excluded. There was no error in allowing the witness (plaintiff) to testify in regard to expense which he incurred in trying to keep the stock out of his land. This is a proper item of damage, provided the plaintiff could not recover, in all, more than the amount of damage which he would have been entitled to, had not the expense been incurred. *St. L. & S. F. R. v. Ritz*, 33 Kan. 404, 6 Pac. 533, 536; 13 Cyc. 154, note 85." *Atlanta, etc., Railway v. Brown*, 158 Ala. 607, 48 So. 73, 76.

"As a rule, a witness or a party is not allowed to testify as to his opinion of the amount of damages suffered in consequence of a breach of contract, or of a wrong the basis of the action for damages. Witnesses in this matter, as in most others, can only testify to the facts, and must leave it to the jury to draw the conclusions from the facts. This is peculiarly the province of the jury, and not

that of the witness. *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Young v. Cureton*, 87 Ala. 727, 6 So. 352; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83." *St. Louis, etc., R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81, 82.

"It was at an early date ruled in this state that a witness should not be allowed to state his opinion as to the amount of damages the plaintiff or the witness sustained, or was entitled to recover, in consequence of a given act or omission, the basis of the suit. *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185. In that case the witness was allowed to testify as to the amount of damages done land by the construction of a railroad thereon. This was held error. This rule had been applied to a great number of subsequent cases, some of which were actions for personal injuries, some for injuries to live stock, and some actions *ex contractu* as for breaches of contracts. In the case of *Young v. Cureton*, 87 Ala. 727, 6 So. 352, it was ruled that a party could not testify as to the amount of damages he sustained by the breach of the contract on which he had sued. The reason assigned for the rule is that to allow such statements would be to substitute the witness' opinion or conclusion for that of the jury, whose exclusive province it is to draw the inferences and conclusions from the facts and circumstances in evidence." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509.

Delaying Baggage.—In an action by a passenger for delay in delivery of her baggage, it was proper to permit her to testify as to what the baggage would have been worth to her while she was without it. *Central of Georgia Ry. Co. v. Jones*, 170 Ala. 611, 54 So. 509.

Injury to Goods.—The question of injury not being involved, but having been adjudicated against defendant by the default judgment, the question, on proceedings to assess damages, "State in bulk the reasonable market value of the injured goods prior to their injury," does not invade the province of the jury. *K. B. Koosa & Co. v. Warten*, 158 Ala. 496, 48 So. 544.

"The rule for the admeasurement of damages in this cause is the difference between the market value of the goods

injured just prior to, and such value just after, the flooding. Witness J. W. Craig qualified himself to give testimony in regard to the value of the goods. He was asked by plaintiffs' counsel to 'state in bulk the reasonable market value of the injured goods prior to their injury.' The testimony sought by the question was competent, material, and relevant. These were the specific objections made to the question; and we can look to no other ground of objection, even if any exists. It is argued, however, that the question 'involves' the province of the jury, and the case of *Central, etc., R. Co. v. Barnett*, 151 Ala. 407, 44 So. 392, is cited as authority to support the argument. But that case is not in point. Here the fact of injury is not contested. That question was adjudicated against the defendant in the judgment by default. Furthermore, the question of injury is not presented by the objections. The court should have overruled the objections to the question, and it committed reversible error in not so doing." *Koosa & Co. v. Warten*, 158 Ala. 496, 48 So. 544, 546.

Inconvenience from Shutting Off Water.

—In an action against a water company for breach of a contract to supply water to plaintiff's residence by shutting off the supply for thirty hours, a question asked plaintiff, "Were you put to any inconvenience by having your water shut off?" was objectionable as calling for the conclusion of the witness. *Birmingham Waterworks Co. v. Ferguson*, 164 Ala. 494, 51 So. 150.

Overflow of Drain.—In an action for injuries to plaintiff's property by the overflow of a drain, evidence that the effect of the overflow was to damage plaintiff's property a very great deal was objectionable as invading the province of the jury. *Central of Georgia Ry. Co. v. Keyton*, 148 Ala. 675, 41 So. 918.

"For the same reason the question to the plaintiff, 'State if your property was damaged by the overflow,' and the answer thereto, were improperly allowed. The plaintiff testified that he could not tell the extent of the damage of the rainfall of August 15, 1904, but that the rainfall, together with others prior thereto, had reduced the rental value of his property \$2.50 per month. Damages caused by

other overflows than the one named in the complaint were not recoverable in this action; hence proof of such damages should not have been allowed. The witness should not have been allowed to take into consideration damages caused by other floods. *Alabama, etc., R. Co. v. Shahan*, 116 Ala. 302, 22 So. 509." *Central, etc., R. Co. v. Keyton*, 148 Ala. 675, 41 So. 918, 922.

Damages for Extracting Tooth.—In an action against dentists for damages for extracting a tooth, a witness can not testify as to whether he exercised due care and skill in his dental treatment; that being the ultimate issue for the jury. *Union Painless Dentists v. Dement*, 6 Ala. App. 505, 60 So. 421.

"The question to the witness Powell, to which the plaintiff objected, in effect called for a statement by him as to whether or not he exercised due care and skill in his dental treatment of the plaintiff. That was one of the issues in the case, and was a question for the jury. The question was subject to objection as not calling for a statement of the facts by the witness, leaving the deductions of conclusions to be drawn by the jury from the facts as found by them from the evidence, but for the conclusion of the witness as to a fact in issue. The court was not in error in sustaining the objection. *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355; *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482; *Hames v. Brownlee*, 63 Ala. 277." *Union Painless Dentists v. Dement*, 6 Ala. App. 505, 60 So. 421.

Damages to Mule or Slave.—"It has, however, been held by this court that a witness might give his opinion as to the amount of damages or injury to a mule or to a slave, when the only damage referred to was the difference between the value of the slave or mule before and that after the injury; and thus such evidence was not within the rule first announced in *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185, and subsequently followed. In fact, *Varner's Case* is expressly referred to and distinguished therefrom. *Johnston v. State*, 37 Ala. 457, 460; *Ward v. Reynolds*, 32 Ala. 384." *St. Louis, etc., R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81, 82.

Value before and after Injury.—Wit-

nesses, whether experts in land values or not, may testify as to the extent of injury to land, and, if they know the land, may testify as to its value before and after the injury; but they can not fix the quantum of damages suffered, that being for the jury. *Tennessee Coal, Iron & R. Co. v. McMillion*, 161 Ala. 130, 49 So. 880.

§ 356 (3) Performance or Breach of Contract.

Completion of Work.—On an issue whether work had been completed to defendant's satisfaction as agreed, a question to a witness whether it has been so completed is proper, as preliminary to evidence of the causes of dissatisfaction. *Electric Lighting Co. v. Elder*, 115 Ala. 138, 21 So. 983.

§ 356 (4) Due Care and Proper Conduct.

Proper Performance of Mechanical Operation.—"The opinion of this witness as to the proper way in which to perform the mechanical part of the operation was properly received; its weight being left to the jury. But the witness was allowed to go further. He was allowed, in effect, to testify that the operation involved in the case on trial was negligently performed. This was error. It was not for the witness to usurp the province of the jury by drawing that conclusion of fact upon which the issue of the case depended. *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482." *Staples v. Steed*, 167 Ala. 241, 52 So. 646, 647.

Proper Method of Hobbling Horses.—A nonexpert, who had often seen horses hobbled and thrown in a way to prevent injury, and whose observation had covered twelve or thirteen years, was entitled to testify as to the proper way to throw a horse so as not to injure it, but could not testify that a method used was negligent, that being for the jury. *Staples v. Steed*, 167 Ala. 241, 52 So. 646.

Reckless Handling of Engine.—A question propounded to the engineer as to whether his engine was wantonly or recklessly propelled against decedent was properly disallowed. *Louisville & N. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573.

Negligence in Striking Mules.—In an action against a master for injuries to a pedestrian by the servant's negligence in driving a mule team, a question whether

it was negligent to strike the mules, under the circumstances, was properly excluded. *American Bolt Co. v. Fennell*, 158 Ala. 484, 48 So. 97, cited in note in 24 L. R. A., N. S., 1189.

Proper Care in Oiling Machinery.—A question to a witness whether, if plaintiff had used ordinary care in oiling the machinery, he could have been injured, was properly sustained, though the witness might testify as an expert to the proper manner of oiling the machinery and as to what was a safe way and what an unsafe way. *Forbes & Carlross v. Davidson*, 147 Ala. 702, 41 So. 312.

In an action for injuries to a servant, a question to a witness as to how, in his opinion, the plaintiff got hurt in oiling the machinery, was properly excluded. *Forbes & Carlross v. Davidson*, 147 Ala. 702, 41 So. 312.

Proper Care for Protection of Cotton.—In an action against a railroad company to recover the value of cotton which was destroyed by fire, the question, propounded to defendant's witness, "whether everything was done which could have been done to save the cotton from being burned," was properly overruled, as the matter it called for was for the jury to determine, and not for the witness. *Montgomery & W. P. R. Co. v. Edmunds*, 41 Ala. 667.

"The court did not err in refusing to permit the question to be answered, whether everything was done, which could have been done, to save the cotton from being burned. This was a matter for the jury to determine, and not the witness. A witness may, in some instances, be permitted to give an opinion; but this is not one of them. *Gibson v. Hatchett & Bro.*, 24 Ala. 201; *Otis v. Thom*, 23 Ala. 469; *Brice & Co. v. Lide*, 30 Ala. 647; *Gregory v. Walker*, 38 Ala. 26; *Nuckolls v. Pinkston*, 38 Ala. 615." *Montgomery, etc., R. Co. v. Edmunds*, 41 Ala. 667, 677.

§ 356 (5) Ownership.

See ante, "Title and Ownership," § 355 (25); "Possession," § 355 (26).

So, a claim of ownership, unless communicated, is an improper subject for testimony. *East Tennessee, etc., R. Co. v. Davis*, 91 Ala. 615, 8 So. 349, cited in note in 23 L. R. A., N. S., 370.

§ 356 (6) Motive and Intent.

"In the construction of a written contract, the intention and meaning of the parties must be ascertained from the terms of the writing, the nature of the transaction, and the surrounding circumstances; and the parties can not be allowed to testify as to their understanding and intention. *Kyle v. Bellenger*, 79 Ala. 516." Cited in note in 23 L. R. A., N. S., 370.

Intent Question at Issue.—Where the intent is the very question in issue, neither a party nor any other witness should be heard to testify with what intent he did the act in question. The intent should be found by the jury from the attendant circumstances. *Oxford Iron Co. v. Spradley*, 51 Ala. 171.

Reservation in Lease of Homestead.—Where the owner of land which has been occupied by a tenant for several years seeks to defeat an execution sale thereof on the ground that it is his homestead, and the only issue is whether, when leasing, he reserved a part of the dwelling for his use as a residence, he should not be permitted to testify that he reserved a part of the house "to live in." *Bland v. Putman*, 132 Ala. 613, 32 So. 616.

Purpose of Causing Arrest.—In an action for false imprisonment, defendant was not entitled to testify as to his purpose in having plaintiff arrested. *Gray v. Strickland*, 163 Ala. 344, 50 So. 152.

Intention of Doubling Stock of Corporation.—In quo warranto to forfeit the charter of a corporation for fictitious increase of stock, an answer to a question to a witness, "was there any scheme to double the stock of the company?" was inadmissible, as it called for the opinion of the witness as to a matter which it was the province of the jury to determine. *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

Intention of Entering into Contract.—A party to a contract, testifying for himself in an action thereon, can not be permitted to state the intention with which he entered into the contract. *Oxford Iron Co. v. Spradley*, 51 Ala. 171, cited in note in 23 L. R. A., N. S., 370.

Misrepresentation in Purchase of Goods.—And a purchaser of goods, in an action against the vendor for misrepresentation with reference to them, can not be per-

mitted to testify that the representation was relied on and induced the purchase, since this is not strictly fact, but an inference or conclusion of fact, to be drawn by the jury. *Sledge v. Scott*, 56 Ala. 202, cited in note in 23 L. R. A., N. S., 370.

Belief in Solvency of Purchaser.—Nor can a person seeking to recover goods sold to another, who proved to be insolvent, testify that he sold the goods to the purchaser because he believed him to be solvent, and that he would not have sold had he known of his insolvency. *McCormick v. Joseph*, 77 Ala. 236, cited in note in 23 L. R. A., N. S., 370.

Purpose in Delivering Deed.—And where it appears, in an action of ejectment in which the issue is the sufficiency of the delivery of the deed, that, after the signing and acknowledgment of the deed, the grantor left it with his attorney, with no instructions as to delivery, the grantor can not be permitted, when examined as a witness, to testify as to his purpose and intention as to the delivery of the deed. *Fitzpatrick v. Briggman*, 130 Ala. 450, 30 So. 500, cited in note in 23 L. R. A., N. S., 371.

Arrangement to Collect Money.—So, one of a firm of lawyers sued for negligence in failing to collect a demand placed in their hands for collection can not testify that an arrangement entered into with reference to the claim was, under all the circumstances, the best that, in his judgment, could be made. *Goodman v. Walker*, 30 Ala. 482, cited in note in 23 L. R. A., N. S., 371.

Intention to Visit Family.—And a statement by a witness that a third person had made a statement to him that made him wish to visit a named family is properly rejected. *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662, cited in note in 23 L. R. A., N. S., 371.

Consent to Transfer of Insurance Policy.—So, in an action on an insurance policy, on an issue as to ownership, where there was a transfer of the policy, testimony of the agent of the insurance company as to whom he thought he was consenting for the transfer to be made to, whether to the plaintiff's agent or the plaintiff himself, is inadmissible. *Manchester Fire Assur. Co. v. Feibelman*, 118 Ala. 308, 23 So. 759, cited in note in 23 L. R. A., N. S., 371.

§ 356 (7) Mental Condition or Capacity.

See ante, § 355 (14).

See, generally, the title WILLS.

Statement as to Mental Condition.—

A nonexpert witness will not be permitted to give an opinion as to the mental condition of another without first stating the facts upon which the opinion is based. *Roberts v. Trawick*, 13 Ala. 63, cited in note in 38 L. R. A. 723.

And a jury in a will contest in which the question of sanity or insanity is at issue should not be told that common experience has shown, and the courts have often remarked, that opinions of professional witnesses upon the question of insanity have become of little practical value from the almost universal conflict between those called upon the different sides as compared with testimony consisting of acts and sayings of the testator. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, cited in note in 39 L. R. A. 333.

So, to authorize expressions of an opinion by a nonexpert witness on the question of the mental condition of another he must state facts which have some significance upon the question of such mental condition. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, cited in note in 38 L. R. A. 737.

And upon the extent and character of the impairment of the mind. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, cited in note in 38 L. R. A. 745.

Competency to Manage Affairs.—On the trial of an inquisition of lunacy, the opinion of a witness that the defendant was incompetent to manage his affairs and take care of himself is inadmissible. *In re Carmichael*, 36 Ala. 616, cited in notes in 38 L. R. A. 730, 39 L. R. A. 309, 37 L. R. A., N. S., 598.

Capacity to Make a Will.—On an issue as to testamentary capacity, a witness, can not testify that testator was or was not capable of making a will, that being for the jury's determination. *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Appearance of Mental Anguish.—One suing for mental anguish arising from a mistake in a telegram, whereby he was led to believe his wife and baby were dying, can show that on returning home, and before learning of the mistake, he

seemed to be distressed. *Lay v. Postal Telegraph Cable Co.*, 171 Ala. 172, 54 So. 529.

Knowledge of Particular Business.—It was proper to exclude testimony of a witness as to whether plaintiff knew all about a certain business; such matter being a question for the jury from the facts shown. *United States Cast Iron, Pipe & Foundry Co. v. Granger*, 162 Ala. 637, 50 So. 159.

"There was no error in sustaining the objections to the questions to the witness Chillison, on cross-examination, 'Knew all about the business, didn't he?' and 'He was pretty familiar with everything around there, was he not?' The witness should testify as to facts, and not the mental operations of the plaintiff. It was for the jury to find, from the facts, whether or not the plaintiff knew all about the business, etc. *Bailey v. State*, 107 Ala. 151, 18 So. 234; *Central, etc., R. Co. v. Martin*, 138 Ala. 531, 36 So. 426." *United States, etc., Foundry Co. v. Granger*, 162 Ala. 637, 50 So. 159, 160.

Suffering Pain and Anguish.—In an action for failure to deliver a telegram, plaintiff could only testify as to the circumstances under which a message was sent, and not that she suffered pain and mental anguish on account of "the dispatch;" that being a conclusion for the jury to draw, as plaintiff might have suffered anguish from some other cause. *Western Union Telegraph Co. v. Peagler*, 163 Ala. 38, 50 So. 913.

§ 356 (8) Nature, Condition, and Relation of Objects.

Injury from Falling Timber.—In a servant's action for injuries from a falling piece of timber, where the size of the block was proved as well as the distance it fell, evidence of another employee who had sawed it off as to whether it would be likely to knock plaintiff down was inadmissible, as the jury were as competent to form an opinion as the witness. *Alabama, etc., R. Co. v. Neal (Ala.)*, 62 So. 554.

§ 356 (9) Value.

See ante, § 355 (14).

Market Value of Logs.—"The testimony of the witness Joiner as to the market value of logs at Mobile and Jackson and at the river, and the comparison of prices

and the cost of transportation, were properly admitted as furnishing data from which the value at the place of conversion could be arrived at. *Berry v. Nall*, 54 Ala. 446, 451, 16 Cyc. 1144." *Zimmerman Mfg. Co. v. Dunn*, 151 Ala. 435, 44 So. 533, 534.

Value of Horse.—"The plaintiff testified that he was familiar with the value of stock, and he was properly allowed to give his opinion as to the value of the horse in controversy, of which he was the owner. To render such testimony competent, it was unnecessary that he should be shown to possess any peculiar skill to qualify him as an expert on this subject. *Ward v. Reynolds*, 32 Ala. 384; *Burks v. Hubbard*, 69 Ala. 379; *Rawles v. James*, 49 Ala. 183; *Lawson Exp. Ev.* 17, 456." *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

§ 356 (10) Cause and Effect.

See ante, § 355 (18).

Injury to Cattle.—In an action against a carrier for injury to cattle in shipment, a witness was asked what he would say caused the injury, if cattle that had been shipped as those in question reached their destination in the condition in which he saw the cattle in question on their arrival. Held, error not to exclude the answer, as the question called for a conclusion of the witness as to a fact in issue which it was the province of the jury to determine. *Louisville & N. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482.

Effect of Pollution of Stream.—In an action for polluting a stream, it was proper to exclude nonexpert opinions as to whether the alleged pollution made the premises involved unhealthy or uninhabitable; that being a jury question. *Stennett v. City of Bessemer*, 154 Ala. 637, 45 So. 890.

Effect of Eating Oysters.—While one made sick by eating spoiled oysters could testify in an action for damages as to his symptoms after eating them, evidence by him as to the cause of such symptoms was properly excluded; that being for the jury. *Travis v. Louisville, etc., R. Co. (Ala.)*, 62 So. 851.

"We think that it was entirely competent for him to tell his symptoms after eating the oysters, but we do not think that the trial court should be put in error for refusing to allow him to give his opin-

ion as to the cause of those symptoms. That was a question for the jury. There is nothing in the cases of *Brantley v. State*, 91 Ala. 47, 8 So. 816; *Knowles v. State*, 80 Ala. 9, and *Carl v. State*, 87 Ala. 17, 6 So. 118, in conflict with these views. In these cases witnesses were permitted to testify that certain drinks did or did not have upon them the same effect as whiskey. Alcohol has a peculiar well known effect upon human beings, and in those cases these witnesses were permitted to testify to 'a shorthand rendering of the fact.' In the instant case the witness was called upon to give his opinion as to the cause of his sickness." *Travis v. Louisville, etc., R. Co. (Ala.)*, 62 So. 851, 855.

Cause of Derailment.—If a witness were not an expert, and no expert knowledge was required for an opinion as to the cause of a derailment, his opinion could be of no service to the jury, where they were in possession of all the facts on which his conclusion rested. *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111.

§ 357. Inferences or Impressions from Collective Facts.

Exclusion of Inferences.—A question which calls for an inference of the witnesses which it is the province of the jury to draw from the facts detailed is properly excluded. *Polytinsky v. Patterson & Son*, 3 Ala. App. 302, 57 So. 130.

"The question propounded to the defendant on his cross-examination by his counsel, namely, 'How much of your income was it necessary for you to use for the support of yourself and family at the time this suit was instituted?' was not subject to the objection that it called for a conclusion of the witness. That which was called for was only a collective fact, or shorthand rendering of the facts. *Shaffer & Co. v. Hausman*, 139 Ala. 237, 35 So. 691, and cases there cited." *Torrey v. Kraus*, 149 Ala. 200, 43 So. 184, 185.

Persons Crossing Railroad Track.—Where a witness was in a position to observe, he may be able to state that another person who was present saw stated conditions, which were visible, and hence, in an action against a railroad company for injuries received by plaintiff in crossing defendant's spur track, a witness may

state that defendant's conductor saw persons crossing and recrossing the track; such testimony not being a conclusion, but a collective statement. *Louisville, etc., R. Co. v. Williams (Ala.)*, 62 So. 679.

"But, if the witness was in a position to observe, he may be able to state that another person who was present saw stated conditions or occurrences which were visible and open to ordinary observation. This is the statement of a collective fact which the witness may well know with certainty, and which is in accordance with common, everyday experience. *International, etc., Co. v. Anchonda*, 33 Tex. Civ. App. 24, 75 S. W. 557; *Central, etc., R. Co. v. Hyatt*, 151 Ala. 355, 43 So. 867. A cross-examination of the witness might have exposed the inadmissibility of his quasi conclusion, but this was not attempted." *Louisville, etc., R. Co. v. Williams (Ala.)*, 62 So. 679, 682.

"There was no error in permitting the witness Bridges to testify, against defendant's objection, whether 'many' or a 'few' people used the particular crossing. It was in the nature of the statement of a collective fact, and not a conclusion of the witness. It was open for the defendant to inquire on cross-examination what constituted 'few' or 'many.' Nor was there any error in admitting in evidence, against the objection of the defendant on the grounds stated, the code of municipal ordinances of the city of Tusculumbia as to the particular ordinance. The code purported on its face to be a code of ordinances or by-laws of such municipal corporation. Code 1896, § 1822." *Southern R. Co. v. Weatherlow*, 153 Ala. 171, 44 So. 1019, 1021.

Agreement to Accept Prorate on Contract.—In an action on an order it appeared that plaintiff had received it from the original contractor, who was building houses for defendant, and the defendant had accepted it to be paid out of the fifth estimate. Before the fifth estimate was rendered, the contractor repudiated the contract, and the plaintiff completed the work on an agreement with defendant, without further estimates being rendered. The defendant claimed that plaintiff had agreed to complete the contract for the original contractor, and accept a prorate of what should be left after the house was

completed. Defendant's witness was asked whether it was not the agreement that defendant would accept a prorate of what should be left after the houses were completed. Held, that the question was proper as calling for the statement of a collective fact. *E. E. Shafer & Co. v. Hausman*, 139 Ala. 237, 35 So. 691.

Ability to Stop Train.—In an action for injuries to a passenger, plaintiff claimed that the train was running at a dangerous speed, and defendant asked the engineer whether he could have stopped at a crossing. Held, that defendant was not entitled to an answer to the question, since the conclusion called for was not a permissible shorthand rendering of collective facts. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113.

Quality and Sufficiency of Timber.—In a suit by a servant against a railroad company for injuries sustained by reason of a skid breaking while unloading machinery, questions to a witness as to what was the timber used, whether the piece broken was sufficient for unloading the machinery, and how large a piece should have been used, were permissible not as seeking expert opinion, but on the ground that the witness was testifying to collective facts. *St. Louis & S. F. R. Co. v. Brantley*, 168 Ala. 579, 53 So. 305.

"Plaintiff was allowed to ask a witness whether the skids which were used to unload the piece of machinery were heavy enough for that purpose, what was the matter with the timber constituting the skids, whether or not the timber which was broken was large enough for the piece of machinery to be unloaded on, and, finally, how large a timber ought to have been used to unload the machinery with safety. These rulings of the trial court are to be justified, not on the ground that the witness was an expert or that the matters inquired about required expert knowledge, as appellant assumes to have been the reason controlling the action of the court, but on the ground that the witness was testifying to collective facts. There have been many cases allowing questions of this sort. Thus in *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 So. 507, a witness was permitted to testify that the place where the injury occurred was a dangerous place for the car

to stop. That seems to be an extreme case. In *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216, a witness was allowed to testify that certain holes, which had been charged with dynamite and made ready for explosion, were 'properly charged.' Other illustrations are to be found in *McVay v. State*, 100 Ala. 110, 14 So. 862; *Rollings v. State*, 136 Ala. 126, 34 So. 349; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813. The witness must not, of course, be permitted to decide the issue in controversy. *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482; *Eureka Co. v. Bass*, supra. There was no error in allowing the questions indicated." *St. Louis, etc., R. Co. v. Brantley*, 168 Ala. 579, 53 So. 305, 308.

Exercising Acts of Ownership.—A witness with personal knowledge of the subject-matter may testify in ejectment as to whether the plaintiffs have exercised acts of ownership over the land in suit in the last twenty-five years; his testimony not being objectionable as an opinion, since acts of ownership are collective. *Busbee v. Thomas*, 175 Ala. 423, 57 So. 587.

"Defendants asked their witness Selman, 'Have the school trustees exercised any acts of ownership over any of that land or the academy, or anything else, in the last twenty-five years?' Objection to the question was sustained by the trial court. Acts of ownership are collective facts, and the form of this question was not objectionable, as calling for the witness' opinion or conclusion. *Woodstock Iron Co. v. Roberts*, 87 Ala. 436, 6 So. 349. Nor, in view of some of the testimony introduced for plaintiffs, was the witness' negation of such acts other than rightful and proper. There are three reasons, however, any one of which might justify the rejection of the question: First, it does not appear that the witness was qualified by any sufficient personal knowledge of the subject-matter of the inquiry to answer so sweeping a question; second, the inquiry as to acts of ownership over 'anything else' than the premises in dispute was outside the issue, and therefore irrelevant; and, third, it conclusively appears from the bill of exceptions that this witness, in his testimony actually given, told all he knew about the trustees and their acts of ownership and control over

the land, and, indeed, specifically answered in the negative this very inquiry, a duplication of which was not a matter of right in the defendants." *Busbee v. Thomas*, 175 Ala. 423, 57 So. 587, 590.

Physical Condition.—Plaintiff in an action on a policy of health insurance, requiring as a condition of recovery that he should have been necessarily confined to the house, could testify to the collective fact, within his cognizance, and of such character that an effort to have him state the ultimate elements of his condition would have contributed nothing to the enlightenment of the jury, that his disability was total, immediate, and continuous after a certain date. *Pennsylvania Casualty Co. v. Perdue*, 164 Ala. 508, 51 So. 352.

Obstruction of Alley.—Where a witness, in an action for obstruction of access through an alley, stated the facts in detail, the question as to whether or not the obstruction interfered with the use of the alley called for no more than a collective fact, and was not objectionable. *Birmingham Ry., Light & Power Co. v. Long*, 5 Ala. App. 510, 59 So. 382.

"The question asked the witness Lindsay called for no more than the shorthand rendering of a collective fact. *Shafer & Co. v. Hausman*, 139 Ala. 237, 35 So. 691. The witness stated in detail the facts, and even if the statement was an unauthorized conclusion it was not prejudicial to the defendant. *Hill v. State*, 146 Ala. 51, 41 So. 621; *Adair v. Stovall*, 148 Ala. 465, 42 So. 596." *Birmingham R., etc., Co. v. Long*, 5 Ala. App. 510, 59 So. 382, 384.

Sale of Personal Property.—Permitting a witness to testify that a sale of the engine in controversy in detinue was made between other parties was not error, where there was nothing in the question or the answer of the witness indicating that he did not testify as to a collective fact within his knowledge. *Shaw v. Cleveland*, 5 Ala. App. 333, 59 So. 534.

Circumstances Surrounding Injury from Car.—In an action for the death of a person hit by a car, evidence as to whether the locus in quo was a thickly populated neighborhood, where there were numbers of people on both sides of the track, whether the station thereat was a regular station or stopping place, and at what hour of the day the crossing was most used, was properly admitted to determine

the degrees of negligence of the defendant's servant in running at a high rate of speed. And such facts are collective, and may be testified to by any witness. *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584.

"There was no error in permitting the evidence as to whether the locus in quo was 'a thickly populated neighborhood,' where there were 'numbers of people on both sides of the track,' etc. Such evidence is permissible, in connection with other evidence, in order to determine whether the conditions at such place were such as to impute simple negligence or willful or wanton wrong to the engineer in running at a high rate of speed at the locality. *Highland Ave., etc., R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566; *Louisville, etc., R. Co. v. Orr*, 121 Ala. 489, 26 So. 35; *Weatherly v. Nashville, etc., Railway*, 166 Ala. 575, 51 So. 959." *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584, 590.

"For the same reason, there was no error in permitting the evidence as to at what hour of the day the crossing was most used. At any rate, the answers were favorable to the defendant, and it was not injured thereby. *Redus v. Milner, etc., R. Co.*, 148 Ala. 665, 41 So. 634; *Alabama, etc., R. Co. v. Guest*, 144 Ala. 372, 29 So. 654; *S. C.*, 136 Ala. 348, 34 So. 968; *Birmingham R., etc., Co. v. Ryan*, 148 Ala. 69, 41 So. 616; *Southern R. Co. v. Forrister*, 158 Ala. 477, 48 So. 69; *Birmingham Southern R. Co. v. Fox*, 167 Ala. 281, 52 So. 889." *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584, 590.

Amount Due for Transportation.—In an action to recover for transportation furnished by plaintiff to defendants, testimony of defendants as to whether or not they owed plaintiff for the transportation was not a conclusion, but a collective fact, and competent. *Owen v. McDermott*, 148 Ala. 669, 41 So. 730.

"On the trial one of the defendants was asked this question: 'Do you owe Mr. Owen any sum for transportation, or not?' The plaintiff objected to the question on the grounds that it called for a conclusion of the witness and that it was incompetent. The court sustained the objection, and the defendants reserved an exception to the ruling of the court. This ruling of the court was assigned in the motion

as one of the grounds for a new trial. The foundation of the plaintiff's cause of action was a claim of \$238 for transportation from New York to Mobile, alleged to have been furnished at the request of the defendants by the plaintiff to four members of the 'Thorne Opera Troupe.' The plaintiff had given evidence tending to show that he had furnished the transportation as alleged and that it was worth the amount claimed. Whether or not the defendants owed plaintiff for the transportation was a matter within the knowledge of the defendants, and testimony that they did not owe plaintiff would not have been a conclusion, but a collective fact, and it would also have been competent evidence. The witness would have been subject to cross-examination as to the answer he would have given. The court erred in sustaining the objection. *Shrimpton v. Brice*, 109 Ala. 640, 20 So. 10; *Hood v. Disston*, 90 Ala. 377, 7 So. 732; *Turnley v. Hanna*, 82 Ala. 139, 2 So. 483; *Elliott v. Stocks & Bro.*, 67 Ala. 290; *Massey v. Walker*, 10 Ala. 288, 290. And it was within the power of the court to grant a new trial on account of this error, committed against the defendants." *Owen v. McDermott*, 148 Ala. 669, 41 So. 730.

Danger in Stopping Hand Car.—In an action against a railroad company for the death of a section hand caused by the sudden stopping, by direction of the foreman, of a hand car which was in front of a car on which deceased was riding, evidence that it was a dangerous place to stop was the statement of a collective fact, and admissible. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 So. 507.

Sounding of Whistle.—On cross-examination of a witness who testifies that no whistle was sounded at the time of a railroad accident, an inquiry whether it might not have been, and he not have heard it, may be excluded as mere matter of opinion for the jury to determine. *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

Correctness in Surveying Line.—A county surveyor, testifying as to a line which he has himself run, may state that it was run correctly. *Shook v. Pate*, 50 Ala. 91.

Value of Colt.—On an issue as to the value of a horse the owner may testify

that it was "a very fine colt," "fine stock," "sired by a trotting horse," "its mother a fine blooded mare," and he may use kindred expressions illustrating its qualities, including "beauty of form" and "gracefulness of movement." *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

Action for Criminal Conversation.—

Where, in action for crim. con., a witness testifies that he saw the defendant at the plaintiff's house in company with the wife of the latter, his opinion as to the purpose for which he was there is not admissible as evidence. *Cox's Adm'r v. Whitfield*, 18 Ala. 738.

§ 358. Special Knowledge as to Subject-Matter.

§ 358 (1) In General.

Character and Contents of Lost Instrument.—Where a witness stated that he did not recollect the contents of a lost instrument, and merely gave his opinion as to whether it was a bill of sale or a mortgage, the exclusion of such evidence was not error. *Stuart v. Mitchum*, 135 Ala. 546, 33 So. 670.

Control of One Workman over Another.—In an action for an injury to an employee at a sawmill, there was no error in permitting a witness to be asked whether the person running the saw had control over the assistant, where the witness had been shown to be sufficiently acquainted with the business to know the fact, and there was evidence that the plaintiff was an assistant to the person running the saw. *Forbes & Carlross v. Davidson*, 147 Ala. 702, 41 So. 312.

Likeness of Pictures.—One who has had pictures of himself or friends taken by an artist is competent to testify that such pictures were good likenesses, though he may have no practical knowledge of the art of taking such pictures. *Barnes v. Ingalls*, 39 Ala. 193, cited in note in 35 L. R. A. 802.

In *Barnes v. Ingalls*, 39 Ala. 193, cited in note in 35 L. R. A. 802, photographs appear to have been put in evidence for the purpose of determining the merits of a photograph painter who executed them, but the questions in dispute were in respect to the testimony offered in respect to the photographs, such as the opinions of witnesses as to their being good like-

nesses or otherwise, rather than as to the admissibility of the photographs themselves.

Competency of Slave.—Testimony that the witness "considered" a slave a good hand is competent, when it appears from the rest of his deposition that it was based upon his knowledge that the slave was active, able, and willing. *Ward v. Reynolds*, 32 Ala. 384.

Proper Light on Boat.—The testimony of a mate of a steamboat, who had been engaged in navigating a boat for nine or ten years, and who saw the collision, that the flatboat which was sunk did not have out a proper light, is competent. *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176.

Sufficiency of Officers and Crew of Steamboat.—Upon a question as to the sufficiency of the number of officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons, having an opportunity of personal observation and of forming a correct opinion, and testifying to the facts derived from that observation, is admissible. *McCreary v. Turk*, 29 Ala. 244.

"Upon such a question as the sufficiency of the number of the officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons, having an opportunity of personal observation, and of forming a correct opinion, and testifying to the facts derived from that observation, is admissible. The effect of admitting such opinion as evidence is not to submit to the decision of the witness a point which the jury alone can try, but merely to assist them in judging of a question of common sense as well as of science, with which the witness may reasonably be supposed, on account of his superior opportunities for becoming acquainted with it and forming a correct judgment, to have been more competent to judge than they themselves. The jury are to decide upon the value of the opinion of the witness, as well as upon the value of the evidence on which it is founded; and thus the whole matter is submitted to that consideration. *Florey v. Florey*, 24 Ala. 241; *Milton v. Rowland*, 11 Ala. 732; *Porter v. The Peq. Man. Co.*, 17 Conn. 249; *Fenwick v. Bell*, 1 Carr. & Kirwan, 312; *Weber v. Eastern*

R. R. Co., 2 Metc. [Mass.] 147; *Beckwick v. Sydebotham*, 1 Camp. 116; *Malton v. Nesbit*, 1 Car. & Payne, 70; 1 Greenlf. Ev., § 440; *Watson v. Anderson*, 13 Ala. 202." *McCreary v. Turk*, 29 Ala. 244, 245.

Odors from Sewage Purification Plant.—A witness who was familiar with a sewage purification plant, and who had visited it under different weather conditions and at different times, was competent to give his opinion as to whether under any wind or weather conditions he could smell odors from the plant while standing at a certain place to show the volume and intensity of the odors from the plant, and the consideration that the wind blew away from him on the occasions he visited the plant, and that the jury were as familiar with the facts, merely went to the weight of the evidence. *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315.

§ 358 (2) Bodily Condition.

Illness of Person.—"Though a nonexpert witness would not be allowed to testify that a patient had malarial or typhoid fever, yet he could testify that a person was ill or had fever. *Dominick v. Randolph*, 124 Ala. 562, 27 So. 481." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

"This court has said that the most ignorant witnesses may be permitted to state the fact of disease, when open to the perception of the senses (*Milton v. Rowland*, 11 Ala. 732); that the apparent condition of the physical system as to health or sickness is certainly a matter of fact (*Bennett v. Fail*, 26 Ala. 605). In such cases, if the observations of the witnesses do not justify their assertions, it is the office of a cross-examination to show this. *Blackman v. Johnson*, 35 Ala. 252, 255; *Barker v. Coleman*, 35 Ala. 221." *Central, etc., R. Co. v. Jones*, 170 Ala. 611, 54 So. 509, 510.

Species of Fits.—A witness who is not a medical man is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. *McLean v. State*, 16 Ala. 672, cited in note in 38 L. R. A. 742.

§ 358 (3) Mental Condition or Capacity.

See ante, §§ 355 (14), 356 (7).

See GENERAL INSANITY.

It is generally stated that nonexpert

witnesses may testify as to their opinions upon the question of the sanity or insanity of another where there has been long and intimate acquaintance to enable them to form a correct judgment as to the mental condition of such person. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685; *Fountain v. Brown*, 38 Ala. 72, cited in note in 38 L. R. A. 729.

Reason for Allowing Opinions.—The admission of opinions in evidence on an issue of insanity is necessary for the reason that it may be impossible to convey to the mind of the jury from the medium of language a distinct idea of the true condition of the party by a statement of the facts alone. *Powell v. State*, 25 Ala. 21, cited in note in 38 L. R. A. 723.

Length of Acquaintance Required to Render Opinion Admissible.—No precise rule can be laid down as to the length or character of acquaintance which would render the opinion of a person not a physician admissible evidence on a question of insanity. In case of general insanity—a total incapacity to distinguish right from wrong on any question—the same degree of observation is not required to discover the existence of the disease as in cases of monomania or partial derangement, and therefore the same degree of intimacy is not necessary to render the opinion of the witness admissible; but in every case the circumstances must be such as to have afforded the witness the opportunity of forming an accurate judgment as to the existence or nonexistence of the disease, considered with reference to the character or degree in which it is alleged to exist. *Powell v. State*, 25 Ala. 21, cited in notes in 36 L. R. A. 65, 69, 38 L. R. A. 723, 729, 730, 741, 743.

“There are some diseases of the body, which it requires no physician to detect or pronounce upon. They are shown by external symptoms, so marked in their character, as to be readily seen and determined by every one of ordinary intelligence; and the total want of reason, as manifested by complete idiocy, or the utter dethronement of the intellect, as exhibited by mania, or raving madness, seldom, if ever, requires any long acquaintance or close observation to discover. Opinion is necessary, for the reason that it may be impossible to convey to the

mind of the jury through the medium of language, a distinct idea of the true condition of the party by a statement of the facts alone (*Norris v. State*, 16 Ala. 776), but it is impossible to lay down any precise rule as to the length or character of acquaintance which would render the opinion of a witness admissible on this question. All we can say is, that the circumstances must be such as to have afforded the opportunity to form an accurate judgment as to the existence or nonexistence of the disease, considered with reference to the character or degree in which it is alleged to exist.” *Powell v. State*, 25 Ala. 21.

And the acquaintance with another which will qualify a witness on an inquisition of lunacy who is not a physician to give his opinion as to his sanity or insanity in connection with the facts upon which it was based must be something more than mere occasional brief interviews on general or indifferent subjects; it must be one which will enable him to affirm with some confidence that he has knowledge of the intellectual workings and mental states of the person in question. In *re Carmichael*, 36 Ala. 514, cited in note in 38 L. R. A., 730.

Witnesses who are not medical experts should be applied to show that their acquaintance with the testatrix had been sufficiently intimate and long to justify the formation of a correct judgment as to her mental status and habits, before testifying as to the condition of her mind at the time of making her will. *Moore v. Spier*, 80 Ala. 129, cited in note in 38 L. R. A. 730.

Before a witness can be allowed to testify as to the mental condition of the testatrix, it must be first shown that his acquaintance had been so intimate, and had continued for such a length of time, as justified the formation of a correct judgment as to her mental status and habits. *Moore v. Spier*, 80 Ala. 129.

So the right to ask questions calling for opinions as to testamentary capacity or capacity to make a will or the will in question has been sustained in the following cases: *Roberts v. Trawick*, 13 Ala. 68; *Stuckey v. Bellah*, 41 Ala. 700, cited in note in 36 L. R. A. 69.

A witness who has known a party from

childhood, and been intimate with him, is competent to give his opinion as to his mental status generally, though he seldom saw him during two or three months which immediately preceded his execution of an instrument claimed to be void for want of mental capacity. *Stubbs v. Houston*, 33 Ala. 555, cited in note in 38 L. R. A. 732, 734.

And a witness in a contest over a gift made by a person since deceased, who was a relative of and intimate with deceased and had stayed at his house for some time, is competent to testify as to his mental capacity. *Stuckey v. Bellah*, 41 Ala. 700, cited in note in 38 L. R. A. 733.

And so is a witness who has been intimately acquainted with a testator for thirteen years, and has frequently been at his house for weeks together. *Florey v. Florey*, 24 Ala. 241, cited in note in 38 L. R. A. 732.

A witness who "was intimate with a deceased person, was a relative, and had stayed at his house for some time," and another witness who "had known the deceased intimately for two years before his death, and was with the deceased every day or two for awhile before his death," are competent to give an opinion on the question of the mental capacity of the deceased about the time of his death. *Stuckey v. Bellah*, 41 Ala. 700, cited in notes in 36 L. R. A. 69, 38 L. R. A. 733, 741, 37 L. R. A., N. S., 596.

Acquaintance in Quarantine Station.—

Where a nonexpert offering to testify on an issue of insanity stated that he had known the person claimed to be insane, had been in the quarantine station with him for ten months, and had seen and talked with him very often, he was competent to give his opinion as to his sanity under the rule that a nonexpert may so testify only when he has had long and intimate acquaintance with the person inquired about, as distinguished from a casual acquaintance and occasional conversations and interviews. *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147.

"Where the question of insanity is a fact in issue, a nonexpert witness may give his opinion that a person is sane or insane only when it is shown that he has had long and intimate acquaintance

in contradistinction to a casual acquaintance and occasional conversations and interviews with the person. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481; *Burney v. Torrey*, 100 Ala. 157, 14 So. 685. The witness Shaw testified that he knew *John P. Fowler* in 1892, that he was at the quarantine station with him for ten months, would see him every day, and talked to him very often (not casually or occasionally). There was no error in permitting this witness to testify as to the mental condition of said *J. P. Fowler*." *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147, 148.

One, not an expert, who testified that he had known defendant for twelve years, and had had a great many conversations with him, and that he wrote the contract sued on, and that it was signed by defendant in his presence, has had an acquaintance with defendant sufficiently long and intimate to render him competent, as a nonexpert, to testify as to whether or not defendant was sane at the time he executed the contract. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594.

One who testifies that he had known defendant for several years, but did not know him intimately; that he had seen him occasionally, and had had casual short conversations with him, but no business transactions until a short time before he executed the contract, is not qualified as a nonexpert to testify on the question of his sanity. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594.

Facts and Opinions May Be Given.—

Upon questions of insanity, a witness whose acquaintance with the party has been such as to enable him to form a correct opinion of his mental condition may not only depose to facts conducing to establish unsoundness of mind, but may also, in connection with those facts, give his own opinion upon the question of sanity or insanity. *Florey's Ex'rs v. Florey*, 24 Ala. 241, cited in note in 38 L. R. A. 730, 732; *Norris v. State*, 16 Ala. 776, cited in note in 38 L. R. A. 730.

The opinions of witnesses in connection with the facts on an issue as to mental capacity, however, are admissible in evidence where it is apparent that those

who were called upon to testify occupied a position toward the person alleged to be insane which enabled them to form a correct judgment as to his mental condition. *Powell v. State*, 25 Ala. 21; *Ford v. State*, 71 Ala. 385, cited in note in 38 L. R. A. 730.

Knowledge of Intellectual Workings and Mental Status.—A witness, not a physician, in order to be competent to testify on a question of sanity, must have such an acquaintance with the person whose sanity is in question as will enable him to affirm with some confidence that he has a knowledge of the intellectual workings and mental status of such person. In *re Carmichael*, 36 Ala. 514, cited in notes in 38 L. R. A. 730, 39 L. R. A. 309, 37 L. R. A., N. S., 598.

An administrator who was a testator's family physician can not testify in an action on the testator's note as to the condition of his mind at the time it was made, under Ala. Code, § 3058, for giving testimony as to any transaction with or statements by deceased persons. *Davis v. Traver*, 65 Ala. 98, cited in note in 39 L. R. A. 306.

Necessity for Stating Circumstances upon Which Opinion Is Predicated.—The fact that a witness, who had an opportunity of forming a correct judgment of the testator's sanity, is unable to state all the circumstances on which his opinion is predicated, or that the circumstances stated by him do not justify his opinion, does not authorize the court to exclude his opinion as evidence, or to instruct the jury to disregard it. *Stubbs v. Houston*, 33 Ala. 555.

Firmness of Views and Convictions.—A witness, having knowledge of the facts, may testify that the testatrix was firm in her views and convictions, or, on the other hand, that she was capable of being easily influenced; but not that her character in the community was that of one easily influenced. *Moore v. Spier*, 80 Ala. 129.

Capacity to Assign Note.—On an issue of whether an assignor had sufficient mental capacity to assign a note, a non-expert witness, not shown to have such a long acquaintance with the assignor as to enable him to form a correct judgment in the premises, and who does not state

the facts on which his opinion is based, is not qualified to give an opinion on her mental incapacity, and the fact that the assignor was near dissolution would make no difference. *Carlisle v. Atchley*, 165 Ala. 265, 51 So. 798.

"The court properly refused to admit such evidence. Fulmer was not shown to have been qualified to give an opinion on that matter. Before a nonexpert, such as Fulmer was, can give an opinion of one's mental incapacity, it is essential that he be shown to have had such a long and intimate acquaintance with the person whose mental state is the subject of inquiry as to enable the witness to form a correct judgment in the premises, and, more, he must state the facts and circumstances on which his opinion is based. Otherwise, such a witness is incompetent to give his opinion that another lacks mental capacity. *Burney v. Torrey*, 100 Ala. 157, 14 So. 685. We know of no reason why this rule should have modification when the subject of the inquiry is near to final dissolution. Some retain their faculties even until the moment the end comes, and others do not. The frailty of the body does not, of course, necessarily show a like weakness of the mind. They may concur, but not necessarily. The proof of the former does not, alone, tend to show the latter." *Carlisle v. Atchley*, 165 Ala. 265, 51 So. 798.

Impression of Danger.—Testimony of a witness of the accident that a woman who was driving the horse was "so anxious that she got the impression on her part that she was in danger" was inadmissible; the witness not being competent to testify as to the woman's mental status. *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853.

§ 358 (4) Quantity or Capacity.

Amount of Cotton in Tract.—A witness, having testified that he was a farmer and had been cultivating cotton all his life, and that he saw the land that was in cotton on the tract in question, was competent to give his opinion as to what, in his opinion and best judgment, it then made. *Baker v. Cotney*, 142 Ala. 566, 38 So. 131.

"The witness was an expert farmer, and could have given his opinion as to

the amount of cotton produced on the land." *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 132.

"The witness doubtless could not tell exactly what the land made, yet he could have given it as his opinion that it made less than four bales, or less than one, and which would have been contradictory evidence as to the plaintiff's lien or title to the cotton in question. There was also evidence that plaintiff had gotten about fifty bushels of corn off the land, and, while the mortgage shows a credit for corn, it does not give the amount, and the jury ought to have ascertained whether or not credit had been given for all corn he got." *Baker v. Cotney*, 142 Ala. 566, 38 So. 131, 132.

Number of Trees Cut.—Where witnesses had "looked over the ground where the timber had been sawed," they could give their best judgment as to the number of trees cut, though they did not count the stumps. *Bufford v. Little*, 159 Ala. 300, 48 So. 697.

Capacity of Sawmill.—In an action for breach by defendant of a contract requiring him to run and saw plaintiff's logs with all due diligence, and as fast as water would permit, witnesses who knew the capacity of defendant's sawmill and waterways could testify to the number of logs that could have been run and the number that could have been sawn each day while plaintiff's logs were in readiness. *Fletcher v. Prestwood*, 143 Ala. 174, 38 So. 847.

§ 358 (5) Due Care and Proper Conduct in General.

Qualifications of Mine Superintendent.—A witness who testified that he had been engaged in mining two and one-half years; that the duties of defendant's superintendent were, together with his laborers, to take down from the roof of the entry of the mine, and load, slate or rock, and that he was familiar therewith; and that he had known the superintendent four and one-half years, and had seen his work often, was competent to testify as to whether the superintendent was qualified to act as such. *Buckalew v. Tennessee Coal, Iron & R. Co.*, 112 Ala. 146, 20 So. 606.

Cause of Injury in Mine.—Where a wit-

ness testified that he saw plaintiff immediately before his injuries driving down the entry of a coal mine, and immediately after the accident saw him pinioned between the derailed car and the side of the mine, his statement that plaintiff was hurt on account of the car being derailed as he was hauling coal from the mine was not objectionable because the witness did not see the accident. *Republic, etc., Steel Co. v. Lawson*, 2 Ala. App. 525, 56 So. 597.

Misconduct of Flagman.—In an action for injuries to plaintiff while crossing between the cars of a freight train, plaintiff testified that the engine was two or three car lengths from him when he tried to cross, that the track was straight, and that steam was escaping noisily from the engine. He did not know where the conductor was and did not see the engineer. He was then asked whether the brakeman or flagman, who was present and said, "Come across," spoke loud enough for the engineer to hear him. Held, that the question was properly excluded as calling for the witness' conclusion in the absence of preliminary proof showing where the engineer was, or what he was doing, or that the witness knew where he was. *Westbrook v. Kansas City, M. & B. R. Co.*, 170 Ala. 574, 54 So. 231.

§ 358 (6) Railroadings.

Effect of Starting Train.—A witness, not shown to be an expert in managing an engine or running a train, was not qualified to answer the question, "When it is in that position, just turned, and you start it off and put the steam to it, doesn't that create a jerk in the train?" *Dilburn v. Louisville & N. R. Co.*, 156 Ala. 225, 47 Ala. 210.

Methods of Coupling Cars.—A witness, having sufficient knowledge, may testify as to the general practice of railroads in coupling cars, and the comparative safety of different methods, but is not competent to show that the different method of another road is better than that of defendant. *Propst v. Georgia Pac. R. Co.*, 83 Ala. 518, 3 So. 764.

Distance Train Can Be Stopped.—A witness not shown to know the time or distance within which a train can be stopped is incompetent to give his opinion in re-

gard thereto. *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 25 So. 251.

§ 358 (7) Speed.

Speed of Train.—Any one competent as a witness may testify to the speed of a train at the time of an accident. *Highland Ave. & B. R. Co. v. Sampson*, 112 Ala. 425, 20 So. 566.

A witness, who saw the train, and who had noticed the speed of trains—having ridden on them and worked as a section hand on a railroad, and seen them pass a great many times—is competent to testify as to the speed at which the train in question was running, though he stated that his opinion was simply his guess. *Louisville & N. R. Co. v. Orr*, 121 Ala. 489, 26 So. 35.

§ 358 (8) Cause and Effect.

Effect of Lighting Cotton.—A person familiar with cotton and its liability to catch fire may give his opinion as to whether cotton, if a lighted coal were applied to it, would ignite and burn so quickly that its extinguishment would be impossible or improbable. *Seals v. Edmondson*, 71 Ala. 509.

Cause of Death.—In an action to recover for the death of plaintiff's intestate by suffocation or other unnatural cause, it was error to allow a witness to testify that deceased "looked as if he had smothered to death," where the witness was not shown to be competent to give an opinion on the subject. *Alabama Consol. Coal & Iron Co. v. Heald*, 154 Ala. 580, 45 So. 686.

A physician who has had long experience in the practice of his profession, and a knowledge of the symptoms of the malady of the deceased, is competent to testify as an expert. *Mitchell v. State*, 58 Ala. 417.

Where the physician testified that "he would not have come to the conclusion that the symptoms of the sickness and the death of deceased was caused by poison by arsenic, if he had not heard that there was arsenic in the house,"—the force of his testimony would be much impaired by such acknowledgment though it would still be admissible, and for the jury to decide whether it should influence their verdict. *Mitchell v. State*, 58 Ala. 417.

Injury Caused by Derailment of Car.—

A witness having seen plaintiff in a coal mine immediately before and immediately after his injury was properly permitted to testify that plaintiff was hurt because of the car being derailed as he was hauling coal from the mine, though he did not see the accident. *Republic Iron & Steel Co. v. Lawson*, 2 Ala. App. 525, 56 So. 597.

§ 358 (9) Pecuniary Condition.

Indebtedness to Firm.—Testimony of one as to indebtedness of decedent to a firm, showing that he was not testifying from his own knowledge, but from what he found in its books, which he did not keep, is not competent. *Kornegay v. Mayer*, 135 Ala. 141, 33 So. 36.

Commercial Standing of Former Employer.—It is error to permit a former salesman, who has never examined the books, to testify concerning the commercial standing of his employer during the time he was in his service, there being no other evidence that witness had any knowledge on the subject. *Stix v. Keith*, 85 Ala. 465, 5 So. 184.

Financial Standing of Buyer.—In an action against a seller for breach of a contract to sell and deliver cotton seed hulls, one having general charge of the buyer's cotton seed hull department, with authority to buy and pay for hulls, and who testified to personal knowledge of the buyer's financial condition, could testify that the buyer was able and willing to pay for the hulls contracted for with defendant if they had been delivered, such testimony being as to a collective fact, and it was immaterial that he was absent from the buyer's place of business a part of the time covered by the testimony as he could know its financial conditions, etc., without being present. *Farmers' Cotton Oil & Trading Co. v. W. L. Ward & Son*, 170 Ala. 491, 54 So. 513.

Solvency of Purchaser.—In an action by the vendor of goods to recover them from one to whom his vendee had sold them, on the ground that such vendee had fraudulently represented himself as solvent at the time of their purchase, when he had no reasonable expectation of paying for them, plaintiff can not, as witness for himself, be allowed to state that "from general report he understood"

that the purchaser was solvent. *McCormick v. Joseph*, 77 Ala. 236, cited in note in 23 L. R. A., N. S., 368, 370.

Insolvency of Certain Debtors.—A witness may state that "he regards certain debtors as insolvent," if his testimony shows that his conclusion is based upon his knowledge of their circumstances; but not otherwise. *Royall's Adm'r v. McKenzie*, 25 Ala. 363.

§ 358 (10) Handwriting.

See post, § 365.

Genuineness of Writings.—One who has merely seen writings which purported to be those of a certain person, but who is not shown to have personally communicated with said person respecting them, or to have acted upon them as his can not testify to his belief as to the genuineness of said writings. *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 11 So. 365, cited in note in 63 L. R. A. 977.

Genuineness of Signature.—One who has seen another write, or who knows his handwriting, may express an opinion as to the genuineness of a disputed signature, though he be not an expert. *Moon's Adm'r v. Crowder*, 72 Ala. 79, cited in note in 62 L. R. A. 836; *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

In an action against a carrier for failure to deliver three bales of a shipment of cotton, a witness was properly permitted to testify for plaintiffs that he was their agent in the purchase of cotton during the year in which the particular bales were shipped, that during that year several bales had been received by plaintiffs on bills of lading signed by the same person who signed bills of lading for the particular shipment, since any witness who has seen another write or who knows his handwriting may express an opinion as to the genuineness of his signature. *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84.

"For the purpose of showing that the appellant had received the cotton for the purpose of transporting and delivering it to the appellees, two bills of lading were introduced. A witness was examined by appellees, who testified that he had been an agent or servant of appellees in and about the purchase of cotton during the

year in which the cotton was shipped, and that during such year several hundred bales of cotton had been received by the appellees on bills of lading signed by the same party who signed the bills of lading evidencing the shipment of the cotton in dispute. 'The competency of persons to give their opinions as to whether a given signature is in the proper handwriting of the person it purports to have been made by is not confined to experts. Any witness who has seen the party write, or who knows his handwriting, may express his opinion as to the genuineness of the signature. Of course, the extent of his familiarity with the handwriting will enter into the weight of the testimony.' *Moon v. Crowder*, 72 Ala. 79." *Southern R. Co. v. Cortner*, 3 Ala. App. 400, 58 So. 84, 85.

A witness who has seen a party write once, but who says he does not know his handwriting, may be asked: "Has the handwriting which you have seen made any impression of the general character of his handwriting upon your mind? If yea, does the signature of the writing presented to you make an impression on your mind, amounting to a belief, that the writing shown you is the writing of the plaintiff?" *Hopper v. Ashley*, 15 Ala. 457, cited in note in 63 L. R. A. 980.

"When it becomes necessary to prove handwriting, any person having a previous knowledge of the writing of the supposed writer may express an opinion that the writing in question was or was not written or signed by him. The frequency or infrequency of the opportunities of the witness to acquire knowledge rendering him capable of expressing an opinion, or the nearness or remoteness of such opportunities, in point of time, to the time of his examination, are matters addressed to the credibility or weight, and not to the admissibility, of the evidence, and are for the consideration of the jury. The testimony of the witness Glidwell shows that on two or three occasions, considerable lapse of time intervening, he had seen the defendant write the names of persons and places casually, and that there was in his writing a peculiarity attracting his attention, and the last of these occasions was several years before the trial. The testimony is not the highest and most satisfactory kind, but

it was competent, and authorized the introduction of the writing in evidence, so far as its admissibility depended on proof of handwriting. *Lawson Exp. Ev.*, 280-286; 1 *Greenl. Ev.*, § 577; *Hopper v. Ashley*, 15 Ala. 457." *Karr v. State*, 106 Ala. 1, 17 So. 328, 330, cited in note in 62 L. R. A. 970.

Knowledge Derived from Correspondence.—A witness who has corresponded with a person by mail, and received replies purporting to be written by him, may testify to his handwriting, though he has never seen him; and his testimony is prima facie evidence of the genuineness of such person's signature. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369, cited in notes in 63 L. R. A. 972, 17 L. R. A., N. S., 229, 7 L. R. A., N. S., 559.

Handwriting of Anonymous Letter.—A witness who had seen the defendant write, on two or three occasions, the last of which was several years before the trial, and had noticed in his writing certain peculiarities, was competent to testify as to whether an anonymous letter offered in evidence was in defendant's handwriting. *Karr v. State*, 106 Ala. 1, 17 So. 328, cited in note in 63 L. R. A. 970.

But in *Karr v. State*, 106 Ala. 1, 17 So. 328, cited in note in 63 L. R. A. 970, it is declared that the frequency or infrequency of the opportunities of the witness to acquire knowledge rendering him capable of expressing an opinion, or the nearness or remoteness of such opportunities in point of time to the time of his examination, are matters addressed to the credibility or weight, and not to the admissibility, of the evidence, and are for the consideration of the jury. So where the testimony of a witness showed that on two or three occasions, with a considerable time intervening, he had seen an individual casually write the names of persons and places, and that there was in his handwriting a peculiarity attracting his attention, but the last of these occasions was several years before the trial, his opinion of its genuineness was competent, and authorized the introduction of the writing in evidence, although the testimony was not of the highest and most satisfactory kind.

Figures in Pencil.—It was not error to

refuse to allow a witness to give his opinion as to whether certain figures in pencil on books of an assignor, which were used also by the assignee, were made by the assignor, before it was shown that the witness knew his handwriting. *Richardson v. Stringfellow*, 100 Ala. 416, 14 So. 283, cited in note in 36 L. R. A., N. S., 368, 372.

Insufficient Knowledge to Testify to Handwriting.—One who is not an expert on handwriting, and testifies that he did not know defendant's handwriting; that he had seen him write but once, and that he had seen but that one writing that he knew to be defendant's; that he was not familiar with defendant's handwriting, and could not say whether the note or order under consideration was in defendant's handwriting—is not competent to give an opinion as to such writing. *Nelms v. State*, 91 Ala. 97, 9 So. 193, cited in note in 63 L. R. A. 980.

And proof by a witness who had seen the defendant write but once, that he was not familiar with and did not know the defendant's handwriting, and could not say whether the note in question was in his handwriting; without more and without any special instructions as to the necessary extent of a witness' knowledge or acquaintance with the handwriting—did not show that the knowledge of the witness was sufficient to render him competent to give an opinion. *Nelms v. State*, 91 Ala. 97, 9 So. 193, cited in note in 63 L. R. A. 980.

Testimony that the handwriting of a letter was like other handwriting the witness had seen, which purported to be that of the alleged author, was insufficient to authorize the admission of the letter in evidence. *White v. Tolliver*, 110 Ala. 300, 20 So. 97.

Alteration of Check by Chemicals.—Whether a check could be altered in a certain manner by the use of chemicals without bearing any evidence of such alteration could be shown only by persons who possessed knowledge of such means and processes. *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53.

"The question on the trial was not whether the check appeared on its face to have been altered. To the contrary, it was conceded that it did not so appear.

But the real, and, indeed, the only, inquiry, was whether a check could be altered in the way it was claimed this one has been, by the use of gas or acids or other chemicals, without afterwards bearing any evidence of alteration. This was a question for solution by expert evidence from the mouths of witnesses whom knew something about the effect of chemicals in the connection under inquiry. A man without knowledge on this subject is not a competent witness upon it, however many experiences he may have had in the examination of checks and other papers with a view to determining whether they in fact gave any indication in and of themselves, upon their faces, of having been tampered with. However expert such persons may become in the interpretation of a paper by everything that appears on its face, they yet may be as entirely ignorant of the means and processes by which writing is taken out of paper, and as to whether it can be taken out so as to leave no sign or token that any writing other than that presently appearing on the paper has ever been there, as a person having no experience or special information in either respect. Hence we think the court erred in allowing certain of defendant's witnesses, bank tellers and the like, who had no expert knowledge on the subject, to be asked their opinion as to whether such an alteration could be made. Their answers, however, do not appear to have been of a character to prejudice the plaintiff." *Birmingham Nat. Bank v. Bradley*, 116 Ala. 142, 23 So. 53, 55.

§ 358 (11) Nature, Condition, and Relation of Objects.

Condition of Fence.—A farmer who had had considerable experience with fences, but who had not seen a particular fence for two or three years prior to its destruction by fire, was not competent to testify whether the fence was sufficient to turn cattle. *Edwards v. Massingill*, 3 Ala. App. 406, 57 So. 400.

Weight of Engine.—Where a witness testified that he had been an engineer for a number of years, and had had a great deal of experience during that time, he was competent to give his estimate of the weight of a locomotive engine, the over-

turning of which killed plaintiff's intestate. *E. E. Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 So. 445.

"Presumably the witness Meroney, in the course of his experience as an engineer and section boss, had acquired such knowledge of engines as, together with his personal observation of the engine derailed, qualified him to give, in testifying, his estimate of the weight of that engine. 'The rule excluding opinions as evidence is not applied so strictly to questions of values and estimates as to many other subjects.' *Mobile, etc., R. Co. v. Riley*, 119 Ala. 260, 24 So. 858." *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 37 So. 445, 448.

Ancient Surveyor's Showing Correct Line.—Where, in an action involving a disputed boundary line, there was much testimony concerning an upper and lower line, defendant contending that the north or top line, as shown by maps in the record, was the true line dividing the north and south half of the section, while plaintiff contended that the northwest quarter extended to the lower line, it was proper to permit a witness, who was not a surveyor, but who had long acquaintance with the property, to testify whether he found surveyor's marks on trees along the upper line all the way through the section from east to west, since evidence of ancient surveyor's marks along the line had a bearing on the question whether that was the correct line. *Ashford v. McKee* (Ala.), 62 So. 879.

§ 358 (12) Value in General.

"At one time opinion evidence as to value was not admissible; but that rule has now been departed from, says Mr. Greenleaf, except by the court of New Hampshire. 1 Greenl. Ev., §§ 441, 442. Witnesses who have sufficient knowledge of the facts may testify as to the value of property. In fact, one of the reasons assigned why a witness should not be allowed to testify as to the amount of damages done to land or personalty, or that resulted from the breach of the contract, is that the witness should be required to testify as to the value of the property before and after, or without and with the injury or wrong complained of. *Hames v. Brownlee*, 63 Ala. 277; *Ladd v. Ladd*,

121 Ala. 583, 25 So. 627; 3 Mayfield's Digest, pp. 492, 493." Central, etc., R. Co. v. Jones, 170 Ala. 611, 54 So. 509, 511.

"To this general rule there are many exceptions, most of which are noted by Mr. Greenleaf, in his work on Evidence, vol. 1, § 440; and the question before us is whether this case proves one of the exceptions to the general principle. When the question to be ascertained is the value of property, the opinion of witnesses as to its value is frequently admitted, and in many cases it would be difficult, if not impossible, to prove the value in any other mode. Kellogg v. Krauser, 15 Serg. & R. 137 [16 Am. Dec. 480]; C. & H. notes to Phil. Ev., vol. 2, 760. But I have not been able to find any case that holds the opinions of witnesses, as to the quantum of damages resulting from any act, competent proof." Montgomery, etc., R. Co. v. Varner, 19 Ala. 185, 186.

Value of Use of Goods.—"While the evidence offered and allowed in this case was not as to the value of the goods, but was as to the value of the use of same during the time they were wrongfully kept from the plaintiff by the defendant, which was the basis of the cause of action, this evidence we think was admissible and not subject to the objection interposed by the defendant." Central, etc., R. Co. v. Jones, 170 Ala. 611, 54 So. 509, 511.

§ 358 (13) Value of Services.

Value of Physician's Services.—One not a physician is incompetent to express his opinion of the value of medical services rendered to an invalid. Mock v. Kelly, 3 Ala. 387.

Services of Engineer.—In an action for the death of plaintiff's intestate, a question as to "what would the services of deceased have been worth when he had reached twenty-one years of age, if he had lived," was rightly excluded, as calling for an opinion based on contingencies too remote and uncertain to furnish a basis for the assessment of damages. Nave v. Alabama, etc., R. Co., 96 Ala. 264, 11 So. 391.

"The testimony of the witness H. S. Jones was properly excluded. The plaintiff was not shown to be an engineer, or doing the work of an engineer; hence the

salary of an engineer was no criterion for the value of his services. Besides, the witness stated that the sole basis for his opinion was that 'certain bankers and brokers who finance different corporations employ expert engineers by the month. These supervise from three to five railroads. Their time is continually occupied, and their compensation runs from \$400 to \$700 per month.' The witness did not show any knowledge of what is the customary compensation for a man in the position of the plaintiff, doing the service which plaintiff claims to have done." Alabama Security Co. v. Dewy, 156 Ala. 530, 47 So. 55, 59.

Cost of Raising Grade.—A witness having testified that defendants did not bring the grade up to the engineer's stakes, as specified in the contract between plaintiffs and defendants, it was proper to refuse to permit him to testify to the value of the work required to bring the grade up to those stakes, it not appearing that he had examined the grade, or knew the facilities for raising it, or that he had knowledge of the cost or value of such work. Andrews v. Tucker, 127 Ala. 602, 29 So. 34.

Services of Ward.—Where in a guardian's settlement, to offset an account for her board, the ward counterclaimed for services performed, testimony that her services were "worth as much as her board" was not admissible, especially as the witnesses did not profess complete knowledge of the services. Thompson v. Hartline, 84 Ala. 65, 4 So. 18.

§ 358 (14) Value of Real Property.

Necessity of Being Expert.—One undertaking to testify as to the value of land need not show that he is an expert, and, where he shows that he has given special attention to land values and has had uncommon occasion to know them, he is competent to give his opinion. Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315.

A witness disclaiming familiarity with the price of property should not be permitted to give his opinion as to its value. Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315.

§ 358 (15) Value of Personal Property.

Value of Personal Property in City.—Opinions of witnesses as to the amount

and value of the personal property in a city at a particular time are inadmissible when not founded on knowledge of the facts. *Winter v. City Council of Montgomery*, 79 Ala. 481.

Value of Franchise.—In quo warranto to forfeit the charter of a new corporation alleged to have been created for the sole purpose of accomplishing a fictitious increase of the capital stock of an old corporation, a witness who was familiar with the business, plans, and conditions of the old company was competent to testify as to the value of the franchise of that company, though he did not qualify as an expert. *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

"Whiting did not have to be an expert to testify as to the value of the franchise; he was familiar with the plant, business, and condition of the old company. *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17." *White v. Citizens', etc., Power Co.*, 172 Ala. 232, 55 So. 193, 195.

Value of Slave.—No peculiar skill is requisite to qualify one who knows the property to testify as to the value of a slave. *Ward v. Reynolds*, 32 Ala. 384.

Value of Horse or Mule.—Under Code 1907, § 3960, providing that one need not be an expert, but may testify as to the value of an article, where he has had an opportunity for forming a correct opinion, a person buying a horse and having the same in his possession from that time until the death of the horse is properly permitted to testify to its value. *Millsap v. Wolfe*, 1 Ala. App. 599, 56 So. 22.

A witness may give his opinion as to the value of a mule or horse known to him, although he is not an expert, and does not know the market value of the animal. *Rawles v. James*, 40 Ala. 183.

Value of Bull.—In an action for negligence in killing a thoroughbred Galloway bull, testimony as to its value, given by two witnesses, one of whom was superintendent of plaintiff's stock farm, the other a farmer who had raised and sold cattle and half breed Galloway calves, both knowing the bull, his breed, and peculiar merits, was admissible. *Alabama G. S. R. Co. v. Moody*, 92 Ala. 279, 9 So. 238.

Value of Dogs.—A witness having knowledge of the value of the kind of

dogs involved, gained from actual sales, was entitled to testify as to such value, though without the special knowledge or training to qualify as an expert. *Hooper v. Dorsey*, 5 Ala. App. 463, 58 So. 951.

"Mr. Dorsey, who was a witness for the plaintiff, swore, as to the ownership of a dog, in the trial of a law suit between him and the witness Bullard, could have been admissible except for the purpose of impeaching his testimony in the present case, and it was not made admissible for that purpose by laying the proper predicate in the course of his examination as a witness. The appellants have nothing to complain of in the admission of evidence of the price at which they sold one of the dogs with the conversion of which they were charged. *Ladd v. Ladd*, 121 Ala. 583, 25 So. 627." *Hooper v. Dorsey*, 5 Ala. App. 463, 58 So. 951, 952.

Value of Jewelry.—A witness in an action to recover the price of jewelry sold, who was not shown to have any knowledge in regard to the character, quality, and value of the goods testified about, was an incompetent witness as to the quality and value of the goods. *McAllister-Coman Co. v. Matthews*, 150 Ala. 167, 43 So. 747.

Market Value of Cotton.—Although a witness does not base his opinion as to the market value of cotton at a certain time exclusively on actual transactions of which he is cognizant, his testimony, which is based in part upon market reports and quotations, is competent. *Ellis v. W. L. Casey & Co.*, 4 Ala. App. 518, 58 So. 724.

"It is not a ground for excluding the testimony of a witness as to the market value of a commodity that his opinion is based, not exclusively on actual transactions of which he was cognizant, but also upon market reports and quotations, which are recognized sources of information on such a subject. *Sisson v. Cleveland & T. Ry. Co.*, 14 Mich. 489, 90 Am. Dec. 253; *Hudson v. Northern Pacific Ry. Co.*, 92 Iowa, 231, 60 N. W. 608, 54 Am. St. Rep. 550; *Jones on Evidence*, § 582." *Ellis v. Casey & Co.*, 4 Ala. App. 518, 58 So. 724, 725.

Household Goods.—That witness owned household goods destroyed and was familiar with them qualified him to testify to their value. *Birmingham Ry., Light &*

Power Co. v. Hinton, 157 Ala. 630, 47 So. 576.

"While we treat this case upon the idea that the market value of the goods at the time of destruction was the criterion of their value, and affirm it upon the idea that the jury had some evidence of said market value, yet we do not mean to hold that the marketable value should be the test as to articles of the charter in question, or that the owner could not have shown the cost of same as a factor in arriving at their value. Household goods, such as furniture, bedding, and wearing apparel, kept for use and not for sale, and which have in fact been used, may have a real intrinsic value to the owner, yet little or no market value. In some instances it would be difficult, as well as expensive to replace them, and yet, if put upon the market, there would be little or no demand for them, and in such cases the value should be fixed or ascertained in some rational way, other than by showing what they would bring in a particular market or if hawked off by a secondhand dealer. *Denver, South Park & Pac. R. R. v. Frame*, 6 Colo. 382; *Southern Exp. Co. v. Owens*, 164 Ala. 412, 41 So. 752; *Trustees v. Turner*, 71 Ala. 429, 430." *Birmingham R., etc., Co. v. Hinton*, 157 Ala. 630, 47 So. 576.

Value of Stock of Goods.—A witness who testified that he had been in the fire insurance business twenty years at the place where the stock in suit was located, and was thoroughly familiar with the prices of goods at such place, was competent to testify that the sum brought by the goods at sheriff's sale was much less than their value. *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136, 19 So. 436.

"The motion to exclude the evidence of W. F. Fitts, Sr., as to the value of the goods, as for the objections raised to its admissibility, was properly overruled. To render such testimony admissible, it was unnecessary that he should have been shown to possess any peculiar skill to qualify him as an expert on the subject. *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Burks v. Hubbard*, 69 Ala. 379, 380." *Louisville Jeans Clothing Co. v. Lischkoff*, 109 Ala. 136, 19 So. 436, 439.

Value of Goods at Different Places.—A

witness, knowing the value of goods at Huntsville or Decatur, may testify as to the value at the other, without showing that he knows the value at both places. *Corey v. Penney*, 165 Ala. 234, 51 So. 624.

Value of Machinery.—None but an expert can testify as to the value of machinery. *Winter v. Burt*, 31 Ala. 33.

In an action to recover the price of machinery sold by plaintiffs to defendant, a material inquiry being as to the value of the machinery, its correspondence with plaintiff's representations, and its capacity to accomplish given results, the opinion of experts, having peculiar knowledge of such and similar machinery, is competent and admissible evidence. *Blackman v. Collier*, 65 Ala. 311.

§ 358 (16) Damages.

Value before and after Injury.—In an action for damages to a stock of dry goods, a witness testified that he had examined the injured stock and stated its value before and after its injury. It appeared that he had been in the dry goods business for seven or eight years in the vicinity and was familiar with the class of goods in question. Held, that he showed such knowledge of the goods as to be competent to testify. *Werten v. K. B. Koosa & Co.*, 169 Ala. 258, 53 So. 98.

Where a shipper, suing for injury to goods, showed in his testimony that he knew the value of the goods before and after the injury, and that he referred to the difference when speaking of the amount of his damages, his testimony was competent on the measure of damages. *St. Louis & S. F. R. Co. v. Cash Grain Co.*, 161 Ala. 332, 50 So. 81.

Damage from Diversion of Water.—A witness who is well acquainted with the mill business can not give his opinion as to the damage sustained by plaintiff by a diversion of the water from his mill, when he is not informed of the size of the stream, its supply of water, or the quantity diverted. *Stein v. Burden*, 24 Ala. 130.

§ 359. Subjects of Opinion Evidence in General.

"The general rule is that witnesses must testify to facts, not to inferences, opinions, or conclusions. Experts, or persons instructed by experience, are ex-

ceptions to this rule. They can not, however, as experts, give mere opinions as to matters of common knowledge, which persons of ordinary intelligence, including jurors themselves, are just as capable of comprehending as the witnesses. *Hammond v. Woodman*, 66 Amer. Dec. 229, note. There are other exceptions to the general rule, also, as, for example, estimates of value, distance, time, quantity, and opinions as to handwriting, general identity, and the like. 'So an opinion can be given by a nonexpert concerning matters with which he is specially acquainted, but which can not be specially described.' 7 Amer. & Eng. Enc. Law, 496. And, as expressed by Mr. Wharton: 'An inference, necessarily involving certain facts, may be stated without the facts.' 1 Whart. Ev., § 510. This is often called a conclusion, or inference in the nature of a collective fact, involving cases where it is not practicable to lay before the jury the primary facts upon which the inference is based. Under these principles it was competent for the plaintiff to testify that the animal killed was a 'very fine colt,' 'fine stock,' 'trotting stock;' that it 'was sired by Clipper, a trotting horse at Cave Springs;' that 'its mother was a fine blooded animal,'—and other kindred expressions illustrating the qualities of the horse, including 'beauty of form' and 'gracefulness of movement.'" *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

"The general rule is, that witnesses must depose to facts, and can not be allowed to give their opinions founded on these facts, or the inferences or deductions which they have drawn from them." *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185, 186.

Intentions of Third Person.—A witness can not be allowed to state what the intention of another person was in doing a certain act. *Planters' & Merchants' Bank v. Borland*, 5 Ala. 531; *Clement v. Cureton*, 36 Ala. 120.

The reason for the rule that uncommunicated motives and intentions can not be given in evidence is that such testimony, in its nature, is insusceptible of contradiction. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497. But, where intention is the fact to be ascertained, objection to

proof of it by the testimony of the party entertaining it may be waived; and the evidence, when so introduced, is legal and relevant. *Fuller v. Whitlock*, 99 Ala. 411, 13 So. 80, cited in note in 23 L. R. A., N. S., 369.

And a party can not state his uncommunicated reason for acts or conduct on his part, though he testified to such acts or conduct on cross-examination; it amounting to an admission against his interest. *Burks v. Bragg*, 89 Ala. 204, 7 So. 156, cited in note in 23 L. R. A., N. S., 369.

A witness can not be asked what were the "motives and intentions" of another person in executing a deed. *Peake v. Stout*, 8 Ala. 647.

Reason for Not Buying Land.—In ejectment it is improper to ask a witness for the reason why he did not buy the land in suit. *Laster v. Blackwell*, 128 Ala. 143, 30 So. 663.

Meaning of Term "Pre-Emption Lands."—In ejectment, after defendant testified that the land had been held by him as "pre-emption lands," the opinion of another witness as to the meaning of the term as used by defendant was incompetent. *Doe v. Beck*, 108 Ala. 71, 19 So. 802.

Necessity for Garnishment Proceedings.—In an action for wrongfully suing out a writ of garnishment, it was improper to permit defendant to testify that at the time the garnishment action was commenced he believed that process of garnishment was necessary to obtain satisfaction of his debt. *Mobile Furniture Commission Co. v. Little*, 108 Ala. 399, 19 So. 443, cited in note in 23 L. R. A., N. S., 368, 371.

Claims against Estate of Deceased.—Opinion evidence is not admissible to prove claims against the estate of a deceased. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892.

Danger from Hoisting Bucket.—Whether a hoisting bucket in a coal mine is more liable to jump out of the skidway when going fast, and whether it is dangerous to stand by the skidway when the bucket is traveling up, and whether the bucket running at a certain speed is liable to jump out relate to matters of common observation; and it is not error to

exclude the opinion of a witness thereon. *New Connellsville Coal & Coke Co. v. Kilgore*, 162 Ala. 642, 50 So. 205.

Boundary Lines of City.—A nonexpert witness may testify in an election contest as to the location of the boundary lines of the city in which the election occurred. *McDonald v. Wood*, 118 Ala. 589, 24 So. 86.

Employment of Attorney.—Where the material question in issue in a suit by an attorney for professional services was whether he had been retained by defendant in a certain action, the statement of a witness, in his deposition, that he understood from a conversation between the parties in his presence that defendant had retained plaintiff as his attorney in that action, was competent in the absence of objection. *Carlisle v. Humes*, 111 Ala. 672, 20 So. 462.

In an action by an attorney against the auditor of state to recover damages suffered by the attorney on account of the auditor's refusal to allow him to inspect the records in the auditor's office, containing the accounts between the state and certain tax collectors represented by the attorney, evidence on the part of defendant as to his belief concerning plaintiff's employment or his authority to represent the tax collectors is not admissible. *Brewer v. Watson*, 71 Ala. 299, cited in note in 23 L. R. A., N. S., 371.

Opinion as to Loan.—The opinion of a witness that "he considered" a certain transaction a loan to A. B. is not evidence. *Saltmarsh v. Bower*, 34 Ala. 613.

Approval of Agent's Act.—A question to a witness sought to be charged as principal, whether "he approved or disapproved" of his agent's act, is improper, so far as it inquires simply in reference to a mental state, without reference to acts or words. *Burns v. Campbell*, 71 Ala. 271, cited in note in 23 L. R. A., N. S., 369.

Pro Rata Share of Fund.—Where the issue involves the application of the proceeds of collateral securities to the payment pro tanto of several debts, the amount of a debt being shown, a witness may testify what the pro rata share was, as direct and primary evidence, without stating the amount of the debt. *McKenzie v. Branch Bank*, 28 Ala. 606.

Dog as a Nuisance.—In an action to recover damages for the wrongful shooting of plaintiff's dog, a witness can not be asked "whether, from his knowledge of the dog, he did or did not consider him a nuisance." *Parker v. Mise*, 27 Ala. 480.

Number of Stripes Received by Slave.—Witnesses of experience may testify what number of stripes a slave has in their judgment received, judging from the marks on him. *Hall v. Goodson*, 32 Ala. 277.

Amount Due on Note.—In an action on a garnishment bond given to secure the insurance of process of garnishment in an action on a note, questions eliciting the mere opinions or conclusions of witnesses as to the amount due on the note at the time of the suing out of the garnishment were properly excluded. *Ritter v. Hoy*, 2 Ala. App. 358, 56 So. 815.

§ 360. Personal Identity, and Characteristics.

Men Seen Night of Crime.—A witness, who had testified that he met two men together on the night of the homicide, and could not be sure who they were, after describing their appearance, could state that "in his best opinion" they were defendant and deceased, with both of whom he was acquainted. *Thornton v. State*, 113 Ala. 43, 21 So. 356.

"A witness, Hartley, for the state, testified, that two men passed him coming from the direction of Greenville, late in the night in which deceased was killed, and they were, 'in the best opinion,' the defendant and the deceased. He testified, before the question was asked calling for his opinion of their identification, that he could not be positive as to who they were, because he could not see their faces distinctly; that he knew them both and had met them a great many times, and he noticed them carefully that night, and described the size of each. The defendant objected to this evidence, but the court admitted it, and in this there was no error. *Mitchell v. State*, 94 Ala. 68, 10 So. 518; *Turner v. McFee*, 61 Ala. 468; *Walker v. State*, 58 Ala. 393; 1 Greenl. Ev., § 440." *Thornton v. State*, 113 Ala. 43, 21 So. 356, 357.

§ 361. Age.

Nonexpert Opinion.—The opinion of a

nonexpert witness is not admissible to prove age. *Martin v. State*, 90 Ala. 602, 9 So. 858.

Age of Witness.—Where a person appeared before the jury as a witness, it was error to allow another to testify that such person looked to be forty or forty-five years old. *Ham v. State*, 156 Ala. 645, 47 So. 126.

§ 362. Bodily Appearance or Condition.

§ 362 (1) In General.

Appearance of Injury.—In an action for assault, a witness who saw the assault testified that he supposed plaintiff's feelings were hurt, that it would have hurt witness' feelings, and was then asked: "[Plaintiff] did not look like he was hurt, did he?" Held, that such question called for proper evidence. *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657.

See, also, post, "Testimony in General," § 385.

Appearance of Anger.—Emotions, such as anger, joy, etc., and the tone of a person's voice, are incapable of description in words, so that, in an action for assault and battery, a witness was properly permitted to testify that the appearance of the defendant was "very angry." *Long v. Seigel (Ala.)*, 58 So. 380.

"There was no error in overruling the objections to the question to the witness Seigel, 'What was the appearance of Mr. Long?' and the motion to exclude the answer, 'Very angry.' It has long been the holding of this court that emotions, such as anger, joy, etc., are incapable of description in words, as are also indications of pain, suffering, sickness, etc., and that a witness may testify as to whether a person looked 'sick,' or 'bad,' or seemed angry, etc., being a mere shorthand rendering of a fact which could not be otherwise more accurately described. *Stone v. Watson*, 37 Ala. 279, 288; *South, etc., R. Co. v. McLendon*, 63 Ala. 266, 276; *Carney v. State*, 79 Ala. 14, 18; *Jenkins v. State*, 82 Ala. 25, 2 So. 150; *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657. This applies, also, to the question as to the tone of his voice. The manner of the defendant is an important fact in determining whether an assault and battery has been committed." *Long v. Seigel (Ala.)*, 58 So. 380.

§ 362 (2) Physical Condition.

Illness at Particular Time.—While it is proper to prove by witnesses who have not qualified as experts that a person was sick at a certain time, it is not competent to let such witnesses testify as to what the disease was with which the person was afflicted, since such knowledge requires expert skill. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594.

Appearance of Feebleness.—One could testify that another "seemed to be very feeble" and that "he seemed to be crippled." *Dilburn v. Louisville & N. R. Co.*, 156 Ala. 228, 47 So. 210.

Afflicted with Disease.—Any person may speak of the existence of disease in another, when the disease is perceptible by the senses. *Milton v. Rowland*, 11 Ala. 732.

In the contest of a will on the ground of want of testamentary capacity, a witness who is not an expert may testify that testator was "diseased" prior to the execution of the will. *Fountain v. Brown*, 38 Ala. 72, cited in note in 38 L. R. A. 729.

"It was competent for the contestants to show that the testator was diseased before the execution of the will; and our previous decisions settle the law to be, that a witness who is not an expert may testify to the fact that a person was 'diseased.' *Blackman v. Johnson*, 35 Ala. 252; *Barker v. Coleman*, 35 Ala. 221. It is clear, therefore, that a part, at least, of the question to the witness Bohannon, was legal; and the rule is, that a general objection to an entire question, a part of which calls for legal evidence, may be overruled entirely. *Sayre v. Durwood*, 35 Ala. 247." *Fountain v. Brown*, 38 Ala. 72, 75.

Physical Condition of Slave.—The opinion of one not an expert that he thought the slave was going to die is not competent. *Blackman v. Johnson*, 35 Ala. 252.

In an action for damages for unsoundness of a slave sold to plaintiff, evidence that the slave looked sick is admissible, although the witness is not an expert. *Stone v. Watson*, 37 Ala. 279, cited in notes in 53 L. R. A. 541, 24 L. R. A., N. S., 254.

Anybody is competent to testify that a

slave was obviously apparently in bad health, diseased, and incapable of doing hard work. *Barker v. Coleman*, 35 Ala. 221; *Blackman v. Johnson*, 35 Ala. 252.

On a question of the soundness of a slave, a witness may testify that "she appeared to be healthy;" and, if the party against whom the evidence is offered desires to ascertain what the appearances were which the witness denominated "healthy," he must elicit such proof on cross-examination. *Bennett v. Fail*, 26 Ala. 605.

A witness, not a physician or midwife, may testify to the physical condition of a slave, and may state that said slave "was sick," "had fever," "was pregnant," etc. *Wilkinson v. Moseley*, 30 Ala. 562, cited in note in 24 L. R. A., N. S., 254.

§ 362 (3) Nature or Extent of Personal Injuries.

Capacity to Work.—In an action for damages from personal injuries, evidence by a daughter of plaintiff to the effect that plaintiff was unable to do anything was not objectionable on the ground that the witness was not shown to be an expert. *Mobile Light & R. Co. v. Walsh*, 146 Ala. 295, 40 So. 560.

"The motion to exclude the statement of Mrs. Brown that 'her mother [the plaintiff] was unable to attend to her duties and is still unable to do anything,' because the witness was not shown to be an expert, was properly overruled. *South, etc., R. Co. v. McLendon*, 63 Ala. 266, 276, and cases there cited; *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562." *Mobile, etc., R. Co. v. Walsh*, 146 Ala. 295, 40 So. 560, 563.

§ 362 (4) Pain.

Pain Resulting from Injury.—A witness may testify as to whether plaintiff seemed to suffer after receiving the injury for which he sues. *Southern Ry. Co. v. Hobbs*, 151 Ala. 335, 43 So. 844.

"Pain and suffering are natural manifestations attending physical injury, and may be detected in the look or facial expression of a person; and a witness, though he is not an expert, may testify to a person's appearance or expression. *Stone v. Watson*, 37 Ala. 279, 288; *South, etc., R. Co. v. McLendon*, 63 Ala. 266, 276; *Carney v. State*, 79 Ala. 14, 17; *Jenkins v. State*, 82

Ala. 25, 2 So. 150; *State v. Houston*, 78 Ala. 576; *Birmingham R., etc., Co. v. Franscomb*, 124 Ala. 621, 27 So. 508; *Mayberry v. State*, 107 Ala. 64, 18 So. 219." *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657, 658.

§ 362 (5) Condition of Animal.

Suffering for Food and Water.—In an action for injuries to cattle caused by delay in delivery by the carrier to whom they were intrusted for shipment, a question to a witness whether the cattle looked to be suffering for food and water upon their arrival was not improper as calling for an opinion, as an ordinary witness could not convey a picture of the animals, so as to enable the jury to reach a conclusion as to their condition without conveying the conclusions as to the need of food and water which he found on seeing the animals. *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513.

"It is a matter of common knowledge that the effects of depriving animals of food and water for an unwonted time are manifested in their appearance. It was competent for the plaintiff to show that his cattle were injured in this way in consequence of an unreasonable delay in their arrival at the place of destination. Of necessity the principal available proof in this connection was evidence as to the appearance and condition of the cattle. The plaintiff sought to elicit proof on this subject by the question propounded to several of his witnesses: 'State whether or not from your observation and experience in your judgment said cattle were suffering for food and water.' This question was objected to because it called for the opinion or conclusion of the witness. Under a recognized modification of the general rule against admitting in evidence the opinions of ordinary witnesses, their conclusions as to the appearance of persons, animals, or things may be proved as being in their nature not mere opinions, but descriptive of facts. The law recognizes that ordinary witnesses as to such matters are not to be expected to be endowed with such powers of graphic description as to be able so to portray to the jury the subject of inquiry as to enable them to reach a conclusion as to its condition without the aid of the impression

made upon or the conclusion reached by the witness who saw it. The ground upon which conclusions or opinions in reference to such matters are admitted is that from the very nature of the subject in issue it can not be stated or described in such language as to enable persons not eyewitnesses to form an accurate judgment in regard to it. *Jones on Evidence*, § 360; *Smith v. State*, 137 Ala. 22, 34 So. 396; *Birmingham R., etc., Co. v. Frankscomb*, 124 Ala. 621, 27 So. 508; *South, etc., R. Co. v. McLendon*, 63 Ala. 266. If at the time in question the plaintiff's cattle were in fact suffering for the lack of food and water, and an eyewitness had been asked, not for his judgment or conclusion on the subject, but for a description of their condition so as to enable the jurors to draw their own inferences as to the fact and its cause, the probability is that, because of the inability of the witness to separate the indications upon which his conclusions were based from the conclusions themselves, he would not have confined himself to an enumeration of appearances, but would have attempted to convey to the jury the impression made upon himself by some such statement as that the cattle were in need of food and water, or that they appeared to be in a famishing and starved condition. The question objected to was not calculated to elicit, and did not in fact elicit, what the law regards as inadmissible opinion evidence." *Southern R. Co. v. Proctor*, 3 Ala. App. 413, 57 So. 513, 515.

Blindness of Mule.—A nonexpert witness may testify that a mule is blind. *Rarden v. Cunningham*, 136 Ala. 263, 34 So. 26.

§ 363. Mental Condition or Capacity.

See ante, §§ 355 (14); 356 (7); 358 (3). See the title INSANITY.

A witness may not testify to the mental status of the cognition of another. *Anthony v. Sturdivant*, 174 Ala. 521, 56 So. 571.

"The rule is well established in this court that a nonexpert must state the facts upon which he bases his opinion in testifying as to insanity. *Ragland v. State*, 125 Ala. 12, 27 So. 983; *Burney v. Torrey*, 100 Ala. 157, 14 So. 685; *Parrish v. State*, 139 Ala. 16, 36 So. 1012." *Birmingham R.,*

etc., Co. v. Randle, 149 Ala. 539, 43 So. 355, 356.

Conclusion Involving Expert Knowledge.—A question whether testator was "capable of transacting ordinary business" calls for a conclusion involving expert knowledge. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348, cited in note in 37 L. R. A., N. S., 397, 598.

Opinion Going Beyond Facts.—A question calling for the opinion of a witness as to the mental condition of a person, which goes beyond the facts testified to by the witness and predicates his opinion on other matters, is improper. *Loveman v. Birmingham Ry., L. & P. Co.*, 149 Ala. 515, 43 So. 411.

Facts Showing Grade of Intellect.—The object being to impeach a note for fraud, because the maker was a man of imbecile intellect, impaired by long habits of intemperance, a witness can not be asked whether he was a man of strong or weak intellect, but the facts showing the grade of his intellect should be proved. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

Action to Impeach Note.—The object being to impeach a note for fraud because the maker was a man of imbecile intellect, impaired by long habits of intemperance, a witness can not be permitted to state that he was well acquainted with the party, and that such were his habits and mental incapacity that he was very liable to be imposed on in any settlement he might undertake to make, especially when under the influence of ardent spirits, which was almost always the case. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

Question of Sanity.—Insanity, is shown by the proof of acts, declarations, and conduct, inconsistent with the character, and previous habits of the party. The mere opinions of witnesses, of the sanity, or insanity, of a person, are not competent testimony, unless they are medical men, acquainted with the facts. *McCurry v. Hooper*, 12 Ala. 823, cited in note in 38 L. R. A. 721.

Where the question of the sanity of a person is in issue, it is not competent to ask a witness whether a third party controlled such person and his business, or whether such person was not going down

hill generally, or what the latter's appearance was—whether that of a man of sound or unsound mind—or what the impression was that he made on the mind. In *re Carmichael*, 36 Ala. 514, cited in notes in 38 L. R. A. 309, 730, 37 L. R. A., N. S., 598.

But see *Stuckey v. Bellah*, 41 Ala. 700, cited in note in 37 L. R. A., N. S., 596, in an action for the conversion of personal property claimed under a gift from the decedent, opinion evidence as to the capacity of the decedent to dispose of his property was held competent. See, also, *Walker v. Walker*, 34 Ala. 469, cited in note in 39 L. R. A. 751.

Manner of Conversation.—In a will contest on the ground of testamentary incapacity, a nonexpert witness may testify as to conversations with testator, and state whether testator was rational. *Hodge v. Rambow*, 155 Ala. 175, 45 So. 678.

The court properly refused to exclude the statement of a witness that testator "talked rationally." *Hodge v. Rambow*, 155 Ala. 175, 45 So. 678.

§ 364. Pecuniary Condition.

Insolvency of Party.—A witness will not be allowed to testify that a party "was insolvent," although he states that he "knows the fact of his own personal knowledge." *Nuckolls v. Pinkston*, 38 Ala. 615.

A witness "well acquainted with the affairs of" another person can not be permitted to testify that the latter was insolvent. *Brice v. Lide*, 30 Ala. 647.

"In permitting a witness to state, notwithstanding the defendant's objection, that Pinkston was insolvent, the court violated a principle announced in *Brice & Co. v. Lide*, 30 Ala. 647, and committed an error for which we must reverse the judgment." *Nuckolls v. Pinkston*, 38 Ala. 615, 618.

"In *Lawson v. Orear*, 7 Ala. 784, it was said that reputation was not admissible to prove insolvency, as that it the legal conclusion from facts to be stated; but reputation of facts or circumstances from which insolvency may be inferred, is proper evidence to go to the jury. In *Massey v. Walker*, 10 Ala. 288, it was objected, that a witness should not have

been allowed to state that a party 'was largely embarrassed by debts,' because this was a statement of conclusions, not of facts. To this it was answered, that 'from the course this notion of conclusions as distinguished from facts, seems to be taking, it is as well to state that the decisions upon this point refer to conclusions of law, to be deduced from facts which may or may not exist. There is no matter which involves a combination of facts that is not liable to be called a conclusion, if this term is properly applied to the knowledge by one individual that another is embarrassed with debt.' [*Griffin v. Brown*] 2 Pick. 304; [*Town of Rochester v. Town of Chester*] 3 N. H. 349; [*Town of Peterborough v. Town of Jaffrey*] 6 N. H. 462; [*Commonwealth v. Thompson*] 3 Dana, 301; [*Kellogg v. Krauser*] 14 Serg. & R. 137 [16 Am. Dec. 480]." *Chenault v. Walker*, 14 Ala. 151, 154.

Destitute Circumstances.—In an action against a county to recover for medical attendance upon a destitute sick person, under the act of 1852, a witness may testify that such person was "in such destitute condition as to demand public charity and prompt attention." *Autauga County v. Davis*, 32 Ala. 703, cited in note in 19 L. R. A. 750.

Financial Condition of Sureties.—In an action against a sheriff for refusing a replevin bond, and to allow plaintiff to replevy property levied on by defendant, one whom the sheriff refused to take as a surety on the bond may be examined as a witness, and asked what he was worth after payment of his debts. So it is competent to prove by others, acquainted with the condition of the persons offered as sureties, what they were worth at the time they were tendered, after the payment of their debts. *Chenault v. Walker*, 14 Ala. 151.

Financial Condition of Decedent's Estate.—Opinion evidence is not admissible to prove that the personal property of a deceased is insufficient to pay his debts. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892.

Opinion evidence is not admissible to prove the necessity of a sale of all of the real property of a deceased to pay his debts. *Miller v. Mayer*, 124 Ala. 434, 26 So. 892.

§ 365. Handwriting.

See ante, § 358 (10).

Proof of Mark.—The mark of a party to an instrument, like his handwriting, may be proved by a witness who is sufficiently acquainted with it to be able to testify that he believes it to be his. *Strong's Ex'rs v. Brewer*, 17 Ala. 706, cited in note in 64 L. R. A. 314.

Intention in Making Letter.—The opinion of a witness, not an expert, acquainted with the writer's hand, can not be received as evidence that a letter made as a "v" was intended for an "r," although the writer usually made "r" like other persons. *Sayres v. State*, 30 Ala. 15, cited in note in 64 L. R. A. 306.

Proof of Signature.—Witnesses shown to be acquainted with the handwriting of a person may, though not experts, give their opinion as to whether a signature is in her handwriting; but they may not, like experts, give their opinion from comparison with admittedly genuine writings of such person. *Ware v. Burch*, 148 Ala. 529, 42 So. 562.

"Therefore, according to the great preponderance of authority, a witness may testify that he knows the decedent's handwriting, and that the signature to the document is genuine, and for the same reason he may state that the signature is not genuine; but it is not competent for the witness to testify that he saw the decedent sign the paper." 30 Am. & Eng. Ency. Law, 1033; *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077; *Jesse v. Davis*, 34 Mo. App. 341; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *Peoples v. Maxwell*, 64 N. C. 313; *Minnis v. Abraham*, 105 Tenn. 662, 58 S. W. 645, 80 Am. St. Rep. 913; *Martin v. McAdams*, 87 Tex. 225, 27 S. W. 225. A contrary view has been taken in the cases of *Merritt v. Straw*, 6 Ind. App. 360, 33 N. E. 657; *Holliday v. McKinnie*, 22 Fla. 153, and *Neely v. Carter*, 96 Ga. 197, 23 S. E. 313. The Georgia court goes on the idea that the proof of the signature would only be another method of proving the fact that the decedent actually signed his name to the paper. Our own court seems to be in line with the authorities that are opposed to such evidence, and it was held in the case of *Kirksey v. Kirksey*,

41 Ala. 626, that such evidence was a transaction as forbidden by the statute then existing, and which is § 1794 of the Code of 1986. The *Kirksey* case has been overruled in respect to other points, but not as to the one involved in the case at bar, but has been approvingly cited on this point in the case of *Harwood v. Harper*, 54 Ala. 659. The trial court, therefore, properly sustained the objection to the question propounded to A. R. Ware as to the signature of the decedent." *Ware v. Burch*, 148 Ala. 529, 42 So. 562, 563.

"The competency of persons to give their opinions as to whether a given signature is in the proper handwriting of the person by whom it purports to have been made is not confined to experts. Any witness who has seen the party write, or who knows his handwriting, may express his opinion as to the genuineness of the signature. Of course, the extent of his familiarity will enter into the weight of his testimony. Wharton on Ev., §§ 707, 708; 1 Brick. Dig., § 1078. Experts may go further; but then, to legalize such testimony, the witness must first be shown to be an expert—that is, accustomed to and skilled in the matter of handwritings, genuine and spurious. These may institute comparisons between writings of unquestioned genuineness and the writing in dispute, and may give their opinion whether both were written by one and the same person. They may, also, give their opinion whether a given writing is genuine, or a feigned or forged signature. There are certain other matters pertaining to handwriting about which they can give their skilled opinions, not necessary to be here considered." *Moon v. Crowder*, 72 Ala. 79, and cases there cited. Only experts, persons accustomed and skilled in the matter of handwriting, may institute comparisons between writings of unquestioned genuineness and the writing in dispute, and give an opinion. *Griffin v. State*, 90 Ala. 596, 8 So. 670." *Ware v. Burch*, 148 Ala. 529, 42 So. 562.

A nonexpert on handwriting may not express an opinion as to the genuineness of a signature solely from a comparison of handwriting, but may give his opinion if he knows the handwriting of the

party from having corresponded with him or seen him write. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521.

"On the question of the comparison of handwriting, where the genuineness of a writing is in issue, the decisions of the courts are by no means in harmony. In some jurisdictions the question has been the subject of legislation. The question has been frequently under consideration in this court, and from former adjudications here the following rules may be laid down as being well settled: First, when the forgery of a paper is in issue, and another paper admitted or proven to be genuine is properly in the case and before the court, a comparison may be instituted between the signature of the genuine paper and the signature of the disputed one. The comparison may be made by the jury trying the case, for the purpose of determining the question of forgery vel non of the disputed paper. An expert witness may also make a comparison in such case of the two signatures, and after such comparison express his opinion as to the genuineness of the paper in dispute. Second, a comparison of handwriting may not be instituted between the writing that is in question and extraneous papers, although such extraneous papers may be shown to be genuine. A writing, although admitted to be genuine, when not relevant and admissible in evidence, is not admissible for the sole purpose of instituting a comparison of handwriting, whether by the jury trying the case or for the expression of an opinion by one examined as an expert witness. Third, a witness who is not an expert may not express an opinion as to the genuineness of a signature solely for a comparison of handwriting; but a witness, though not an expert, may express his opinion as to the genuineness of a signature, where such witness knows the handwriting of the party from having corresponded with him or seen him write. *Little v. Beasley*, 2 Ala. 703; *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34; *Kirksey v. Kirksey*, 41 Ala. 626; *Williams v. State*, 61 Ala. 33; *Moon v. Crowder*, 72 Ala. 79. See, also, in this connection, 17 Cyc. pp. 73, 163." *Griffin v. Work-*

ing Woman's Home Ass'n, 151 Ala. 597, 44 So. 605, 606.

And the opinion of a witness who had mailed one or more letters to the person whose signature was in question, directed to his name and place of residence, and received replies purporting to come from that place, and to be signed by him, was held *prima facie*, and, in the absence of any denial of the authenticity of the letter in question, sufficient to establish the genuineness of the signature. *Campbell v. Woodstock Iron Co.*, 83 Ala. 351, 3 So. 369, cited in notes in 7 L. R. A., N. S., 559, 63 L. R. A. 972.

§ 366. Due Care and Proper Conduct.

§ 366 (1) In General.

See ante, §§ 355 (17); 356 (4); 358 (5).

Mismanagement of Business.—The testimony of a witness that an employee so mismanaged the business of the employer as to cause the loss of money to the employer is inadmissible. *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 So. 315.

Manner of Seizing Property.—A witness may testify that the seizure of property by an officer acting without lawful authority "was made in an offensive and insulting manner." *Raisler v. Springer*, 38 Ala. 703.

Mistake in Credit on Note.—On a contest as to the correctness of a credit placed on a note, testimony of the witness who entered the credit that he would not have committed such a mistake as putting a credit of \$117, when only \$17 had been actually paid, is mere opinion, and incompetent. *Weed v. Martin*, 89 Ala. 587, 8 So. 132.

Reason for Discharge.—Plaintiff, after testifying that he had been hired for a year, and that he had been discharged before the expiration of the term, could not be asked if the discharge was "without fault on his part," and if at that time he had "performed his part of the contract in full," as the questions called for his opinions. *Clark v. Ryan*, 95 Ala. 406, 11 So. 22.

Proper Medical Treatment.—A physician can not be permitted to express an opinion that other physicians would probably have treated a case, the symptoms of which are described to him, in a particular way, when at the same time he

considers that such treatment would be improper. *Mosely v. Wilkinson*, 14 Ala. 812.

Manner of Mining Coal.—One who is not an expert is not competent to testify as to the proper way to drive a heading in a coal mine and as to the manner in which the work had been done. *Pennsylvania Coal Co. v. Bowen*, 159 Ala. 165, 49 So. 305.

§ 366 (2) Due Care of Person Injured.

Danger from Riding on Cross Beam of Engine.—In an action against a railroad company by a head brakeman who had been injured while sitting on the cross beam in front of the engine of a moving freight train, opinion evidence that it is not more dangerous to ride on the front of the engine than on top of the cars is not admissible. *Warden v. Louisville & N. R. Co.*, 94 Ala. 277, 10 So. 276, cited in note in 41 L. R. A., N. S., 684.

Injury While Standing on Track.—In an action by a brakeman for personal injuries received by him while on the track signaling a train, plaintiff, who had had a long service as brakeman, could testify whether the track was the proper place for a brakeman charged with the duty of signaling a train under circumstances similar to those under which he undertook to signal. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276, cited in note in 24 L. R. A., N. S., 254.

Driving in Front of Cars.—A witness testified that he was standing behind the team when it started across the track; that he heard the train coming, and looked up and saw it; that he called to the driver, and told him not to attempt to cross, but the driver seemed excited, and whipped up the team; and that he did not stop before crossing, nor appear to look or listen. Held, that it was error not to permit the witness to state whether the driver could have seen the cars in time to have avoided the accident. *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134, 15 So. 508.

Care in Keeping Lookout.—In an action for damages for the death of plaintiff's intestate, struck by an obstruction standing near the track, and knocked off from an engine, it was error to allow plaintiff to ask a witness, who was with

deceased at the time, whether they were ordinarily careful in keeping a lookout for obstructions on the day the accident occurred. *Louisville & N. R. Co. v. Boul-din*, 110 Ala. 185, 20 So. 325.

Standing Safe Distance from Track.—In an action for death of a section hand by an article falling from a passing engine, the opinion of one who has for years been a section foreman, that ten feet from a passing train (the distance at which deceased was standing) was a safe distance for a section hand to stand, is admissible. *Culver v. Alabama Midland Ry. Co.*, 108 Ala. 330, 18 So. 827.

§ 366 (3) Operation of Railroads.

Ability to Couple Cars.—Whether an inexperienced man, who had never been instructed as to coupling cars having a certain coupling apparatus, could couple them the first time attempted, is not admissible. *Boland v. Louisville & N. R. Co.*, 106 Ala. 641, 18 So. 99.

Whether an inexperienced man, who had never been instructed as to coupling cars having a certain coupling apparatus, could couple them the first time attempted, is not a fact which a witness can testify to, but a matter of deduction or inference to be drawn by the jury from facts and circumstances in evidence. *Boland v. Louisville, etc., R. Co.*, 106 Ala. 641, 18 So. 99.

Speed of Train.—Nonexpert testimony is not admissible to show that the speed at which a train was running at the time of an accident was dangerous. *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599, 17 So. 176.

Conduct of Conductor.—In an action for ejection of a passenger, the testimony of a witness that the conductor seemed to be anxious to get the matter settled as to whether plaintiff had paid his fare, and that, in the witness' opinion, the conductor acted as well as a man could do in such a case, was properly refused, as expressing merely the opinion of the witness. *Alabama G. S. R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236.

"There was no error in excluding from the jury the testimony of the witness Barnes, with respect to the efforts of the conductor to ascertain whether the plaintiff had paid his fare to Birmingham, as

he claimed to have done, to the effect that 'the conductor seemed to be anxious to get the matter settled;' that 'the conductor's actions showed that he was doing his utmost to get the matter settled without further trouble;' and that, 'in my opinion, Conductor Ford conducted himself as well as a man could do in such a case.' These were not 'shorthand' renderings of fact, but patently the opinion and conclusions of the witness upon certain facts which themselves should have been adduced in evidence, and upon which the jury alone were to pass judgment and make up their opinion and conclusion as to whether the conductor was at fault in the premises immediately involved. *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Hames v. Brownlee*, 63 Ala. 277; *Loeb & Bro. v. Flash Bros.*, 65 Ala. 526; *Baker v. Trotter*, 73 Ala. 277; *Poe v. State*, 87 Ala. 65, 6 So. 378." Alabama, etc., R. Co. v. *Tapia*, 94 Ala. 226, 10 So. 236, 237.

Attempt to Stop Train.—In an action by an executor against a railroad company for killing his decedent, there was evidence that deceased was on horseback ahead of a train; that he saw the train, but made no effort to escape until it was within twenty-five yards of him; that the whistle had been blown and brakes applied; that his horse became unmanageable and threw him upon a rail, stunning him and preventing his escape; and that the train had almost stopped when the pilot struck him. Held, that the engineer could not testify that he had used "all the means he had" to stop the train, but should be compelled to state what means he had used. *Tanner's Ex'r v. Louisville & N. R. Co.*, 60 Ala. 621, cited in note in 42 L. R. A., N. S., 924.

Attempt to Stop Car.—In an action for death of plaintiff's intestate by being struck by a street car, a witness was not entitled to testify that the motorman "seemed to try to stop the car as quick as he could," but should have been required to state the facts as to what the motorman did to stop the car. *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355.

In an action for death in a collision with a street car, the motorman was not entitled to testify whether he stopped the car as soon as he could, but was required

to state what he did to stop the car, and whether that was all that could have been done to stop the car as soon as possible. *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355.

§ 367. Custom or Usage.

"Evidence of usage can only be resorted to when the law is doubtful, or unsettled." *Price v. White*, 9 Ala. 563, 565.

"Witnesses may be examined to prove the course of a particular trade, but not to show what the law of that trade is. *Winthrop v. Union Ins. Co.*, 2 Wash. C. C. 7 [Fed. Cas. No. 17,901]; *Austin & Taylor v. Williams*, 2 Ohio, 64; *Sampson v. Gazzam*, 6 Port. 123." *Price v. White*, 9 Ala. 563, 565.

"When the meaning of a word used to designate an article of trade, is to be fixed by mercantile usage, it may be shown by the usage among merchants dealing particularly in such article. *Astor v. The Union Ins. Co.*, 7 Cow. 202. But it has been held to be a general rule, that one witness is not sufficient to prove a custom." *Price v. White*, 9 Ala. 563, 565.

Custom to Pay Expenses of Clerk.—A witness, who had lived both in New York and Mobile, understood it was the custom of merchants that the employer should pay the expenses and passage of clerks who were engaged in the former place to do service in the latter place for the whole of the ensuing business season. The witness, who was a merchant, had never so employed or paid a clerk, but he knew of one case where, under a stipulation to that effect, the wages and passage money of a clerk thus employed were paid by the employer. Held, that this evidence was inadmissible, and consequently incompetent, to establish the usage or custom of trade. *Price v. White*, 9 Ala. 563.

Custom Rendering Agent Responsible.—The mere opinions of witnesses that an agent is alone responsible are not evidence of a custom which will exonerate the principal. *Garey v. Meagher*, 33 Ala. 630.

"It only contains the opinions of witnesses, that the clerk only, and not the master, is liable in a case like the present. To give this evidence the effect claimed would be to allow the opinions

of witnesses to overturn the decision pronounced in this court in the case of *Hosea v. McCrory*, 12 Ala. 349. See *Jewell v. Center & Co.*, 25 Ala. 498." *Garey v. Meagher & Co.*, 33 Ala. 630, 634.

§ 368. Nature, Condition, and Relation of Objects.

§ 368 (1) In General.

Position for Seeing up Track.—J. testified that he was a brakeman on the train which ran over plaintiff, and that his engineer blew for brakes about 600 yards from the place of the accident, whereupon J. looked from the rear platform of the caboose, and saw a red light and a white light on or near the track, which he subsequently learned were plaintiff's lights. S., another employee on the same train with J., testified that only a white light was visible at the time. Held, that it was improper for S. to testify that he was in a better position to see up the track than J., such conclusion being for the jury to determine from the facts submitted. *Helton v. Alabama Midland R. Co.*, 97 Ala. 275, 12 So. 276, cited in note in 24 L. R. A., N. S., 264.

Condition of Stumps.—A nonexpert could testify whether stumps on land were old or showed that the trees had been recently cut. *Bufford v. Little*, 159 Ala. 300, 48 So. 697.

Condition of Hook.—It was proper to permit a witness to testify as to whether a hook like the one in issue could get out of fix. *United States Cast Iron, Pipe & Foundry Co. v. Granger*, 162 Ala. 637, 50 So. 159.

§ 368 (2) Land.

Improvements on Land.—Where a judgment debtor has absconded, and certain land attached to secure the judgment is claimed as exempt by his adopted child, and defendant is asked whether any improvements had since been made by defendant or for her, an answer, "Right smart improvements have been made in clearing and fencing," though a mere conclusion of facts, is properly allowable, subject to cross-examination by plaintiff. *Cofer v. Scroggins*, 98 Ala. 342, 13 So. 115.

§ 368 (3) Railroad Track.

Nature of Roadbed.—In an action by an executor against a railroad company

for killing his decedent, there was evidence that deceased was on horseback ahead of a train; that he saw the train, but made no effort to escape until it was within twenty-five yards of him; that the whistle had been blown and brakes applied; that his horse became unmanageable and threw him upon a rail, stunning him and preventing his escape; and that the train had almost stopped when the pilot struck him. Held, that the engineer could not properly be asked whether the roadbed was such as to permit deceased to escape. *Tanner's Ex'r v. Louisville & N. R. Co.*, 60 Ala. 621, cited in note in 42 L. R. A., N. S., 924.

§ 368 (4) Sidewalk.

Condition of Sewer as Rendering Street Impassable.—In an action against a city for injuries caused by a partly filled sewer ditch, the conclusion of a witness as to whether the street in question was in a "dangerous or impassable condition" was properly excluded, since such fact could be determined alone by the jury. *City of Anniston v. Ivey*, 151 Ala. 392, 44 So. 48.

§ 369. Quantity.

Corn Necessary for Plantation.—It is competent to ask a witness, who professes to know the number of slaves, mules, etc., employed on a plantation, how much corn per month it would require to supply the wants of the plantation. *Rembert v. Brown*, 14 Ala. 360, cited in note in 52 L. R. A. 549.

"If the witness has stated how much corn it required for the subsistence of a single slave, horse or mule, there could certainly have been no objection to the competency of such evidence. Upon principle, there can be no difference between such testimony and that which a direct answer to the question would have elicited; so that if the witness could say what precise quantity one slave, horse or mule would probably consume within a given period, he might certainly state how much would be required for a greater number. This would be a mere matter of arithmetical calculation, about which there could be no mistake." *Rembert v. Brown*, 14 Ala. 360, 367.

"The inquiry of the witness, 'how much corn per month it would require to supply the wants of said plantation,' was pre-

ceded by a statement that he lived near the plantation of the defendant's intestate, and believed he knew about the number of hands, horses and mules employed thereon. If the plaintiff furnished corn for a definite time, it is difficult to perceive how he could have shown the quantity by more satisfactory proof, unless there had been some witness to its delivery; and it can not be inferred that he could have adduced such evidence, as he had the sole management of the plantation—the intestate giving himself but little concern about it, and rarely visiting it." *Rembert v. Brown*, 14 Ala. 360, 366.

Quantity of Coal Delivered.—The opinion of a nonexpert witness as to the quantity of coal he delivered to his employer per day, being based upon his own observation, is admissible. *Bass Furnace Co. v. Glasscock*, 82 Ala. 452, 2 So. 315.

§ 370. Value.

§ 371. — In General.

Application of Opinion Evidence.—The rule excluding opinions as evidence is not applied so strictly to questions of values and estimates as to many other subjects. *Mobile, J. & K. C. R. Co. v. Riley*, 119 Ala. 260, 24 So. 858.

"There was no error in allowing the plaintiff, as a witness, to give his opinion of the reasonable market value of the stock of goods at the time the attachment was sued out and levied. If in what he said, as appears to be the case, their market value at that time, in his judgment, was their cost price, with thirty-three and one third per cent. added, it was competent for it to go to the jury in that shape. Possibly a cross-examination would have shown that the estimate was speculative, but it does not now so appear. What are termed 'speculative profits'—that is, possible, or even probable, profits—are too remote, and evidence tending to show such profits is not admissible. *Pollock & Co. v. Gantt*, 69 Ala. 373, 377; *Union Refining Co. v. Barton*, 77 Ala. 148; *Brigham & Co. v. Carlisle*, 78 Ala. 243, 248; *Young v. Cureton*, 87 Ala. 727, 6 So. 352." *Little v. Lischkoff*, 98 Ala. 321, 12 So. 429, 430.

Value of Articles.—Nonexperts may give their opinion as to the value of an article with which they are acquainted or

familiar. *Southern Ry. Co. v. Morris*, 143 Ala. 628, 42 So. 17.

"There was no error in permitting the witness to testify as to the value of the mare as they all knew her. Nonexperts can give their opinion upon certain subjects, and value is one upon which they can give an opinion; the proper predicate being that the witness was acquainted or familiar with the thing to be valued. *Alabama, etc., R. Co. v. Moody*, 92 Ala. 279, 9 So. 238; *Ward v. Reynolds*, 32 Ala. 384; *State v. Finch*, 70 Iowa, 316, 30 N. W. 578, 59 Am. Rep. 443; *Cantling v. Hannibal & St. J. R. Co.*, 14 Am. Rep. 476; 1 *Wigmore on Ev.*, § 716." *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17, 18.

Value of Estate.—A nonexpert may testify as to the value of an estate; the proper predicate being that he is acquainted with it. *Hodge v. Rambow*, 155 Ala. 175, 45 So. 678.

"It was not necessary for Rambow to have been an expert to testify as to the value of the estate. 'Nonexperts can give their opinion upon certain subjects, and value is one upon which they can give an opinion; the proper predicate being that the witness was acquainted or familiar with the thing to be valued.' *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17." *Hodge v. Rambow*, 155 Ala. 175, 45 So. 678, 679.

§ 372. — Services.

Services of Tug Boat.—On a question of quantum meruit for the services of a tug boat, the court properly refused to allow witnesses to state whether they would have done the work at prices less than those charged. *Syson v. Hieronymus*, 127 Ala. 482, 28 So. 967.

Executor's Services.—On the executor's final accounting, evidence as to what witnesses thought would be a fair compensation for him was improperly admitted. *Kenan v. Graham*, 135 Ala. 585, 33 So. 699.

Services as Superintendent.—A claim was presented to the probate court for general services in superintending the business affairs of the deceased during eleven years, and witnesses were allowed to state what was the value of those services per year; the party not being obliged to prove each particular service and its value. *Parker v. Parker*, 33 Ala. 459.

§ 373. — Real Property.

Market Price of Property.—The market price of property may be proved by the opinions of witnesses. *Alabama Consol. Coal & Iron Co. v. Turner*, 145 Ala. 639, 39 So. 603.

"There was no error in allowing the witness, Lackey, to state what in his opinion was the market value of this mill property June, 1902. The market price of property being a conclusion which is largely made up of presumptions, may always be proved by the opinions of witnesses based, of necessity even in fact on hearsay. *Burks v. Hubbard*, 69 Ala. 379, 380; *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813." *Alabama, etc., Iron Co. v. Turner*, 145 Ala. 639, 39 So. 603, 606.

§ 374. — Personal Property.

Market Value of Goods.—There is no error, in a suit for wrongful attachment of a stock of goods, in allowing plaintiff to give it as his opinion that the cost price, with a certain per cent added, was the reasonable market value of the goods at the time of the attachment, unless it appears that such estimate is purely speculative. *Little v. Lischkoff*, 98 Ala. 321, 12 So. 429.

Value of Services of Slave.—A physician who has some knowledge (though but limited) of the value of slaves, and who has examined and prescribed for the slave in controversy, may state that "her medical bill, for attention to her, would exceed the profit she could render her owner." *Roberts v. Fleming*, 31 Ala. 683.

Value of Horse and Wagon.—A witness is not required to be an expert to testify to the value of the horse and wagon. *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 So. 284.

"The first, second, and eighteenth assignments of error are without merit. It is unnecessary that a witness should be an expert to testify as to the value of a horse and wagon. If the witness did not know such value, it could have been brought out on cross-examination and the testimony excluded. *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813, and authorities there cited." *Chandler Bros. v. Higgins*, 156 Ala. 511, 47 So. 284, 285.

Value of Cattle.—A witness having no expert knowledge may testify as to the value of cattle. *Montgomery Moore Mfg. Co. v. Leeth*, 162 Ala. 246, 50 So. 210.

Basis of Estimate.—In an action for the killing of a cow, the statement of a witness, when testifying to the value of the animal killed, that he based his estimate on "a Jersey craze," could only affect the weight of his evidence, not its admissibility. *Western Railway v. Lazarus*, 88 Ala. 453, 6 So. 877.

To permit a witness, at the instance of plaintiff, to show the market value of thorough bred jerseys, when the cow injured is only a graded jersey, is reversible error. *Western Railway v. Lazarus*, 88 Ala. 453, 6 So. 877.

Value of Animal Killed by Train.—A witness can not give his opinion as to the amount of damages sustained in consequence of injuries to an animal and a wagon struck by a train, but he may testify to the value of the animal killed by the train. *Central, etc., R. Co. v. Barnett*, 151 Ala. 407, 44 So. 392.

"The rule of evidence in permitting witnesses to give their opinion as to the value of property does not extend the right to testify as to the quantum of damages sustained. They can state the injuries, and even the value before and after the injury, and the damage would ordinarily be the difference; but it seems, from the weight of authority, that the jury, and not the witness, should ascertain the quantum of damages suffered. *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Chandler v. Bush*, 84 Ala. 102, 4 So. 207; *Krebs Mfg. Co. v. Brown*, 108 Ala. 510, 18 So. 659; *Young v. Cureton*, 87 Ala. 727, 6 So. 352." *Central, etc., R. Co. v. Barnett*, 151 Ala. 407, 44 So. 392, 393.

Decrease in Value of Horse.—In an action against a street railway company for injuries to a horse, sustained in a collision with a street car, the testimony of a witness as to the decrease of the market value of the horse, due to a cut received in its side, was not objectionable on the ground that he was not an expert. *Montgomery St. Ry. v. Hastings*, 138 Ala. 432, 35 So. 412.

"The obligation to the witness Bolling testifying that the fact of a cut which he had described being in the horse's side in-

jured its market value, proceeding on the ground that the witness was not an expert, was not well taken. *Ward v. Reynolds*, 32 Ala. 384; *Alabama, etc., R. Co. v. Moody*, 92 Ala. 279, 9 So. 238." *Montgomery St. Railway v. Hastings*, 138 Ala. 432, 35 So. 412, 414.

§ 375. Space or Distance.

Distance Horse Can Be Seen.—Where it is impracticable to lay before the jury all the details bearing on the distance a horse can be seen along a railroad track, the opinions of witnesses may be received. *East Tennessee, V. & G. R. Co. v. Watson*, 90 Ala. 41, 7 So. 813.

Close Enough to Hear Statement.—In an action against a street railroad company for an assault and battery committed by a conductor, a witness for plaintiff, in rebuttal, testified that he was present; and, in relation to an attempt by defendant to show that plaintiff had said the conductor was such a d—n fool that he did not know how to run a train, he was asked whether, if plaintiff made the remark, he could have heard it, or was close enough to have heard it. Held that, as against a general objection, it was competent for the witness to answer the question. *Birmingham Ry., Light & Power Co. v. Mullen*, 138 Ala. 614, 35 So. 701.

§ 376. Time.

Length of Time between Order and Injury.—A witness was properly allowed to answer the question "What appreciable time elapsed from the time R. gave the order * * * until deceased was struck, * * * and did he have time to get away?" as the witness could come nearer stating whether the time after the giving of the order was sufficient for deceased to have gotten away, than he could exact time which elapsed, and the jury would thereby have a better understanding of it than they could gain by mathematical calculation. *Reiter-Conley Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 So. 280.

"The objection to the question to the witness, Renfro, 'What appreciable time elapsed from the time Reiter gave the order to slacken until deceased was struck by the block, and did he have time to get away?' was properly overruled. Even if it be admitted that the latter part of the question was objectionable, and that the

rule is that, if a part only of the question be objectionable, the general objection is properly sustained (*Matthews v. Farrell*, 140 Ala. 298, 37 So. 325), yet the question seems to call rather for a statement of collective facts, based on the knowledge of the witness of all the circumstances (*Rollings v. State*, 136 Ala. 126, 34 So. 349). The witness could certainly come nearer stating whether the time after the giving of the order was sufficient for the deceased to have gotten away, than he could the exact time which elapsed, and the jury would thereby have a better practical understanding of it than they could gain by making a mathematical calculation based upon the laws of physics in regard to the time consumed by a falling body." *Reiter-Conley Mfg. Co. v. Hamlin*, 144 Ala. 192, 40 So. 280, 288.

Length of Time Necessary to Stop Train.—Where decedent was killed in a collision between the train of which he was engineer and a train of defendant at a place where the tracks crossed, in an action for the death, the testimony being conflicting as to whether decedent's train stopped within one hundred feet of defendant's track before going on the crossing, as required by Code 1896, § 3441, it was not error to allow a witness who had testified about the speed of that train to testify that the speed was about the usual rate of crossing another railroad after it had stopped. *Southern Ry. Co. v. Bonner*, 141 Ala. 517, 37 So. 702.

Time to Stop Electric Car.—A witness who was not qualified as an expert could not testify that there was plenty of time to stop an electric car before a collision. *Billingsley v. Nashville, C. & St. L. Ry. (Ala.)*, 58 So. 433.

In the absence of proof to the contrary, expert testimony that a locomotive can be stopped quicker by not reversing it, when the air brakes are applied, than by both reversing and applying the brakes, is conclusive on the court or jury; common knowledge, if resorted to, corroborating such testimony. *Harris v. Nashville, etc., Railway*, 153 Ala. 139, 44 So. 962.

Sufficient Time for Passengers to Alight.—In an action against a railway company for the death of a passenger, killed while alighting from a train, it was

proper to allow the conductor to state whether a minute or a minute and a half was sufficient to enable passengers to alight; witness being experienced and competent to testify concerning the subject. *Dilburn v. Louisville & N. R. Co.*, 156 Ala. 228, 47 So. 210.

Time an Event Occurred.—A witness may be asked, and may state, his "opinion as to the time of day" when an event occurred. *Campbell v. State*, 23 Ala. 44.

Length of Time Train Stopped at Station.—Where a witness was asked how long a train was stopped at a particular station, at which decedent was killed while attempting to alight, it was proper for the witness to give his best judgment, provided he had no opportunity to consult a timepiece. *Louisville, etc., R. Co. v. Dilburn (Ala.)*, 59 So. 438.

§ 377. Rate of Speed.

Speed of Moving Vehicle.—A nonexpert witness may testify to the speed of a moving vehicle. *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, certiorari denied *Ex parte Spearman (Ala.)*, 58 So. 1038.

"A witness, though not shown to be an expert, may testify as to the speed of a moving vehicle. *Kansas, etc., R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262; *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562. The court was not in error in overruling the objection to the question to the plaintiff's husband as to the speed of the automobile." *Spearman v. McCrary*, 4 Ala. App. 473, 58 So. 927, 931.

Speed of Train.—Nonexpert testimony is admissible to show at what speed a train was running at the time of an accident. *Alabama G. S. R. Co. v. Hall*, 105 Ala. 599, 17 So. 176; *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562.

Speed of Hand Car.—A witness who has testified that at the time the hand car was suddenly checked by the foreman, thereby throwing plaintiff off and injuring him, it was going eight or ten miles an hour, may properly be allowed to further testify that it was going faster than a man could run. *Kansas City, M. & B. R. Co. v. Crocker*, 95 Ala. 412, 11 So. 262.

§ 378. Cause and Effect.

Effect of Running Engine Slow.—In an action against a railroad company for stock killed by its engine, the opinion of

the engineer as to how it would affect the company's business, if he was required to run his engine slow enough to stop within the limits in which his headlight would enable him to see a horse on the track, is incompetent. *Louisville & N. R. Co. v. Brinckerhoff*, 119 Ala. 606, 24 So. 892.

Effect of Train Passing Curve.—One may, without expert knowledge, testify as to what effect the passing of trains over a certain curve would have, when he was working there and noticed it; such effect being a fact he had seen and observed. *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40.

Signature Obtained Through Fear.—The opinion of a witness as to whether language used was calculated to induce one to sign an instrument through fear can not be given in evidence to show such fear; but the language itself must be given, for the jury to judge of. *Johnson v. Ballew*, 2 Port. 29.

Animal Injured by Train.—Where, in an action for injuries to plaintiff's jack, it was shown that the animal passed out of defendant's right of way fence at a burned place onto defendant's track, and that from that point for a distance of fifteen feet to the south there were no tracks, when there was a "mashed and scarred place" from which point the tracks led to the pasture gate, where plaintiff found the jack with a mashed shoulder, and that between the time plaintiff saw the jack uninjured in the pasture and when he found him in his injured condition there was but one train passed which went south, the court properly permitted plaintiff to testify that in his opinion the jack was struck by a train going in that direction. *Nashville, etc., Railway v. Bingham (Ala.)*, 62 So. 111.

Injury to Lungs and Speaking Organs.—Plaintiff's breast was pierced with an umbrella rib. A physician testified that when he saw the injury it had a scab on it, and he did not pull off the scab or probe. There was no evidence whether the wound was merely on the surface, or whether the rib penetrated the chest, nor did the physician testify as to any injury to plaintiff's lungs or speaking organs. Held, that plaintiff should not have been permitted to testify that the injury received to his chest had affected his lungs

or speaking organs. *Central, etc., R. Co. v. Clements*, 2 Ala. App. 520, 57 So. 52.

Effect of Closing Aperture in Walls.—A building having been consumed by fire, which entered through an aperture in one of the walls, a witness can not state that the house might have been saved if the aperture had been closed. *Gibson v. Hatchett*, 24 Ala. 201.

Failure of Boat to Have Proper Light.—The testimony of a mate of a steamboat, who saw the collision, that the neglect of the flatboat, which was sunk, to have out a proper light, was the cause of the collision, is not admissible. *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176.

Effect of Attachment upon Business and Credit.—In an action to recover damages for the wrongful and malicious suing out of an attachment, a witness may be asked what, from his own knowledge, was the effect of the attachment upon the business and credit of the plaintiff. *O'Grady v. Julian*, 34 Ala. 88.

§ 379. Damages.

§ 380. — Injuries to the Person.

Injury to Physician.—In an action by a physician to recover for injuries caused by an obstruction in a road, the opinion of the physician as to what per cent. his ability to practice his profession had been decreased is inadmissible. *Dunn & Lallande Bros. v. Gunn*, 149 Ala. 583, 42 So. 686.

"The complaint does not claim damages on account of loss of business sustained by the plaintiff on account of the injuries sustained by him. But, we are not to be understood as committing ourselves to the proposition, that such damages would be recoverable, even if laid in the complaint. The motion to exclude the answer to the third question should have been sustained, for the same reason as above laid down for sustaining objections to questions two and five, as not being within the issues made by the pleadings, and, in that it expressed the mere opinion of the witness. *Hames v. Brownlee*, 63 Ala. 277; *Alabama, etc., R. Co. v. Tapia*, 94 Ala. 226, 10 So. 236." *Dunn, etc., Bros. v. Gunn*, 149 Ala. 583, 42 So. 686, 691.

§ 381. — Injuries to Property.

Injuries to Animal.—A witness can not give his opinion as to the amount of dam-

ages sustained in consequence of injuries to an animal and a wagon struck by train. *Central, etc., R. Co. v. Barnett*, 151 Ala. 407, 44 So. 392.

Damage to Land.—In trespass for driving over plaintiff's land and cutting it up, a witness was not entitled to testify that the land was damaged, but could testify to the facts from which such damage could be found by the jury. *Gosdin v. Williams*, 151 Ala. 592, 44 So. 611.

Damage from Improper Writ of Attachment.—In an action for wrongfully suing out a writ of garnishment it was improper to permit defendant to testify that he could not see how he damaged plaintiff to the extent claimed, or to any extent. *Mobile Furniture Commission Co. v. Little*, 108 Ala. 399, 19 So. 443, cited in note in 23 L. R. A., N. S., 368, 371.

The opinion of a witness as to the amount which the plaintiff, suing for a wrongful attachment, had been damaged, is inadmissible. *Trammell v. Ramage*, 97 Ala. 666, 11 So. 916.

In an action for maliciously suing out an attachment against a mercantile firm, the opinion of a witness that such act was injurious to the credit of the firm is inadmissible. *Donnell v. Jones*, 13 Ala. 490.

Damages from Milldam.—In an action to recover damages for building a milldam on the premises of the plaintiff's intestate, whereby a change was made in the flow of a natural water course, a witness can not be asked whether or not in his opinion the land had been injured by said erection. *Hames v. Brownlee*, 63 Ala. 277.

Removal of Furniture.—In trespass for breaking into plaintiff's house and removing his furniture, it is error to permit plaintiff to testify as to the punitive damages which he thought himself entitled to recover. *Chandler v. Bush*, 84 Ala. 102, 4 So. 207.

"The question involved not only the damage done to the furniture, and the value of what may have been proved to be lost, but also an estimate of any exemplary or punitive damages to which the witness thought himself entitled. His opinion as to this matter was not admissible. *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Alabama, etc., R. Co. v. Burkett*, 42 Ala. 83." *Chandler v. Bush*, 84 Ala. 102, 4 So. 207.

Damage from Appropriation Proceedings.—In proceedings to assess damages caused by the appropriation of land for railroad purposes, the opinions of witnesses as to the amount of damages sustained by a landowner are incompetent. *Montgomery & W. P. R. Co. v. Varner*, 19 Ala. 185.

§ 382. — **Breach of Contract.**

Failure to Deliver Goods.—The opinion of a witness as to the amount of damages sustained by the breach of a contract to deliver goods is incompetent, as the witness would thus draw the inferences which are within the province of the jury. *Young v. Cureton*, 87 Ala. 727, 6 So. 352.

"As witnesses, the defendants were asked what damages they sustained by the failure of plaintiff to perform the contract. With some exceptions, witnesses will not be allowed to state their opinion, though it may be founded on facts, or the inferences or conclusions which they may have drawn from them. This case does not fall within any of the exceptions to the general rule. We assume that no respectable authority can be found which maintains the admissibility of the opinion of a witness as to the quantum of damages caused by the breach of an executory contract to deliver goods. This would be to put the witness in the place of the jury, whose province it is to draw the inferences and conclusions from the facts and circumstances in evidence. *Montgomery, etc., R. Co. v. Varner*, 19 Ala. 185; *Chandler v. Bush*, 84 Ala. 102, 4 So. 207." *Young v. Cureton*, 87 Ala. 727, 6 So. 352.

§ 383. **Determination of Question of Competency.**

Question for Court.—Whether a non-expert witness is qualified to testify as to the mental capacity of the subject of the inquiry is a question for the court. *Johnston v. Johnston*, 174 Ala. 220, 57 So. 450.

§ 384. **Examination of Witnesses.**

§ 385. — **Testimony in General.**

Examination Should Be Full and Ample.—The examination of a nonexpert witness testifying as to the mental capacity of the testator should be full and ample.

Johnston v. Johnston, 174 Ala. 220, 57 So. 450.

Form of Answer Admissible.—Where an abutting owner claimed consequential damages to her property from the grading of a street and construction of a street railway therein, testimony, in answer to a question whether the rental value of the property was injured, that "I do not know; I should say I think so," meant that, while witness could not state positively that the rental value had been impaired, that was his opinion, and was not inadmissible on the ground that the answer showed that the witness did not know. *Bragan v. Birmingham Ry., Light & Power Co.*, 163 Ala. 93, 51 So. 30.

The answer of a witness when questioned as to the value of property, that it "would have brought seven or eight hundred dollars," is responsive and admissible. *Ward v. Reynolds*, 32 Ala. 384.

Proper Form of Question.—On trial of the right of property levied on under execution, where the question for the jury was the reasonableness of the price paid by claimants for the goods assigned by the execution defendant, the question, asked a witness, as to whether in his opinion the amount paid was reasonable, was properly excluded; the proper question being, "What in your opinion was the value of the stock of goods?" *Lightman Bros. & Goldstein v. Epstein*, 164 Ala. 660, 51 So. 164.

In an action for assault, a witness who saw the assault testified that he supposed plaintiff's feelings were hurt, that it would have hurt witness' feelings, and was then asked, [Plaintiff] did not look like he was hurt, did he?" Held, that such question was proper in form. *Barlow v. Hamilton*, 151 Ala. 634, 44 So. 657.

Testimony as to Value of Goods.—A witness who helped make an inventory of a stock of goods levied upon under an attachment, who has knowledge of the value of a portion of the same, though not of others, can state what the value of the stock as a whole was, as shown in the inventory, as against objection that the testimony, rather than the witness, was incompetent. *Schloss v. Inman*, 129 Ala. 424, 30 So. 667.

Improper Method of Proving Speed.—It is an improper method, to prove speed

at which a person walked, for counsel to walk in the presence of the jury and witness, and ask if the person walked as fast as that. *Linehan v. State*, 113 Ala. 70, 21 So. 497.

Showing Witness Part of Signature.—

It is permissible for a party to show a witness a part of a signature, concealing the balance, and ask him in whose handwriting the part shown is. *Kirksey v. Kirksey*, 41 Ala. 626, cited in note in 62 L. R. A. 817, 835.

§ 386. — Facts Forming Basis of Opinion.

§ 386 (1) In General.

Facts Forming Basis of Opinion Should Be Stated.—A nonexpert witness must, in giving an opinion, state the facts upon which that opinion is based, as far as possible. *Andrews v. Jones*, 10 Ala. 460; *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355.

General Opinion without Facts.—In an action for personal injuries received by the plaintiff in defendant's mine from a falling roof, one of plaintiff's witnesses stated that he had been a contractor and had worked in an ore mine eight or nine years. His work was getting out coal and not constructing the roofs. He was asked, "Were the timbers where the rock fell sufficiently close together to be reasonably safe?" When the question was asked there had been no proof as to how this roof had been constructed, nor how close the timbers were, and the witness did not state their condition or that he knew it. Held, that the question was properly excluded, for it was for the jury to find whether the props were close enough to be reasonably safe, and the witness should have been required to state facts from which the jury could decide and not his general opinion without facts. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 So. 48.

Question without Proper Basis in Fact.

—In an action for killing plaintiff's mule, the court did not err in refusing to permit defendant to show how far a train would go at the point in question of its own momentum, where there was no proof that the steam had been cut off, or that the train was going of its own mo-

mentum. *Western Ry. of Alabama v. Turner*, 170 Ala. 643, 54 So. 527.

Distance Man Could Be Seen.—There was a conflict in the testimony whether there was a light on the rear of the engine which, while backing, struck plaintiff. A question was asked an experienced engineer as to how near the rear of the engine a man on the track could be seen by the engineer, if there was an electric street light at that place. Held, that as one of the issues in the case was whether the engineer saw the plaintiff in a position of peril and at what distance he was from him, the question was a proper one, as against objection that it took no account of the headlight. *Louisville & N. R. Co. v. Johnson*, 162 Ala. 665, 50 So. 300.

Facts Showing Correctness of Survey.

—A county surveyor, testifying that a line which he has himself run was run correctly, may state the facts on which he bases his opinion of its correctness—as that he found the "corner stake," "bearing points," "marked trees," etc. *Shook v. Pate*, 50 Ala. 91.

Source of Knowledge of Handwriting.

—A witness who swears that he knows the handwriting of a person is *prima facie* competent to testify in relation to it, without stating the source of his knowledge. *Henderson v. Bank of Montgomery*, 11 Ala. 855, cited in note in 63 L. R. A. 967.

§ 386 (2) Bodily Condition.

Condition of Slave.—In assumpsit for breach of warranty for the soundness of a slave, plaintiff offered the testimony of a physician who attended the slave in her last sickness, which tended to prove that she had died from chronic pneumonia, having never recovered from an attack of acute pneumonia which she had had before the sale; and the witness, after having expressed his opinion fully, in answer to the interrogatory, "State anything else you may know which will benefit plaintiff," proceeded to give the history of the symptoms of two cases of pneumonia which he had treated, bearing some resemblance to the case at bar. Held, that the answer was inadmissible, as it was not so connected with the witness' opinion as to show that it constituted, in

law or in fact, a basis for his conclusions. *Bush v. Jackson*, 24 Ala. 273.

§ 386 (3) Mental Condition or Capacity.

Facts Showing Insanity.—Opinions of nonexpert witnesses as to the mental capacity or sanity of another must be accompanied by a statement of the facts on which such opinions are based. *Yarbrough v. State*, 105 Ala. 43, 16 So. 758; *Roberts v. Trawick*, 13 Ala. 68, 38 L. R. A. 723.

A nonexpert is required to state the facts on which he bases his opinion in testifying on an issue of insanity. *Birmingham Ry., Light & Power Co. v. Randle*, 149 Ala. 539, 43 So. 355.

On an issue of sanity vel non, a nonexpert witness may give his opinion affirming the sanity of the person inquired about without a specification of the facts upon which such opinion is based; and it is competent for such witness, who is shown to have known the person inquired about, to testify that he had never seen any indications or evidence of insanity. *Caddell v. State*, 129 Ala. 57, 30 So. 76.

A witness who is not an expert can not testify as to his opinion with reference to the mental capacity of another without stating the facts or reasons upon which his opinion is based. *Roberts v. Trawick*, 13 Ala. 68; *Burney v. Torrey*, 100 Ala. 157, 14 So. 685, cited in note in 38 L. R. A. 735.

Failure to Show Circumstances Forming Basis of Opinion.—On an issue as to a party's insanity, the fact that a witness who had an opportunity to form a correct judgment thereof is unable to set up a circumstance on which his opinion is based, or that the circumstance stated by him does not justify his opinion, does not warrant its exclusion as evidence. *Stubbs v. Houston*, 33 Ala. 555, cited in note in 38 L. R. A. 732, 734.

And the fact that a witness in a will contest, who had an opportunity to form a correct judgment as to the testator's sanity, is unable to state the circumstances upon which his opinion is based, or that the circumstances stated by him do not justify his opinion, does not warrant the court in excluding it as evidence, or in instructing the jury to disregard it. *Stubbs v. Houston*, 33 Ala. 555, cited in note in 38 L. R. A. 734.

Belief Synonymous with Opinion.—

"And the answer of a subscribing witness to a will as to his belief of the testator's mental capacity will not be suppressed when his disposition shows that he used the word 'belief' as synonymous with opinion. *Hughes v. Hughes*, 31 Ala. 519." Cited in note in 39 L. R. A. 719.

§ 386 (4) Due Care and Proper Conduct.

Knowledge Must Be Shown.—A party desiring to know the foundation on which a coal miner, testifying as a witness, will base his answer to a question as to whose duty it was to inspect and keep up the roof of the entry of the mine, should interrogate the witness before he answers the question; and, if his examination reveals lack of knowledge, the court must sustain an objection. *Sloss-Sheffield Steel & Iron Co. v. Green*, 159 Ala. 178, 49 So. 301.

§ 386 (5) Condition of Objects.

Security of Railroad Switch.—In an action for injuries arising from a train running through an open switch, the engineer of the train which had been the last to previously pass through the switch should not be allowed to testify that it was secure when he passed through it, without first stating its condition and how it was secured. *Birmingham Railway & Electric Co. v. Baylor*, 101 Ala. 488, 13 So. 793.

§ 387. — Cross-Examination and Re-Examination.

Cross-Examination as to Basis of Knowledge.—A witness may testify to the ownership of personal property as a fact, but on cross-examination he may be required to state the facts within his knowledge touching the ownership, and thereby aid the jury to determine the value of his testimony. *Pilcher v. Smith*, 4 Ala. App. 444, 58 So. 672.

A witness may testify to the ownership of personal property as a fact, but on cross-examination he may be required to state the facts within his knowledge touching the ownership, and thereby aid the jury to determine the value of his testimony. *Pilcher v. Smith*, 4 Ala. App. 444, 58 So. 672.

Cross-Examination to Test Knowledge of Witness.—On an issue as to testamen-

tary capacity, a witness, whether expert or not, can not testify that testator was or was not capable of making a will, that being for the jury's determination, except that on cross-examination a witness who has testified to sanity or insanity may be asked as to such capacity to test him, but not to establish the fact. *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

"It is well settled that, on the issue as to testamentary capacity, a witness, whether expert or not, can not testify that the testator was or was not capable of making a will, because, as it is said, this is the very issue to be submitted to the jury. *Walker v. Walker*, 34 Ala. 469, 473; *Hall v. Perry*, 87 Me. 569, 33 Atl. 160, 47 Am. St. Rep. 352; 28 A. & E. Ency. Law, 102. The court erred, therefore, in receiving such testimony from the witnesses *Mrs. Archer and Otis Council*. The only exception to the rule stated is on the cross-examination of a witness who has testified as to the sanity or insanity of the testator, and then only to test the witness, and not to thus establish the fact. *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481." *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314, 317, cited in note in 37 L. R. A., N. S., 595.

Where in an action by a servant for injuries caused by the slipping of a belt from a loose to a fixed pulley, and the consequent starting of the machine, defendant elicited from one of its witnesses his opinion as to the safety of the machine, it was competent for plaintiff on cross-examination to test the knowledge of the witness on that subject by questions as to whether the belt would slip under conditions which might have existed, even though there was no evidence that all of them did in fact exist. *Houston Biscuit Co. v. Dial*, 135 Ala. 168, 33 So. 268.

Ability to Make Deed.—Where a non-expert, who has known defendant intimately for a long time, testified that in his opinion defendant was insane, and had been so since a certain sickness, it is proper on cross-examination to ask such witness whether or not defendant was capable of making a deed which it is shown was executed by him subsequent to the sickness. *Dominick v. Randolph*,

124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594.

"In the case of *Milton v. Rowland*, 11 Ala. 732, where it was stated that it was competent for a nonexpert to testify to the fact that a person was sick or diseased or had a fever, and in which case the witness also stated the particular kind of disease, it was clearly intimated in the opinion of the court in this case that, if the objection had been properly made to the statement as to the kind of disease, it would have been good. The cases of *Wilkinson v. Moseley*, 30 Ala. 562; *Bennett v. Fail*, 26 Ala. 605; *Fountain v. Brown*, 38 Ala. 72; *Blackman v. Johnson*, 35 Ala. 252; *Barker v. Coleman*, 35 Ala. 221; *South, etc., R. Co. v. McLendon*, 63 Ala. 266, affirmed the doctrine laid down in *Milton v. Rowland*, supra, that a nonexpert witness may testify to the fact that a person is diseased or sick or has a fever, but they do not support the contention of the appellant that such witness may testify to the particular kind of disease or fever with which the person is afflicted." *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, 483, cited in note in 37 L. R. A., N. S., 594.

And in *Dominick v. Randolph*, 124 Ala. 557, 27 So. 481, cited in note in 37 L. R. A., N. S., 594, it was held in an action on a contract where the defense was the insanity of the defendant, that a witness who had already testified to the insanity of the defendant might be asked on cross-examination whether or not the defendant was capable of making a deed at a certain stated time, the deed referred to not being the one involved in the suit in question. It does not clearly appear how near in point of time the making of the deed was to the making of the contract in suit, but apparently it was very near. This question was allowed for the purpose of testing the sincerity of the witness.

Manner of Coupling Cars.—Where, in an action for injuries to a brakeman while coupling cars, a witness for plaintiff had testified on direct examination as to what cars could be coupled without going between them, defendant had the right to the opinion of the witness on cross-examination as to whether it was necessary to go between the cars in ques-

tion. *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856.

Circumstances Relied on to Show Knowledge.—In a partition suit, cross-examination of plaintiff's grantor, a prior cotenant of defendant, as to whether plaintiff knew of defendant's adverse claim, is not permissible; for the proper practice is for the witness to state the circumstances relied upon to show the knowledge of another. *Layton v. Campbell*, 155 Ala. 220, 46 So. 775.

"J. J. Layton was also asked, on cross-examination, if appellee did not know that appellant claimed to own the entire land at the time the witness conveyed to appellee. The court properly sustained an objection to this question. A witness can not testify that a certain person knew a given fact. The proper practice is for the witness to state the circumstances relied upon to show his knowledge. *Bailey v. State*, 107 Ala. 151, 18 So. 234." *Layton v. Campbell*, 155 Ala. 220, 46 So. 775, 776.

Cross-Examination as to Formation of Letters.—Where a nonexpert witness in a will contest testified that he had seen testator sign a prior will, admitted to be genuine, and certain checks, one of which was paid to witness, and that in his opinion the alleged signature of testator to the proposed will was not genuine, because in making an "R" in the proposed will the tail of the letter came down like a "y," which was not the case in the signature to the prior will, it was not error for the court to refuse to permit proponent, on further cross-examination of the witness, to show, after he had identified the check executed by testator to him, that the tail of the "R" in the signature to the check was the same as in the signature to the proposed will. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521.

Grounds of Statement.—Though the question whether a local officer of a mutual benefit association had authority to accept dues from a member after forfeiture was a jury question, and not a subject of opinion evidence, such officer could testify that he had no such authority; plaintiff being entitled to show on cross-examination the grounds of his

statement. *United Order of the Golden Cross v. Hooser*, 160 Ala. 334, 49 So. 354.

(B) SUBJECTS OF EXPERT TESTIMONY.

§ 388. Matters of Opinion or Facts.

Purpose of Expert Testimony.—"Expert testimony" is admitted for the sole purpose of enlightening the jury and aiding it in arriving at a correct conclusion in the premises, but not, though unimpeached, to control its judgment. *Rogers' Expert Testimony*, § 207, and note; *Andrews v. Frierson*, 144 Ala. 470, 29 So. 512; *Watson v. Anderson*, 13 Ala. 202; *McAllister v. State*, 17 Ala. 434, 438; *Anthony v. Stinson*, 4 Kan. 211; *Head v. Hargrove*, 105 U. S. 45, 26 L. Ed. 1028; *Washburn v. R. R.*, 59 Wis. 364, 18 N. W. 328; *Choice v. State*, 31 Ga. 480; 1 *Blash. on Juries*, § 238; *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722." *Harris v. Nashville, etc., Railway*, 153 Ala. 139, 44 So. 962, 966.

After Showing Qualification of Expert.—A question is not objectionable because of calling for an opinion, where a proper preliminary showing has been made of the witness being an expert on the subject to which the inquiry relates. *Alabama Great Southern R. Co. v. C. C. Gewin & Son*, 5 Ala. App. 584, 59 So. 553.

Question Calling for Fact.—A question to an expert witness in a personal injury action, whether plaintiff was able at a certain time to walk, calls for a fact, and is properly excluded. *Louisville & N. R. Co. v. Elliott*, 166 Ala. 419, 52 So. 28.

Question Not Proper for Expert Testimony.—In an action for injuries at a railroad crossing, questions asked of a medical expert concerning the extent and character of the injury a person would have received had he been struck by an engine going from fifteen to twenty miles an hour, etc., was properly disallowed as not a proper subject for expert testimony. *Southern Ry. Co. v. Weatherlow*, 153 Ala. 171, 44 So. 1019.

Physician's Opinion as to Effect of Injury.—It is not a valid objection to a physician's opinion as to the effect of injuries that it assumes the form of a conclusion. *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562.

Nature and Character of Wound.—"The

witness Dr. Hogan was shown to be competent to testify as an expert as to the nature and character of the wound inflicted on the plaintiff, and, along this line, as to whether or not the said wound permanently impaired the plaintiff physically." *Morris v. McClellan*, 154 Ala. 639, 45 So. 641, 645.

§ 389. Matters Directly in Issue.

Testamentary Capacity.—On an issue as to testamentary capacity, an expert witness can not testify that testator was or was not capable of making a will; that being for the jury's determination. *Council v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 593.

A physician can not testify "that the deceased had sufficient capacity to make a will," the question being on a will. *Walker v. Walker*, 34 Ala. 469, cited in notes in 36 L. R. A. 66, 39 L. R. A. 716, 37 L. R. A., N. S., 592.

In *Walker v. Walker*, 34 Ala. 469, cited in note in 37 L. R. A., N. S., 592, a case relating to the testimony of a physician, —a class of cases in general excluded from this note,—as follows: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises, hence it is improper to ask and obtain the opinion of even a physician as to the capacity of anyone to make a will. Under our system that question was addressed to the jury."

Proper Medical Treatment.—The evidence justifying the hypothesis put, an expert may give an opinion as to whether it was reasonable and prudent for a surgeon setting a broken arm to leave the patient ten days without any one trained in treating wounds, with instructions to the parents that he need not be sent for unless the hand turned black; this not being a substitution of the witness for the jury, but to afford the jury the benefit of an expert's opinion as to whether that kind of treatment was reasonable prudence. *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60.

"There was no error in allowing the question to be propounded to Dr. Lusk, 'Whether it was reasonable prudence on the part of a surgeon setting a broken limb to leave the patient for ten days

without any one trained in treating wounds, and with instructions to his parents that he need not be sent for unless the hand turned black.' The only objection assigned was that it substituted the witness for the jury, and called for an opinion which he, as an expert, could not give; that is, the objection concedes that the witness was shown to be an expert. And if such he was, he was competent to give an expert opinion as to the question hypothesized. There was evidence justifying the hypothesis put; and it was not a substitution of the witness for the jury, but was to afford them the benefit of an expert's opinion as to whether that kind of treatment was reasonable prudence. *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562; 1 Greenl. Ev., § 441K et seq.; *Parish v. State*, 130 Ala. 92, 30 So. 474." *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60, 61.

Safety of Place to Discharge Passengers.—An expert may not give his opinion as to whether the place at which a passenger was ejected from a train was a reasonably safe place for the passenger, but he may only state the facts as to the nature of the place, and leave the determination of its reasonable safety to the jury. *Central of Georgia Ry. Co. v. Bagley*, 173 Ala. 611, 55 So. 894.

Safety of Sewer.—In an action against a municipal corporation for the death of an infant who was drowned in a defective sewer, expert testimony that the sewer system as provided was reasonably safe was inadmissible as usurping the function of the jury. *Birmingham v. Crane*, 175 Ala. 90, 56 So. 723.

Cause of Illness.—While a medical witness could testify, in an action for damages for sickness caused by eating spoiled oysters, that spoiled oysters could have produced plaintiff's sickness, he could not testify that the sickness was caused by spoiled oysters; that being for the jury. *Travis v. Louisville, etc., R. Co. (Ala.)*, 62 So. 851.

Inefficiency of Machinery.—In an action for the agreed price of a dry kiln apparatus, sold under a guaranty that it would do certain work under a certain steam pressure, questions asked a witness whether, in his opinion, the failure of the apparatus to stand the test was

due to buyer's failure to supply steam at the agreed pressure, rather than to inefficiency of the apparatus, were erroneous, because they called for a matter which it was for the jury to determine from the testimony of witnesses, who saw the test, and also because they left the witness to construe the contract. *Walshe Mfg. Co. v. Smith Lumber Co. (Ala.)*, 59 So. 455.

Time Horse Was Injured.—The question as to how long, in the opinion of witness before he saw it, the wound on a horse's head was inflicted, is not open to the objection of calling for his opinion on the fact in issue, whether the animal was injured while in the possession of defendant as carrier. *Alabama Great Southern R. Co. v. C. C. Gewin & Son*, 5 Ala. App. 584, 59 So. 553.

"The plaintiff undertook to prove that the injury to which the death of the mare was attributable occurred while it was still in the custody of the defendant as a common carrier, and for this purpose examined a witness who was shown to be qualified by actual experience and long observation to form an opinion of some probative value, based upon the appearance of a wound on a horse and of the blood found about it, as to the length of time such wound had been inflicted before it was observed by the witness. The witness was asked the question, 'How long, in your opinion, had that wound been inflicted on the mare's head, from the appearance of the blood around the wound?' The question was objected to on a number of grounds. It was not subject to objection because of its calling for the opinion of the witness. A proper preliminary showing was made to the court to warrant it in permitting the witness to be examined as an expert on the subject in reference to which his opinion was called for. *Jones on Evidence*, § 368; *Code*, § 4011. Nor was the question subject to objection on the ground (illustrated by a question which was passed on in the case of *Louisville, etc., R. Co. v. Landers*, 135 Ala. 504, 33 So. 482) that it called for the opinion of the witness as to a fact in issue. The question called for the opinion of the witness, not upon the fact in issue of the animal having been hurt while it was in the custody of the defendant as a common carrier, but upon the

question as to how long the wound had been inflicted before it was discovered upon the arrival of the animal at Greensboro. The court did not err in overruling the objection to the question." *Alabama, etc., R. Co. v. Gewin*, 5 Ala. App. 584, 59 So. 553, 554.

Negligence as to Blasting.—Expert miners can not be asked "within what time it would be reasonably safe" to return to a hole charged with dynamite which had been ignited, and had failed to explode, nor what was "the rule on that subject among experienced miners in like cases," as such questions would take from the jury the question of negligence, and try it by the opinion of witnesses. *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216.

Competency of Employee.—Where a particular employment requires technical skill, an expert, who is shown to have a general acquaintance with the employment, and who knows the particular services incident thereto and has observed a particular person in the course of the employment, may testify that such person is competent or incompetent, but such opinion will be allowed only because, and when, the jury can not be assumed to understand the subject and to be able to reach an intelligent conclusion of their own without expert assistance. *Owen v. Alabama, etc., R. Co. (Ala.)*, 61 So. 924.

"It is settled in this state that where a particular employment requires technical skill, an expert who is shown to have a general acquaintance with the employment, and who knows the particular services incident thereto, and has sufficiently observed a particular person in the course of such employment, may testify that such person is competent or incompetent for such employment. *Buckalew v. Tennessee, etc., R. Co.*, 112 Ala. 146, 20 So. 606. The expert's opinion is allowed in such a case only because, and when, the jury can not be assumed to understand the subject, and to be able to reach an intelligent conclusion of their own, without such expert assistance. This rule was applied, in the case cited, to the position of mine boss or superintendent. By way of contrast, it has been held that the president of an oilmill could not testify whether or not his managing employee 'was a good man to manage hands.' The

court said: 'This inquiry went to the plaintiff's competency as a superintendent of the business in which he was employed, and involved a mere expert opinion of his qualifications. The capacity to manage hands is not such a question of science or skill as that jurors would be incompetent to form a correct judgment upon it without enlightenment by expert testimony. The facts showing incapacity in this particular should have been stated, so that the jury might themselves decide the question.' *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46. These observations apply to and control the present case with respect to the competency of plaintiff's negro helper, and the opinion of the witness Hopp as to his competency was properly excluded." *Owen v. Alabama, etc., R. Co. (Ala.)*, 61 So. 924, 927.

§ 390. Matters of Common Knowledge or Observation.

Rule Stated.—Evidence of an expert, as to a matter of common knowledge, is inadmissible. *Alabama Mineral R. Co. v. Jones*, 114 Ala. 519, 21 So. 507; *Decatur Car Wheel & Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646.

A question propounded to a physician which did not ask for a fact of science or expert knowledge, but for a judgment which the jury was capable of forming, was properly excluded. *City of Montgomery v. Wyche*, 169 Ala. 181, 53 So. 786.

An expert may not give a mere opinion on a subject within the knowledge of men of common experience and observation. *Adler & Co. v. Pruitt*, 169 Ala. 213, 53 So. 315.

Negligence in Striking Mule.—Expert testimony was unnecessary to determine whether it was negligence to strike a mule, which ran over plaintiff in the street after being struck; the nature of the animal and the effect of striking it being common knowledge, so that the jury could determine the question. *American Bolt Co. v. Fennell*, 158 Ala. 484, 48 So. 97, cited in note in 24 L. R. A., N. S., 1189.

"Besides, it does not require any expert testimony to tell whether it is negligence to strike a mule. The nature of the animal, and the relation of lashes to his good behavior, are matters of common

knowledge, known to the jury as well as to any witness. *Ferguson v. Hubbell*, 97 N. Y. 507, 49 Am. Rep. 544." *American Bolt Co. v. Fennell*, 158 Ala. 484, 48 So. 97, 99, cited in note in 24 L. R. A., N. S., 1189.

Physician's Statement That Persons Were Hysterical.—Where a physician has testified that it was taught that people who had lawsuits pending and who were claiming to have been injured by accident imagined they were hurt, but he did not say that such persons were necessarily hysterical, the question as to whether they were hysterical is not objectionable, as calling for matter of common knowledge. *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

Proper Method of Examining Oysters.—Where, in an action for damages for sickness from eating spoiled oysters, a witness had testified that spoiled oysters could be detected by casual examination, further evidence by him that the proper thing to do when taking oysters to prepare them for food is to take them one by one to examine them before serving was properly excluded where that was not shown to be the custom in good hotels. *Travis v. Louisville, etc., R. Co. (Ala.)*, 62 So. 851.

"One Whittaker, who testified as a witness for the plaintiff qualified as an expert in the matter of handling, cooking and serving oysters. He testified, among other things, that by the casual examination of an oyster 'you can tell whether it is spoiled or not; a perfect oyster is plump and of a bluish cast; a spoiled oyster is very black and the hard substance of a spoiled oyster is very hard and turns a yellow cast. * * * A man drawing oysters from a receptacle with a ladle could tell whether an oyster was in good condition or not if he was accustomed to handling oysters.' The above being the condition of the witness' evidence on the subject under discussion, the court committed no error in excluding from the jury the statement of this witness that the 'proper thing to do when taking oysters out of a receptacle to prepare them for food is to take the oysters from the vessel, with a ladle, one by one and examine each before serving.' It was not shown that this was the custom among well regulated ho-

tels and restaurants, and the evidence was not given upon a subject peculiarly within the knowledge of an expert. A person who never kept a restaurant and who never served an oyster knows, if he knows a spoiled oyster when he sees it, that, if oysters are taken separately from a receptacle and examined separately, a spoiled oyster can be more readily detected than if they are taken en masse from the receptacle." *Travis v. Louisville, etc., R. Co. (Ala.)*, 62 So. 851, 855.

Cruel Punishment.—What is a cruel whipping, or the appearances of one, is not a question for experts. *Hall v. Goodson*, 32 Ala. 277.

Capacity to Manage Employees.—The capacity of a person to manage employees can not be shown by mere expert opinion. The facts showing the capacity or incapacity should be stated, that the jury may draw their own conclusion. *Troy Fertilizer Co. v. Logan*, 90 Ala. 325, 8 So. 46.

§ 391. Matters Involving Scientific or Other Special Knowledge in General.

Capacity of Persons to Stand Gas.—In an action for the death of an employee caused by escaping gas, a witness who is possessed of sufficient knowledge on the subject can properly testify that some men can stand more gas than others. *Birmingham Furnace & Mfg. Co. v. Gross*, 97 Ala. 220, 12 So. 36.

Quality of Timber.—Evidence by persons familiar with the timber, that the trees left standing and not cut by defendant were as good as those which he had cut, is admissible. *Thornton v. Savage*, 120 Ala. 449, 25 So. 27.

Number of Ties in Standing Timber.—In an action to recover under a contract under which defendant agreed to cut all timber on certain land suitable for railroad ties, under a penalty for each tie which might have been cut out of trees left standing, evidence of a witness, having special knowledge as to trees suitable for ties, as to the number of ties in the trees remaining on said land which should have been cut by defendant, is admissible. *Thornton v. Savage*, 120 Ala. 449, 25 So. 27.

What Constitutes Merchantable Timber.—An expert witness is not authorized to state that merchantable timber was

such as was fit to go to market, to be conveyed there, and pay expenses, since that is not the proper criterion for determining whether certain timber is merchantable. *Wager Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949, cited in note in 52 L. R. A. 583, 590.

Shale as Mineral.—Testimony of an expert as to whether shale is a mineral, within a conveyance of minerals in land described, is admissible. *McCombs v. Stephenson*, 154 Ala. 109, 44 So. 867.

Time Necessary to Become Expert Lineman.—A witness qualified as an expert was properly allowed to testify as to how long it was necessary for one to become an experienced lineman. *Citizens', etc., Power Co. v. Lee (Ala.)*, 62 So. 199.

§ 392. Mental Condition or Capacity.

Opinion of Physician.—A physician who has been in attendance on a person whose sanity is in question, for the purpose of examining his mental condition, may give his opinion as to the sanity of such person, and may state whether he has discovered any evidences of unsoundness of mind, although he testifies that he has formed no settled opinion as to the person's depth of mind. In re *Carmichael*, 36 Ala. 514, cited in notes in 38 L. R. A. 730, 39 L. R. A. 309, 37 L. R. A., N. S., 598.

§ 393. Handwriting.

Two Papers Written at Same Time.—A witness, as an expert, may be properly allowed to express an opinion as to whether two papers were written at the same time. *Tally v. Cross*, 124 Ala. 567, 26 So. 912.

Genuineness of Writing.—"Experts may go further. * * * They may also give their opinion whether a given writing is genuine, or a feigned or forged signature. There are certain other matters pertaining to handwriting about which they can give their skilled opinions, not necessary to be here considered." See also, *Cox v. Dill*, 85 Ind. 334; *Goodyear v. Vosburgh*, 63 Barb. 154; *Sudlow v. Warshing*, 108 N. Y. 520, 15 N. E. 532; *Withee v. Rowe*, 45 Me. 571; *Moody v. Rowell*, 28 Am. Dec. 317. In 9 Am. & Eng. Enc. Law, 294, the doctrine is stated in the text to be: 'An expert may testify as to the characteristics of the handwriting

ing in question; as to whether the writing is natural or feigned, was or was not written at the same time, with the same pen and ink, and by the same person, and as to alterations or erasures therein, as to the age of the writing, and obscurities therein.' See, also, 1 Whart. Ev. (2d Ed.), § 718; Lawson, Exp. Ev., pp. 418, 419; Rog. Exp. Test., p. 183; Hammond v. Woodman, 66 Am. Dec. 240, note." State v. Flint (Ala.), 26 So. 913, 914.

§ 394. Due Care and Proper Conduct in General.

Proper Method of Mining.—In an action for injuries to a coal miner from falling rock, whether an entry as driven with due care and skill was a proper subject of expert testimony. Warrior-Pratt Coal Co. v. Shereda (Ala.), 62 So. 721.

Though the question of safety vel non of going into a mine was to be determined by the jury, the opinion of an expert, after testifying that under certain conditions there would be carbonic dioxide gas in the mine, and that it was poisonous and suffocating, that it would be unsafe to go into the mine when that condition existed, was within the rule of opinion evidence; his opinion not concluding the jury, but being merely testimony to be considered by them in reaching their conclusion. Alabama Consol. Coal & Iron Co. v. Heald, 168 Ala. 626, 53 So. 162.

§ 395. Construction and Repair of Structures, Machinery, and Appliances.

§ 395 (1) In General.

Condition of Furnace.—In an action for the death of a servant employed at a blast furnace, owing to the giving away of a portion of the furnace, a witness having testified that he had been engaged around furnaces in building, operating and repairing them for thirty-five years, it was proper to permit him to be asked from all he saw at the furnace in question, and from his expert knowledge whether the furnace before the accident was in good condition for operation. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306.

It was proper to permit the witness to be asked whether he saw material at the furnace which came from the furnace, and

which was too large to be put into it; whether certain materials were of sufficient thickness for a furnace the size of the one in question; and to describe the condition of the iron in the furnace, and whether the iron had crystallized when it was torn loose. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306.

§ 395 (2) Railroads in General.

Condition of Tender.—In an action for the death of a railroad employee, based on the alleged negligence of the engineer in charge of the yard engine by which he was killed, in failing to stop after the tender had struck decedent and knocked him down, it was competent to ask an expert engineer, testifying for plaintiff, if ordinarily there is anything under a tender to cause serious injuries. Louisville & N. R. Co. v. Banks, 132 Ala. 471, 31 So. 573.

Emission of Sparks.—One witness having testified that sparks as large as the end of his little finger were emitted by the locomotive, and another that they were as large as a cowpea, an experienced engineer, who had heard all the testimony, may testify that no engine in proper condition should have thrown sparks as large as a cowpea or as large as a pin head. Louisville & N. R. Co. v. Marbury Lumber Co., 132 Ala. 520, 32 So. 745.

Merits of Whipping Straps.—In an action by a brakeman for injuries received by being hit by an overhead bridge, it is error to refuse to permit an expert witness to give his opinion, and reasons therefor, as to the merits and demerits of "whipping straps" as signals to warn brakemen of the proximity of low bridges, and to state whether or not they were generally used on roads regarded as well managed. Louisville & N. R. Co. v. Hall, 87 Ala. 708, 6 So. 277.

§ 395 (3) Mines.

Condition of Roof of Mine.—Whether a proper inspection of a mine entry, which had stood for a long time, and from which a rock fell, could detect the condition of the roof before the falling of the rock, was a proper subject for expert evidence. Sloss-Sheffield Steel & Iron Co. v. Green, 159 Ala. 178, 49 So. 301.

§ 396. Management and Operation of Vehicles, Machinery, and Appliances.

§ 396 (1) In General.

Distance Car Could Be Stopped.—

Where, in an action for death of a pedestrian by being struck by a street car, a witness was qualified to testify as an expert concerning the operation of cars, he was properly allowed to testify to the distance at which a car could be stopped, running at the speed of the car in question. *Birmingham Ry., Light & Power Co. v. Randle*, 149 Ala. 539, 43 So. 355.

§ 396 (2) Vehicles.

Manner of Driving Ox Team.—It was competent for an experienced driver of ox teams to give his opinion whether the manner in which the team was driven at the time a collision with a horse and buggy was proper. *Cohn & Goldberg Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853.

In an action for injuries resulting from a collision between an ox team and wagon and a horse and buggy, there was evidence that the driver of the ox team was an experienced driver, and also evidence how he was managing the team at the time of the accident. Held, that it was competent for an experienced driver of ox teams to give his opinion whether the manner in which the team was driven at the time was proper. *Cohn, etc., Lumber Co. v. Robbins*, 159 Ala. 289, 48 So. 853.

§ 396 (3) Railroads in General.

Proper Management of Road.—Though it was error to refuse to allow an expert witness to state whether certain contrivances should be used on cars by properly managed railroads, it was not error to refuse to allow him to state whether defendant's road was a properly managed road. *Louisville & N. R. Co. v. Hall*, 87 Ala. 708, 6 So. 277.

Stopping of Train.—In an action for injury to a team at a crossing, it is error not to permit an expert engineer, who has testified to all the acts done by the engineer in charge of the engine at the time of the accident in his endeavor to stop the train, to state whether the train was stopped as soon as it could be done after the signal was given. *Alabama G. S. R. Co. v. Linn*, 103 Ala. 134, 15 So. 508.

A brakeman, who had testified to the manner in which a train was stopped and as to his putting on brakes to stop it, and that it was stopped without any unusual jar or jerk, was asked on cross-examination as to the difference between a long train and a short train, with reference to stopping it, and whether, if there was air on two-thirds of the cars, he would have to put up as many brakes or as soon as if he had air on only a part of it. Held not objectionable as calling for expert opinion. *Southern Ry. Co. v. Crowder*, 135 Ala. 417, 33 So. 335.

Method of Coupling Cars.—In an action for injuries to a brakeman, it was proper to permit a railroad man to give an opinion as to what cars could be coupled without going between them. *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856.

In an action for injuries to a brakeman while between cars endeavoring to couple them, it was proper to permit plaintiff's superintendent to testify that the cars could have been coupled without plaintiff going between them. *Huggins v. Southern Ry. Co.*, 148 Ala. 153, 41 So. 856.

Room for Train on Track.—On the question of negligence in backing a train against an engine on an intersecting track, to avoid collision with a train at another intersection in front, a witness shown to be familiar with the place of the collision and the length of the tracks between the intersections, and to know the number of cars in the backing train, may testify that there was enough room for its accommodation between the intersections. *Kansas City, M. & B. R. Co. v. Lackey*, 114 Ala. 152, 21 So. 444.

"We do not think the question to the witness Adams to which objection was made called for irrelevant and incompetent testimony, in view of defendant's efforts to prove that the Alabama Great Southern engine should have 'come in on the cut-off.' Certainly defendant was not prejudiced by the answer which the witness finally made." *Kansas, etc., R. Co. v. Lackey*, 114 Ala. 152, 21 So. 444, 449.

Condition of Brakes.—Where, in an action for personal injury, it appeared that plaintiff was injured by the sudden and violent letting off of the "tight brake," it was proper to allow a question to an

expert as to whether, when a brake becomes tight after it is put up, it does not throw off with more force. *Louisville & N. R. Co. v. Binion*, 107 Ala. 645, 18 So. 75.

Jerking of Train.—A freight train on which plaintiff was brakeman having stalled on a grade, and brakes having been applied to hold it in place, the engineer signaled to release the brakes. Plaintiff had released one brake, and was releasing another, when the engine started the car on which plaintiff was with a "jerk," which caused him to fall to the ground. Held, that plaintiff's testimony that the jerk "was an unusual, hard jerk" was admissible to show negligence on the part of the engineer. *Birmingham Mineral R. Co. v. Wilmer*, 97 Ala. 165, 11 So. 886, cited in note in 40 L. R. A. 557.

Competency of Brakeman with One Arm.—In an action against a railway company to recover for personal injuries, a person shown to be an experienced railroad man may give his opinion as to whether a man with one arm would be as competent a brakeman as a man with two. *Louisville & N. R. Co. v. Davis*, 99 Ala. 593, 12 So. 786.

§ 397. Conduct of Business.

Management of Plantation.—In an action to recover for services as an overseer of a plantation, a witness, who has stated that he understood the business of an overseer, and that "he saw the plantation frequently," referring to the time the plaintiff had charge of it, may be allowed to testify as an expert that in his opinion the plaintiff "managed pretty well," for the purpose of showing that plaintiff had not neglected his duty. *Spiva v. Stapleton*, 38 Ala. 171.

A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave. *Cheek v. State*, 38 Ala. 227.

Profitability of Different Methods of Banking.—The question being whether a certain person was a private banker or a bank agent, an expert can not testify that one occupation is, as a general rule, more profitable than the other, as in

any case the question must depend entirely upon the peculiar circumstances of each case. *Storey v. Union Bank*, 34 Ala. 687.

§ 398. Custom or Usage.

Custom as to Additional Compensation.—Where a railroad contractor seeks to recover for extra items of work, it is competent to show by those acquainted with the same class of railroad construction work what the custom of railroad contractors doing the same class of work is as to additional compensation for such work and the amount of that compensation. *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 So. 838.

"The terms 'mill culls' and 'shipping culls' are technical, and not commonly known to courts and juries, and there was considerable controversy as to the kind of culls delivered, whether mill or shipping culls. It was therefore permissible for the plaintiffs to show, by expert mill men, the meaning of these terms in the customary and ordinary parlance of mill men, in order to enable the jury to classify and differentiate mill culls from shipping culls to determine how many of each were delivered, and whether or not any of them were unmerchantable or unfit to be used by the plaintiff for the manufacture of boxes, etc. *McClure & Co. v. Cox, etc., Co.*, 32 Ala. 617." *Baer & Co. v. Mobile, etc., Box Mfg. Co.*, 159 Ala. 491, 49 So. 92, 95.

The terms "mill culls" and "shipping culls" being technical, and not commonly known in suit on a contract for sale thereof, where the kind of culls delivered was a question, evidence of expert lumber mill men as to the meaning in customary parlance of mill men was admissible. *Richard P. Baer & Co. v. Mobile Cooperage & Box Mfg. Co.*, 159 Ala. 491, 49 So. 92.

§ 399. Laws of Other States or Countries.

Testimony of Attorney.—An attorney of another state may testify to the exposition, interpretation, and adjudication of the statute law of that state. *Walker v. Forbes*, 31 Ala. 9, cited in note in 25 L. R. A. 456, 462.

"The ordinary mode of proving the unwritten laws of a foreign country is by the testimony of witnesses instructed in that

law. *Greenl. Ev.*, § 480; *Story's Conf. L.*, § 641, 642." *Inge v. Murphy*, 10 Ala. 885, 895.

§ 400. Construction of Written Instruments.

Construction of Word "Surfacing."—On an issue as to whether "old grading," is or is not included in "surfacing," it is competent to show by those acquainted with that class of railroad construction work what the term "surfacing" means, and whether it includes such grading as was necessary in that particular case. *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 So. 838.

"It was legitimate to prove, by those acquainted with the doing of that class of work, what the word 'surfacing' meant, and whether it included such grading as was necessary in this case; and it was proper, also, to prove what was the custom in regard to the construction companies doing that class of work, and what the customary charges were for doing it, if additional charge was permitted. The evidence sought to be introduced to establish the custom was at least 'some proof conducing to show such custom,' and whether it was sufficient or not was a matter for the consideration of the jury, under the instructions of the court. Hence it was properly admitted. *Steele v. McTyer*, 31 Ala. 667, 676; 12 Cyc., p. 1102; *Haas v. Hudmon*, 83 Ala. 174, 3 So. 302." *Henderson-Boyd Lumber Co. v. Cook*, 149 Ala. 226, 42 So. 838, 840.

Meaning of Term "K. D. & Released."

—In an action against a carrier for failure to deliver goods, where the bill of lading contained the words, "K. D. & released," in the description of the property, an objection to allowing the railroad agent to explain their terms, on the ground that it was the duty of the court to define and construe words, was properly overruled, as such rule does not apply to the construction of technical words. *Mouton v. Louisville & N. R. Co.*, 128 Ala. 537, 29 So. 602.

Meaning of "Minerals" in Deed.—On the issue of the meaning of the word "minerals," in a deed conveying minerals in land described, the admission of the testimony of an expert as to the meaning of the word was not error. *McCombs v. Stephenson*, 154 Ala. 109, 44 So. 867.

§ 401. Nature, Condition, and Relation of Objects.

Location of Land.—Where the issue in ejectment was whether the land in suit was a part of a certain lot, expert testimony of surveyors as to the true location of the lands and boundaries was admissible. *Chappell v. Roberts*, 150 Ala. 457, 43 So. 489.

§ 402. Cause and Effect.

§ 403. — In General.

Cause of Sickness.—Plaintiff's family physician may testify that an overflow tended to produce sickness, and that, while living on the property, several members of plaintiff's family were sick with malarial troubles, and had never had such sickness while residing in another part of the city. *City of Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47.

Cause of Death.—In an action on a life insurance policy, a physician who attended assured during his last illness may give his opinion as to his disease and the cause of his death. *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290.

§ 404. — Injuries to the Person.

§ 404 (1) Cause.

Injuries Caused by Fall.—In an action for personal injuries, an expert may be permitted to testify that they were occasioned by a fall of some kind; but he can not give his opinion about specific facts of the fall, as to which he does not pretend to know anything. *Patterson v. South & North Alabama R. Co.*, 89 Ala. 318, 7 So. 437.

Injuries from Being Dragged by Engine.—There being evidence tending to show the facts hypothesized, it was competent to ask a physician, who testified to the nature of decedent's injuries, if a man of decedent's size had been run against with an engine, and was knocked or fell down, and was dragged along by the footboard six inches from the ground, and got behind it, and was dragged further, whether that sort of treatment would have caused the injuries described. *Louisville & N. R. Co. v. Banks*, 132 Ala. 471, 31 So. 573.

Impaired Physical Condition.—Expert professional witnesses may testify as to the cause of plaintiff's impaired physical condition subsequent to the accident. *St.*

Louis & S. F. R. Co. v. Savage, 163 Ala. 55, 50 So. 113.

Cause of Cerebral Meningitis.—A medical expert may give his opinion as to whether, in a hypothetical case based on the facts and circumstances in evidence, resulting cerebral meningitis would have been caused by the injuries shown by the evidence. *Birmingham Ry., Light & Power Co. v. Enslen*, 144 Ala. 343, 39 So. 74, cited in note in 24 L. R. A., N. S., 254.

"There was no error in overruling the objection to the question to the witness Dr. A. R. Jones, which constitutes the ground of the eighteenth assignment of error. This witness was shown to be a medical expert, and this question merely called for his opinion as an expert, and on a matter in which expert evidence was admissible. *Page v. State*, 61 Ala. 16." *Birmingham R., etc., Co. v. Enslen*, 144 Ala. 343, 39 So. 74, 77.

Cause of Death.—In an action for death, an expert who was shown to have examined deceased after his death, and to have had knowledge of deceased's physical condition, was properly permitted to give his opinion, predicated on facts stated in a question asked of him, as to the cause of death. *Foley v. Pioneer Min. & Mfg. Co.*, 144 Ala. 178, 40 So. 273.

Where, in an action on an accident insurance policy, there was some evidence to show that insured received a blow on the back of the head, and possibly died from violent means, evidence was admissible by a physician that a blow on the back of the head might cause death. *Pacific Mut. Life Ins. Co. v. Shields (Ala.)*, 62 So. 71.

Where, in an action on a life policy, the issue was whether insured's death was due solely to accident within the policy, questions put to practicing physicians as to whether or not, if insured received a blow on the chest sufficiently violent to knock him down, and to discolor his chest, and to make him spit blood, the blow was the probable cause of a disease causing death, were proper. *Empire Life Ins. Co. v. Gee (Ala.)*, 60 So. 90.

§ 404 (2) Effect.

Headache Resulting from Wound.—Testimony of a physician, in a personal

injury case, as to the present condition of plaintiff as to the indentation on his head, and as to whether his headaches resulted from the wound, is admissible as going to the extent of plaintiff's injury. *Southern Ry. Co. v. Hobbs*, 151 Ala. 335, 43 So. 844.

Death from Effects of Injury.—Evidence by a physician, who treated the wounds of intestate on the night of the injury, that intestate died that night from the effects of the injury, is admissible. *Lovelady v. Birmingham Ry., Light & Power Co.*, 161 Ala. 494, 50 So. 96.

Permanency of Injury.—In an action for injuries a physician was competent to testify from his examination of plaintiff, and under facts hypothesized, whether, in his opinion, plaintiff's injury was permanent or otherwise. *Kansas City, M. & B. R. Co. v. Butler*, 143 Ala. 262, 38 So. 1024, cited in note in 24 L. R. A., N. S., 254.

(C) COMPETENCY OF EXPERTS.

§ 405. Necessity of Qualification.

Locomotive Engineer.—Where an expert locomotive engineer was asked as to the duty of a fireman on seeing a person on the track on the end of the ties ahead of the engine, and answered that it was his duty to warn the engineer that he was approaching danger, or that some one was in danger, neither the question nor the answer was objectionable on the ground that no predicate had been laid showing the qualifications of the witness. *Louisville, etc., R. Co. v. Bogue (Ala.)*, 58 So. 392.

To Show Boundaries of a City.—A witness, having no other knowledge concerning the location of boundary lines of a city in which an election occurred than that obtained from a surveyor employed by him, is incompetent to testify concerning such boundaries in a contest of such election. *McDonald v. Wood*, 118 Ala. 589, 24 So. 86.

§ 406. Knowledge, Experience, and Skill in General.

General Qualifications of Expert.—While, for one to testify as an expert, he must, in the opinion of the court, have special acquaintance with the immediate line of inquiry, he need not be thoroughly acquainted with the differentia of the spe-

cific specialty under consideration; a general knowledge of the department to which the specialty belongs is enough. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162.

"To entitle a witness to answer as an expert, it is true 'he must, in the opinion of the court, have special acquaintance with the immediate line of inquiry; yet he need not be thoroughly acquainted with the differentia of the specific specialty under consideration. If this were necessary, few experts could be admitted to testify; certainly no courts could be found capable of determining whether such experts were competent. A general knowledge of the department to which the specialty belongs would seem to be sufficient.' 1 Whart. on Ev. (2d Ed.), p. 386, § 439; *Washington v. Cole*, 6 Ala. 212; *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121, 123. Furthermore, the sufficiency of Steele's experience and knowledge of the subject inquired about was a matter addressed to the discretion of the court, and the ruling in respect thereto should not be here disturbed unless it clearly appears to have been erroneous. Authorities supra. See, also, *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Braham v. State*, 143 Ala. 28, 38 So. 919. We are of the opinion, and hold, that the evidence that Steele was an expert was prima facie sufficient, and that the court can not be put in error for allowing the question. *Washington v. Cole*, supra; *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176, 184." *Alabama, etc., Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162, 167.

Quality of Fertilizer.—In an action on a note given for guano sold as a fertilizer, where the defense was that the guano was worthless, a witness who had bought of plaintiff and used for three years guano of the same kind, and had closely watched its effects on various plants and crops, was competent to testify as to the proper method of using it, and as to what would prevent it from acting beneficially. *Young v. O'Neal*, 57 Ala. 566.

Execution of Photographs.—One who, by profession, is an ambrotypist and daguerreotypist, who has been employed in at least one gallery where photographic paintings were executed, and has practiced to some extent the art of painting photo-

graphic likenesses, is competent, as an expert, to testify whether photographs were well executed. *Barnes v. Ingalls*, 39 Ala. 193, cited in note in 35 L. R. A. 802.

Testimony as to Survey.—A practical surveyor, who testifies that he is familiar with the peculiar marks used by the United States surveyors in their government surveys, may give his opinion, as an expert, whether a particular line was marked by them. *Brantly v. Swift*, 24 Ala. 390.

Injury from Falling Block.—A carpenter, not shown to have any special knowledge rendering him capable of giving an expert opinion, was incompetent to testify as to whether a block of a certain size falling a certain distance would be likely to knock down the one struck by it. *Alabama, etc., R. Co. v. Neal (Ala.)*, 62 So. 554.

Handling of Timber.—In an action for an injury from a heavy timber sliding onto plaintiff's foot, where a witness was shown to have had experience in unloading such timbers under ordinary conditions, his qualification as an expert was sufficient to justify admission of his testimony as to the number of men it would take to handle the timbers when they had ice on them, notwithstanding there was no evidence of experience in unloading from cars where there was ice on the timber and cars. *Alabama Great Southern R. Co. v. Vail*, 155 Ala. 382, 46 So. 587.

To Prove Signature.—A witness who testified that he was bookkeeper for a bank for ten or twelve years; that his duty was to keep the accounts of customers, charge the checks, and enter the deposits; that in that position he became familiar with the signature of testator; that, while he had not seen testator write, yet his checks were charged to his account and paid, and most of them were afterwards returned to him; that he knew what the bank always accepted as his signature, that he was familiar with the card that was accepted when the account was opened; and that he had been handling this signature for five years or more—was qualified to testify as to the genuineness of such depositor's signature. *Venable v. Venable*, 165 Ala. 621, 51 So. 833.

To Identify Handwriting.—One who testified that he was not an expert in handwriting, and not an expert in ink, but that for twenty-two years he had been in a business which necessitated the handling of a great many letters, notes, checks, drafts, etc., showed the possession of qualifications rendering him competent to answer the question whether, in his opinion, certain words were written in the same ink in which the rest of the instrument was written. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, cited in note in 63 L. R. A. 986.

Alteration of Check.—Where experts had testified that writing could be removed by acids without leaving any trace, and there was evidence that the name of the payee and amount in the check in question had been altered, but none that the check had been subjected to acids, experienced cashiers were properly allowed to testify as to the genuineness of the check, though not shown to be experts as to the effect of acids on writing. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304, 312.

Quality of Plaster.—Evidence that witness was not a plasterer, but furnished sand, that the plaster in question was made of Gate City sand, which did not make good plaster, that he knew nothing about plastering, except from seeing other people make it, did not show that the witness was not qualified to testify as to the quality of the plaster. *Basenberg v. Lawrence*, 160 Ala. 422, 49 So. 771.

§ 407. Bodily and Mental Condition.

Qualification of Attending Physician.—In an action for failure to deliver a telegram, whereby plaintiff was delayed for two days in reaching his sick wife, it was competent to prove that the wife was sick and nervous when the plaintiff reached her, and had been previous to that time, and the testimony of the attending physician as to her condition was admissible to prove this. *Western Union Telegraph Co. v. Rowell*, 153 Ala. 295, 45 So. 73.

In an action for failure to deliver a telegram whereby plaintiff was delayed in reaching his sick wife, testimony of her physician as to the wife's nervous condi-

tion at and before plaintiff's arrival is admissible. *Western Union Telegraph Co. v. Rowell*, 166 Ala. 651, 51 So. 880.

"The exceptions to the testimony of witnesses Ward and Cameron, in regard to the physical condition of Mrs. Rowell, presented for review by the seventh, eighth, ninth, and tenth grounds in the assignment of errors, possess no merit. Under the express ruling made when the cause was here before, such testimony was held admissible. *Western Union Tel. Co. v. Rowell*, 153 Ala. 295, 45 So. 73." *Western Union Tel. Co. v. Rowell*, 166 Ala. 651, 51 So. 880, 882.

Student of Medical Science.—One who is not engaged in the practice of physic may nevertheless be competent to testify, if he shows that he had studied the science of medicine, and felt competent to express a medical opinion upon a particular disease; and the fact that he was not a practicing physician would go only to his credibility. *Tullis v. Kidd*, 12 Ala. 648.

"Clinical practice, is doubtless a most efficient mode of acquiring such knowledge, by enabling the practitioner, from his own observation, to verify the assertions, or theories of others, or to correct errors into which they may have fallen; and it may be, that medical opinions, not brought to this test, are not worthy of much reliance as the basis of the verdict of a jury. But, if one asserts an ability to give correct opinions, upon any art, or science, from an acquaintance with the subject, acquired by observation and study, we can not perceive on what ground he can be rejected, because he has not been in the actual practice of his profession. This circumstance, as already observed, may deprive his testimony of much weight with the jury, but is no ground for excluding it. So also, among physicians in actual practice, superior skill, greater power, or opportunity for observation, may entitle the opinions of one, to much greater weight than those of another, although both are equally competent, in legal estimation." *Tullis v. Kidd*, 12 Ala. 648, 650.

"One who exercises an art, or trade, is supposed to be acquainted with it. Thus a practicing physician would be presumed, from that circumstance alone, to be ac-

quainted with the cause, and cure of diseases; but it by no means follows, that one who is not in the actual practice of medicine, may not be skilled in the science, so as to be able to give correct opinions, as to the existence, or cause of diseases." *Tullis v. Kidd*, 12 Ala. 648.

Mother of Children.—One who has stated that she was the mother of children, and knew the difference between a prematurely born child and a full grown child, may testify as to whether a birth was premature. *Bessemer Coal, Iron & Land Co. v. Doak*, 152 Ala. 166, 44 So. 627; *S. C.*, 151 Ala. 670, 44 So. 631.

§ 408. Due Care and Proper Conduct in General.

Practical Miner.—One who had dug coal for fifty-five years, and who had mined coal in Alabama for twenty years, is competent to testify as to whether a proper inspection of a coal mine entry, which had stood for a long time and from which a rock fell, could detect the loose condition of the roof before the falling of the rock. *Sloss-Sheffield Steel & Iron Co. v. Green*, 159 Ala. 178, 49 So. 301.

In an action for personal injuries caused by defects in a cross entry in defendant's mine, a witness who has been a miner for thirty years, and is familiar with all the details of mining, and who deposes that he is acquainted with the general construction of cross entries, and that the rule is to have the space between the cars and the wall three feet wide, is competent to give his opinion as to whether it is safe to have such space only a foot and a half wide. *McNamara v. Logan*, 100 Ala. 187, 14 So. 175.

Person Acquainted with Navigation of River.—A person acquainted with the navigation of the river, and a witness of the collision, may give his opinion as an expert whether the particular act which occasioned it was an act of prudence and discretion on the part of the officers. *Cook v. Parham*, 24 Ala. 21.

A practical mason, who had worked on plaintiff's wall, is a competent expert to say whether it was strong enough to withstand all the water coming from the plaintiff's premises. *City of Montgomery v. Gilmer*, 33 Ala. 116.

"The evidence conduced to show, that

the wall of plaintiff's was built with a view to its capacity to resist the flow of water. The witness whose opinion was given as to the capacity of the wall to withstand the flow of water from the inside, was a practical brick-mason, and had been engaged in the construction. He was, therefore, cognizant of the facts, which affected the capacity of the wall to stand, which a stream of water flowed upon it. He was also acquainted with the premises, and knew the sources for the accumulation of a volume of water within the wall. A brick-mason, thus informed, certainly must be deemed to have more than ordinary skill in the determination of the question, whether the flowing from the inside could wash down the wall. A brick-mason must be supposed to possess more skill in determining the strength of a brick wall than persons usually have, especially if he was employed in the construction of the wall. The authorities, we think, fully authorize the conclusion, that the opinion of the witness was admissible under the circumstances, as coming from an expert. 1 *Greenleaf on Evidence*, § 440; *McCreary v. Turk*, 29 Ala. 244." *City Council v. Gilmer*, 33 Ala. 116, 133.

Proper Method of Blasting.—A witness having stated the customary mode of charging holes with dynamite in blasting, he may be asked if those in question were properly charged. *Eureka Co. v. Bass*, 81 Ala. 200, 8 So. 216.

Retired Engineer.—In an action for death caused by being run over by a train, a witness who had been an engineer for two or three years, about twenty years previous to the trial, and had since that time observed the operation of trains, and for the past 3 or 4 years lived near the defendant's railroad, and had noticed the trains operated on the railroad, equipped with air brakes, was qualified to give his opinion as to within what distance a train could be stopped on a straight track with slight upgrade, equipped with air brakes, drawing seven or eight cars, and running at a speed of thirty-five miles an hour. *Southern R. Co. v. Forrister*, 158 Ala. 477, 48 So. 69.

Knowledge of Whistle Signals of Railroad.—In an action for death caused by being run over by a train, a witness who

testified that she lived near a railroad all her life, and knew "the blows of an engine, and that there were two long blasts of the whistle," was competent to testify to the meaning of such signal. *Southern R. Co. v. Forrister*, 158 Ala. 477, 48 So. 69.

§ 409. Machinery and Mechanical Devices and Appliances.

Expert Machinist.—A witness, who qualified as an expert machinist with reference to the setting up and operation of engines and boilers, was properly permitted to state that in his opinion an engine and boiler were properly set up. *W. T. Adams Mach. Co. v. Turner*, 162 Ala. 351, 50 So. 308.

Evidence that witness had been a machinist fifteen or twenty years, that he had formerly been in defendant's employ and had charge of its machinery at its mine for two years, and knew what its air receiver at the mouth of its mine was, and that the air before going into the mine was pumped into the receiver, and that he had some knowledge of chemistry, was prima facie sufficient of his qualification as an expert to testify that if the receiver was as hot as a cook stove it would indicate to the master mechanic that the air that was being forced into the mine had been reduced to a poisonous carbonic dioxide gas. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162.

Master Mechanics.—Witnesses who had never constructed hydraulic presses like the one alleged to be defective, but who were master mechanics of many years' experience, familiar with hydraulic pressure and machinery, and with the general construction and repair of machinery, as well as with making and plugging holes, were qualified to give their opinion as to whether the press was defective. *Caldwell-Watson, etc., Mach. Co. v. Watson (Ala.)*, 62 So. 859.

Person Using Appliance.—One who is well acquainted with the use of a mechanical appliance, and has had a large experience in using it, though not familiar with its construction, is competent to testify as to whether such appliance "was reasonably adapted for the purpose for which it was used," and also as to its condition at the time of the accident. Ala-

bama *Connellsville Coal & Coke Co. v. Pitts*, 98 Ala. 285, 13 So. 135.

"The witness Lewis testified that he was well and long acquainted with the use, if not with the construction of the machinery he was called to testify about. He stated he had had much experience in its use. We think he should have been permitted to testify that the pattern of the tippie employed on the occasion of the injury 'was reasonably adapted for the purpose for which it was used;' and, if he knew the condition it was in when the disaster occurred, whether in good repair, or the contrary, he could state that. *Young v. O'Neal*, 57 Ala. 566; *Propst v. Georgia Pac. R. Co.*, 83 Ala. 518, 3 So. 764; *Blackman v. Collier*, 65 Ala. 311; *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471; *Hames v. Brownlee*, 63 Ala. 277. The city court erred in excluding this testimony. *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 So. 145." *Alabama, etc., Iron Co. v. Pitts*, 98 Ala. 285, 13 So. 135, 137.

Witness Incompetent to Operate Heating Apparatus.—In an action on a contract for installing a heating plant in a hotel, in which defendant claimed damages for a failure of the plaintiff to properly perform the work, his opinion was not admissible; it appearing from his own testimony that he was incompetent to make the apparatus a proper instrumentality to serve the purpose it was intended. *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325.

Person Working Occasionally as Brakeman.—Where a witness testified that he had never followed railroad braking as a business, but had worked occasionally, and could not say that he understood the business thoroughly, he was incompetent to testify whether there was any difficulty in stopping a string of seven cars going down an incline twenty feet high with two brakes before they reached a certain crossing. *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362.

Operation of Ripsaw.—In an action for wrongful death from injuries sustained by an operative of a ripsaw, a witness who had testified that he had been in the lumber and mill business for a long time, and was familiar with the business and the machinery used therein, was qualified to

testify as an expert, though he had never run a ripsaw machine with four saws, like the one in question. *Yates v. Huntsville Hoop & Heading Co. (Ala.)*, 39 So. 647.

§ 410. Construction and Operation of Railroads.

§ 410 (1) In General.

Person Employed as Brakeman, Foreman and Conductor.—Where a witness had been employed as a brakeman, foreman, and conductor for nine years, he was competent to testify as an expert as to the effect of a car, heavily loaded or empty, running rapidly over a switch improperly set. *Louisville & N. R. Co. v. Mothershed*, 97 Ala. 261, 12 So. 714.

Railroad Employee.—Witnesses who have been "railroading" for fifteen years, and are familiar with a brakeman's duties, are competent to testify that a brakeman on the top of a train should be on the footboard, in the center, and not at the edge of the car, as in this latter position there is more danger of being struck by a bridge. *Schlaff v. Louisville & N. R. Co.*, 100 Ala. 377, 14 So. 105.

Proper Method of Loading Cattle.—In an action for injury to a shipment of cattle, a witness who stated that he knew about loading cattle, and helped load and unload cattle for about six years, was competent to testify whether the cattle were properly loaded, or were loaded "too loose" or "too tight." *Nashville, etc., R. Co. v. Hinds (Ala.)*, 60 So. 409.

Proper Shipment of Cattle.—"The witness Elrod was shown to have had sufficient experience in shipping cattle to be allowed to answer the question as to the animals having been "too loose" or "too tight" when loaded in the car for shipment. It is a matter of common practice to allow stock dealers and those acquainted with handling stock to testify as experts concerning the management of stock and matters peculiarly within their knowledge. *Jones on Evidence*, §§ 380, 381." *Nashville, etc., R. Co. v. Hinds (Ala.)*, 60 So. 409, 410.

In an action against a carrier for damages for injury to cattle in shipment, a witness who testified that he had been a dealer in cattle all his life, and had shipped cattle several times over defendant's road, and between the stations be-

tween which the cattle in question were shipped, was qualified to testify as an expert as to the value of the cattle, and as to whether they could be shipped safely without partitions. *Louisville & N. R. Co. v. Landers*, 135 Ala. 504, 33 So. 482.

Arrangement of Car Platforms.—On an issue of a carrier's negligence in failing to cover the space between passenger cars, plaintiff having testified that he had traveled extensively over railroads all over the United States, except on the Pacific Coast, and especially over all the railroads in Alabama, he was properly allowed to testify as to how passenger car platforms were arranged on other well regulated railroads. *Central of Georgia Ry. Co. v. Storrs*, 169 Ala. 361, 53 So. 746.

Method of Stopping Car or Train.—Where, in an action for the death of a person struck by a car, a witness testified that he had been a motorman for between seven and eight years, and had had experience in stopping cars, the court properly permitted him to testify as to the best and quickest way to stop a car. *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584, 585.

The court properly excluded the answer of the motorman of a street car, made after he had stated what he did to stop the car, to the effect that that was all he could do, as the permitting of opinion evidence is largely within the discretion of the trial court. *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584.

And such question was properly excluded, where the witness merely testified that he had been running a car about two months. *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584.

"There was no reversible error in excluding the expression by the witness Colbie, after he had stated what he did to stop the car, 'That is all I could do.' In the first place, the admission of expert testimony is largely within the discretion of the trial court. *Alabama Consol., etc., Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162; *Stewart v. Sloss-Sheffield, etc., Iron Co.*, 170 Ala. 544, 54 So. 48. The witness had merely testified that he had been running a car for about two months, and there was no evidence as to his expertness. In addition, the material question was not, what the particular motorman could do,

but what a skillful one, similarly situated, could have done. *Brown v. St. Louis, etc., R. Co.*, 171 Ala. 310, 55 So. 107; *Louisville, etc., R. Co. v. Young*, 168 Ala. 551, 53 So. 213; *Birmingham R., etc., Co. v. Morris*, 163 Ala. 190, 50 So. 198." *Birmingham R., etc., Co. v. Saxon (Ala.)*, 59 So. 584, 591.

Engineer of Twenty Years Experience.

—An engineer of twenty years experience in railroading, and another shown to have been a railroad engineer since 1905, are competent to testify as experts in an action against a railroad for the wrongful death by being struck by defendant's engine. *Brown v. St. Louis & S. F. R. Co.*, 171 Ala. 310, 55 So. 107.

One who has been a conductor of a railway train continuously for over seven years is a competent expert as to the sufficiency of the means provided by a company for stopping trains. *Mobile, etc., R. Co. v. Blakely*, 59 Ala. 471.

Engineer of Fifteen Years Experience.

—In an action for damages from fire, in which an engineer testified that he had been an engineer for fifteen years and was in charge of the locomotive causing the damages, it was proper to permit him to testify that he knew how to properly handle an engine. *Horton v. Louisville & N. R. Co.*, 161 Ala. 107, 49 So. 423.

"The witness Young testified that he had been a locomotive engineer for about fifteen years, and was in charge of the locomotive alleged to have caused the damage in question. He was then asked: 'Do you know how to properly handle, manage, and control an engine?' A general objection was made by the plaintiff to this question, which was overruled by the court. There was no error in this ruling. The objection was general. The evidence sought was, under the issues in the case, relevant and material. Counsel for appellant cite the case of *Birmingham R., etc., Co. v. Martin*, 148 Ala. 8, 42 So. 618, as opposed to the ruling of the trial court in this case. The questions in the two cases are different. The question here was as to whether the witness knew how to manage an engine, qualifying him to speak as an expert, and upon which the plaintiff might, on a cross-examination, fully test the knowledge of the witness inquired about. In the case cited the question was whether the witness did

carefully control and manage the engine at the time of the accident and it was properly ruled that he should state what he did and how he handled the engine, as the careful handling of the engine at the time was one of the questions in case for the jury." *Horton v. Louisville, etc., R. Co.*, 161 Ala. 107, 49 So. 423, 425.

Person Experienced in Track Construction.

—In an action for injuries to a railroad brakeman a witness shown to be experienced in track construction was competent to give his opinion that the track where the train was derailed was in a defective and unsafe condition. *Northern Alabama Ry. Co. v. Shea*, 142 Ala. 119, 37 So. 796.

Person of Ten Years Experience on Railroad.

—In an action against a railroad company to recover damages for the alleged negligent killing of plaintiff's intestate, who was, at the time of the accident, in the employment of the defendant, where it is shown that the injuries were sustained while the plaintiff's intestate was assisting in placing a derailed car back upon the track, and that, in order to do this, jackscrews were being used, it is competent to show by a witness, who testified that he had for ten years worked upon a section of a railroad, the efficacy of jackscrews in an effort to place a derailed car back upon the track. *Louisville & N. R. Co. v. Jones*, 130 Ala. 456, 30 So. 586.

"Ordinarily, the fitness of a railroad appliance for special uses of one company may be tested by what is shown to be the custom of well regulated railroad companies with respect to such uses under like circumstances. The practice of a few such companies, though it may tend to show what is the custom, does not have that effect as a conclusion of law. *Louisville, etc., R. Co. v. Hall*, 87 Ala. 708, 6 So. 277; *Richmond, etc., R. Co. v. Weems*, 97 Ala. 270, 12 So. 186. In *Weems' case*, a charge proposing to make a standard test of duty by the usage of five railroad companies was held to be invasive of the jury's province. Charge six, referring to eight companies for a like purpose, is subject to the same objection. This charge, and likewise charges seven and eight, would have withdrawn from the jury the question of whether there was

negligent superintendence in omitting to use supports in addition to the jack, for, though they may have been in general and proper use for replacing cars, due care might require that under circumstances like those of this accident their use should be supplemented by other supports." *Louisville, etc., R. Co. v. Jones*, 130 Ala. 456, 30 So. 586, 592.

Danger from Using Ordinary Engine as Yard Engine.—A witness, who was shown to be prima facie an expert in such matter, was competent to testify as to the difference in danger between using an ordinary road engine as a yard engine, with and without a flat car attached to it. *Mobile & O. R. Co. v. George*, 94 Ala. 199, 10 So. 145.

Train Stopped as Soon as Possible.—In an action for injury to a team at a crossing, it is error not to permit an expert engineer, who has testified to all the acts done by the engineer in charge of the engine at the time of the accident in his endeavor to stop the train, to state whether or not the train was stopped as soon as it could be done after the signal was given. *Alabama, etc., R. Co. v. Linn*, 103 Ala. 134, 15 So. 508.

§ 410 (2) Distance within Which Car or Train May Be Stopped.

Stopping of Street Car.—In an action for the death of a pedestrian, struck by a street car, a witness who qualified as an expert as to the operation of cars might give his opinion as to the distance at which a car could be stopped running at the speed of the car in question. *Randle v. Birmingham Ry., Light & Power Co.*, 158 Ala. 532, 48 So. 114.

"When this cause was here on a former appeal, it was then determined, on the same evidence that is now presented, that witness Clayton was shown to possess that degree of experience and knowledge which would qualify him to testify, as an expert, as to the distance within which an electric car could be stopped, if running at the speed of the car in question, and that he could give his opinion on the subject. *Birmingham R., etc., Co. v. Randle*, 149 Ala. 539, 43 So. 355." *Randle v. Birmingham R., etc., Co.*, 158 Ala. 532, 48 So. 114, 116.

Possibility of Stopping Car.—A motor-

man of several months' experience is competent to give his opinion that it was impossible to have stopped the car by the application of all the appliances at his command in time to have prevented the injury complained of. *Wallace v. North Alabama Traction Co.*, 145 Ala. 682, 40 So. 89.

Distance Passenger Engine Can Be Stopped.—One who had twenty years experience in railroading, and had served two years as fireman and three years as freight engineer, and, though he had never run a passenger train, had often observed them being stopped, was competent to state as an expert within what distance the passenger train could be stopped; the passenger engine being similar to the usual type of freight engines, though the passenger cars were different from those composing a freight train. *Southern Ry. Co. v. Gullatt*, 158 Ala. 502, 48 So. 572.

§ 410 (3) Speed.

Dangerous Rate of Speed.—In an action for injuries to a railroad brakeman, one one who had had long experience as a brakeman, and whose duties were concerned with the regulation of the speed of the train under varying circumstances of curve and grade, and who knew what was understood to be a safe rate of speed down the grade and around the curve at the point where the train was derailed, was competent to give his opinion as an expert as to whether the rate of speed of the train at the time of the accident was a dangerous one. *Northern Alabama Ry. Co. v. Shea*, 142 Ala. 119, 37 So. 796.

§ 411. Conduct of Business, Custom, or Usage.

Method of Throwing Horse.—A man having practical knowledge on the subject gained from experience may testify as to the proper manner or method to throw a horse without injury to the animal, although he is not a graduate or skilled veterinary surgeon, or technically learned on the subject. *Staples v. Steed*, 6 Ala. App. 594, 60 So. 499.

A witness who had helped to throw stock off and on for twenty years, had seen several horses thrown, and had thrown several horses and mules, and another witness who had seen many horses

thrown, had helped to throw them off and on for thirty years, and had lived on a ranch several years, during which time he had helped to throw a great many horses, were qualified to testify as to the proper manner or method of throwing a horse without injuring it. *Staples v. Steed*, 6 Ala. App. 594, 60 So. 499.

"The witnesses Watts and Worthy each testified to sufficient facts showing them to be competent to testify to the proper manner or method to throw a horse without injury to the animal. A man having practical knowledge on such a subject gained from experience is qualified to testify about a matter of this nature without being shown to be a graduate or skilled veterinary surgeon, or technically learned on the subject. The witness Watts testified: 'I have helped throw stock off and on for twenty years. I have seen several horses thrown. Have thrown several horses and mules.' The witness further specified instances of his having personally engaged in throwing horses, and stated that he was forty-two years old. This witness having testified to facts showing his competency, it was without error to permit the witness to state that he knew how to hobble and throw a horse without injuring him. The witness Worthy testified that he had seen many horses thrown; that he had helped throw horses off and on for thirty years, had lived on a ranch several years, and during this time had helped hobble and throw a great many horses. The witness then stated in detail particular experiences he had with named persons in hobbling and throwing horses. Both of these witnesses testified to facts showing their knowledge and experience on the subject, and the court in allowing each of them to answer the question, 'Do you know how to hobble and throw a horse without injury?' was but following the ruling of the supreme court on the admissibility of this testimony as set out in the opinion in this case on the former appeal. *Staples v. Steed*, 167 Ala. 241, 52 So. 646, when it was said: 'The opinion of this witness [referring to the witness Worthy] as to the proper way in which to perform the mechanical part of the operation was properly received; its weight being left to the jury.' The original record on the former

appeal shows that the witness Worthy was permitted in the trial from which that appeal was taken to testify that the way in which that horse was thrown was not a safe way or manner in which to throw the horse, and it was the testimony of the witness that was referred to as allowing the witness 'in effect to testify that the operation involved in the case on trial was negligently performed.' *Staples v. Steed*, supra. The record on the present appeal does not contain this illegal testimony." *Staples v. Steed*, 6 Ala. App. 594, 60 So. 499, 501.

Method of Tanning.—The owner of a tanyard, who has been engaged in the business of tanning for twenty-three years, "seeing the work going on, and knowing how it was done," is an expert as to such matters, though he may have employed others to do the work for him, and is not a "practical tanner." *Nelson v. Wood*, 62 Ala. 175.

§ 412. Physical Facts.

Explosion of Gas in Mine.—Evidence that witness was associate state mine inspector and a practical miner, that he had been engaged in mining fifteen years, and that he had "had a good deal of experience in gaseous mines," is a sufficient predicate on which to allow him to answer the question: "If, in the proper ways and works of a mine, if they have sufficient air in the mine, could there be a gas explosion?" *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 284, 47 So. 279.

Characteristics of "Merchantable Timber."—A witness who had been in the logging business for thirty-five years is competent to testify as to the physical characteristics of "merchantable timber" contracted to be delivered by a logging contract. *Wager Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949, cited in note in 52 L. R. A. 583, 590.

Action of Chemicals on Paper.—Where in an action against the payee of a bank check or bill of exchange the issue is as to whether the paper could be altered in a way it was claimed by the plaintiff to have been altered by the use of gases, or acids, or other chemicals, without leaving any indication or trace of the change, or showing that it had been tampered with, a witness who testified that

he had been a bookkeeper for six or seven years, and had performed a number of experiments with the particular chemical inquired about, and had witnessed other persons experiment with such chemical on different kinds of paper, including paper similar to that on which the check in question was drawn, is competent to testify as to the effect of such acid on paper in making erasures. *Birmingham Nat. Bank v. Bradley* (Ala.), 30 So. 546.

§ 413. Value.

§ 413 (1) Service.

Value of Attorney's Services.—Members of the bar are competent as experts to give their opinion of the reasonable value of services shown to have been rendered by an attorney. *T. S. Faulk & Co. v. Hobbie Grocery Co.* (Ala.), 59 So. 450.

An attorney is qualified to testify as to the general value of legal services, after being informed as to what was done, without being shown to be familiar with the plaintiff's professional attainments and experience; such matters being a proper subject for cross-examination. *Fuller v. Stevens* (Ala.), 39 So. 623.

"Referring to assignments two, three, and four: While it is true that in estimating the value of professional services, it is sometimes proper to consider the experience and ability of the lawyer who performs them (*Lungerhausen v. Crittenden* [Mich.] 61 N. W. 270; *Vilas v. Downer*, 21 Vt. 419; *Phelps v. Hunt*, 40 Conn. 97; *Bowling v. Scales*, 1 Tenn. Ch. 620), yet it does not follow that, before an attorney is qualified to testify on these matters, he must be examined as to the professional attainments and experience of the plaintiff. He testifies as to the general value of services, after being informed as to what was done, as in this case, and then, if there are any matters relating to the ability or experience of the lawyer performing the services, those matters can be brought out by cross-examination or otherwise. If there is no testimony on these matters, it will be presumed that the ordinary charges by the bar generally prevail." *Fuller v. Stevens* (Ala.), 39 So. 623, 624.

Physician's Services.—Where witnesses admitted that they did not know the

customary charges for physician's services in certain counties, they were incompetent to testify to the value of such services there rendered. *Duggar v. Pitts*, 145 Ala. 358, 39 So. 905.

§ 413 (2) Real Property.

Value of House.—In an action on an insurance policy a witness testified that he was a builder of houses, and engaged in that business; that he had recently built houses near the burned house; that he knew the value of building material and labor there; and could tell the dimensions of the house from the pillars and marks on the chimneys, which were standing; and that, when estimating the cost of rebuilding, assured had described the house to him in detail. Held, that he could testify as to the value of the house and the cost of rebuilding, as matter of judgment, if he had heard its description by other witnesses, and as matter of skilled opinion when submitted hypothetically. *Phoenix Ins. Co. v. Copeland*, 86 Ala. 551, 6 So. 143.

Distance of Place of Residence.—The court can not assume that the remoteness of the place where an expert resides and saw property from the place where its value is to be ascertained (Talladega and Perry counties) is so great that his evidence would throw no light on its value at the latter place. *Ward v. Reynolds*, 32 Ala. 384.

§ 413 (3) Personal Property.

Value of Slave.—A negro trader may testify as to the value of a slave at a particular time, although he never saw the slave until three years after that time. However weak and unsatisfactory such proof may be, it is error to reject it when offered. *Dixon v. Barclay*, 22 Ala. 370.

Where a witness testifies to the value of a slave personally known to him at his residence in Talladega, it can not be assumed, that the distance between his residence and the place (in Perry county) where the slave was sold was so great, and the price of slaves at two places so different, that the evidence of the witness would shed no light on the question of value at the place of sale. *Ward v. Reynolds*, 32 Ala. 384.

"The witness, Morris, swore the wood

was worth \$2.35 on the river bank. He said that to cord it on the barge was worth fifteen cents a cord, and he knew it was worth \$2.50 when corded on the barge. Defendant moved to exclude on the ground of a want of sufficient knowledge on the subject, to render the witness competent to testify to the value of the wood. To render such testimony admissible, it was unnecessary that the witness should have been shown to possess any peculiar skill to qualify him as an expert on the subject. *East Tennessee, etc., R. Co. v. Watson*, 90 Ala. 41, 7 So. 813; *Burks v. Hubbard*, 69 Ala. 379; *Rawles v. James*, 49 Ala. 183." *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644, 646.

Value of Wood.—It was not necessary that a witness who testified as to the value of certain wood sold should have been shown to have possessed any peculiar skill to qualify him as an expert on the subject. *American Oak Extract Co. v. Ryan*, 112 Ala. 337, 20 So. 644.

Value of Goods.—One who has actual knowledge of the stock of goods involved in the issue, and experience in the particular trade or business to which they belong, should be allowed to state his opinion as to the value of the goods. *Gulf City Ins. Co. v. Stephens*, 51 Ala. 121.

§ 414. Damages.

Injury to Cotton.—A witness who had on two occasions examined cotton that had been under water, he did not know how long, is not an expert as to the injury which twelve to twenty-four hours' submersion would probably cause. *Weaver v. Alabama Coal Min. Co.*, 35 Ala. 176.

§ 415. Cause and Effect.

Cause of Death of Horse.—A witness who testified that he had had considerable experience with horses, had lived on a farm when a boy, and that his father was a horse trader, is not competent to testify as to whether or not an injury to a horse could have caused its death, or what in his opinion was the cause of its death. *Southern Ry. Co. v. Taylor*, 148 Ala. 52, 42 So. 625.

Condition of Track.—Proof that a witness who examined the track immediately after derailment of a train had had sev-

eral years' experience in working as a section hand on railroads was insufficient to qualify him as an expert to testify as to the cause of the derailment. *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111.

Where a witness testified that after a derailment he at once examined the railroad track at the point where it occurred, finding a muddy place where two or three ties had sunk in the mud, so as to be entirely covered, making the outer rail of the curve lower than the inner rail, and that he had been working for defendant, a lumber company, which owned the track, for more than five years, he was not competent to testify as an expert as to what caused the car to turn over, in the absence of any further showing as to knowledge or experience that might have qualified him to give the testimony. *Lawrence v. Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111.

Permanency of Injury.—Where a doctor testified that he attended the plaintiff some ten months previous to the trial, and that he was then suffering from the injury, and described it in a general manner, and that his last visit was six months ago, it was proper not to permit him to testify as an expert as to the permanency of the plaintiff's injury. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 So. 48.

§ 416. Preliminary Evidence as to Competency.

Competency of Physician.—Where a witness, in his deposition, stated that he attended a certain negro "as a physician," it was held that this was sufficient evidence that he was a physician to warrant the admission of his opinions in evidence respecting the disease of the negro. *Washington v. Cole*, 6 Ala. 212.

"In *Mendum's* case, 6 Rand. 709, it was objected that the witness' skill and experience as a surgeon, was not such as to warrant the court in taking his opinion. It was proved, that the witness had graduated as a surgeon at the university, where ample means existed for surgical instruction—that he practiced medicine and surgery seventeen years in the country, that he had performed surgical operations, sometimes with, and occasionally, though

seldom without the aid of others. He stood high as a physician in his neighborhood, and was confided in as a surgeon, etc. Another surgeon testified as to his standing. The witness himself was interrogated as to his particular practice, and though he had never actually inspected a stab made by a knife or dirk, he was allowed upon his general knowledge and experience, to give his opinion whether the particular wound was made by the one or the other." *Washington v. Cole*, 6 Ala. 212, 213.

It is not error to exclude a question to a physician, who testified in a personal injury action that a competent surgeon who examined plaintiff at the time of injury would be better able to tell what the injury to plaintiff was, whether that surgeon was a competent surgeon, where that surgeon was afterwards examined by the court, since it was for the court to decide his competency. *Louisville & N. R. Co. v. Elliott*, 166 Ala. 419, 52 So. 28.

§ 417. Determination of Question of Competency.

Discretion of Court.—The determination of the qualifications of a witness to testify as an expert, rest largely within the discretion of the trial court. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 So. 48; *Louisville & N. R. Co. v. Elliott*, 166 Ala. 419, 52 So. 28.

"The next assignment insisted on is that the court erred in sustaining the objection to the question to Dr. Downing, 'Would you say from what you saw of the plaintiff and from what you know of his injuries that he was permanently injured?' The general rule has been declared that the qualifications of a witness to testify as an expert is a matter largely within the discretion of the court trying the case, and the appellate court will not reverse its rulings unless there has been an abuse of that discretion; and Mr. Wigmore states that the exercise of the discretion in this particular should not be reviewed at all. *Gila Valley R. R. Co. v. Lyon*, 203 U. S. 465, 475, 27 Sup. Ct. 145, 51 L. Ed. 276; *Chateaugay Iron Co. v. Blake*, 144 U. S. 476, 484, 12 Sup. Ct. 731, 36 L. Ed. 510; *Spring Co. v. Edgar*, 99 U. S. 645, 658, 25 L. Ed. 487; *Amory v.*

Inhabitants of Melrose, 161 Mass. 556, 39 N. E. 276; *Brown v. Boston & A. R. Co.*, 179 Mass. 523, 61 N. E. 141; *Allen v. Voje*, 114 Wis. 1, 89 S. W. 925, 928; *L. Corse & Co. v. Minn. Grain Co.*, 94 Minn. 331, 102 N. W. 728." *Stewart v. Sloss-Sheffield, etc., Iron Co.*, 170 Ala. 544, 54 So. 48, 50.

In an action against a railroad for the wrongful death of plaintiff's intestate, a flagman, who testified that he had been in railroad work since a boy, in the transportation department for four years, and familiar with the handling of cars, though he had never had charge of a train or run an engine, and could not run an engine and cars with safety, was asked to tell the jury whether it was safe to couple an engine onto a caboose, and to explain the proper manner of handling the train and engine. Held, that the exclusion of such testimony as expert testimony was within the proper discretion of the lower court. *Neyman v. Alabama, etc., R. Co.*, 174 Ala. 613, 57 So. 435.

Ignoring Denial of Witness' Qualifications.—Though one says that he is not an expert, the court may hold that he is; the question being how many braces ought to be put on a rail on a curve like the one where the accident occurred; he also having stated that he had worked on a railroad three years, off and on, doing section work, keeping up the track on the roadbed; that he had worked on the road in question three years before; and that he had once acted as section foreman for fifteen days on another road, and was trusted to put braces where he thought they were needed. *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40.

Motorman.—Excluding the answer of a motorman that he did all he could to stop a car, which struck a pedestrian, was not an abuse of the court's discretion in the admission of opinion evidence. *Birmingham Ry., Light & Power Co. v. Saxon (Ala.)*, 59 So. 584.

The sufficiency of witness' experience and knowledge of the subject inquired about to qualify him to testify as an expert is a matter addressed to the discretion of the trial court. *Alabama Consol. Coal & Iron Co. v. Heald*, 168 Ala. 626, 53 So. 162.

Failure to Raise Question of Expert's Qualification.—In a suit against a railroad company for killing a pedestrian, who was knocked down by an engine, a witness for plaintiff was asked many questions as to the distance within which an engine, circumstanced as this one was, could be stopped, and as to the conditions thereof, etc. Objections were urged to the questions and answers as being irrelevant and immaterial, and, after a cross-examination as to his competency, defendant's motion to exclude his testimony as to the space within which the engine could have been stopped, made on the ground that he was "not shown to have knowledge," was overruled. Held, that the question as to qualifications to testify as an expert was not raised by proper objections, and there was no error in overruling the objections made. *Louisville & N. R. Co. v. Ratliffe*, 164 Ala. 147, 51 So. 335.

"The question as to the qualifications of the witness Eskridge to testify as an expert was not, in the opinion of this court raised by proper objections. *Brumley v. Flint*, 87 Cal. 471, 25 Pac. 683." *Louisville, etc., R. Co. v. Ratliffe*, 164 Ala. 147, 51 So. 335, 336.

Method of Determining Competency.—Whether a witness, whose opinions are offered in evidence as an expert in any art or science, is competent to testify, is to be determined by the court, either by examining the witness himself or from the testimony of others. *Tullis v. Kidd*, 12 Ala. 648.

"Whether a witness, whose opinions are offered to be given in evidence as an expert, in any art, or science, is competent to testify, depends upon his skill in the art or science. This, like all other questions of the competency of witnesses, is determined by the court; and in ascertaining the fact, the court may examine the witness himself, or may ascertain it from the testimony of others." *Tullis v. Kidd*, 12 Ala. 648, 649.

(D) EXAMINATION OF EXPERTS.

§ 418. Mode of Examination in General.

State of Evidence.—It is one's right to ask an expert's opinion on the state of the evidence tending to support his theory of the subject of the inquiry for

expert opinion. *Birmingham Ry., Light & Power Co. v. Fisher*, 173 Ala. 623, 55 So. 995.

"The court did not err in overruling the objection to the hypothetical question put to the expert witness, Dr. Tally. The grounds of objections to the question were that it did not sufficiently hypothesize the facts in evidence, that it invaded the jury's province, and that it sought a conclusion. It was the examiner's right to seek the expert's opinion upon the state of the evidence tending to support his theory of the subject of the inquiry for expert opinion. *Louisville, etc., R. Co. v. Banks*, 132 Ala. 471, 31 So. 573; *Birmingham R., etc., Co. v. Ellard*, 135 Ala. 433, 33 So. 276." *Birmingham R., etc., Co. v. Fisher*, 173 Ala. 623, 55 So. 995, 996.

Question Not Properly Limiting Answer.—In an action for the obstruction of a water course, damaging plaintiff's land and crops, a question to a witness as to what, in his judgment, was the damage to the crops during the past twelve months before the commencement of the action was objectionable as not limiting the damage to the obstruction complained of. *Black v. Hankins*, 6 Ala. App. 512, 60 So. 441.

"Under the allegations of the complaint and the rulings of the supreme court, it seems the injury to plaintiff's crops sustained within twelve months before the filing of the suit was a proper element of damages. *Alabama Consol., etc., Iron Co. v. Vines*, 151 Ala. 398, 44 So. 377. And it was therefore competent to offer proof showing the extent thereof; but we are of opinion that the court was in error in permitting, over the seasonable and proper objection of defendant, the plaintiff to ask and his witness to answer the following question: 'What, in your judgment, has been the damage or injury to the crops or products of this land during the past twelve months before the filing of the suit?' Pretermitted other reasons, it is sufficient to say that it is objectionable, in that it does not limit the cause of the injury or damages inquired about to the obstruction complained of. It is not necessary to decide whether or not the question calls for an objectionable conclusion of the witness.

It would appear that it did, but under recent rulings of the supreme court the matter is doubtful. We say this in order that the plaintiff may not risk a reversal again by asking the same question on another trial. There are safer methods of proving the damage sustained to the crops." *Black v. Hankins*, 6 Ala. App. 512, 60 So. 441, 442.

§ 419. Questions and Answers Based on Personal Knowledge of Expert.

Testimony of Surveyor.—In an action of ejectment, where there is in issue a disputed boundary line, it is entirely competent for a witness who is shown to have been an engineer of many years experience, and to have surveyed the lines around the lands involved in the suit, and to have known said lines for many years, to testify that the lines as shown upon the map, which was introduced in evidence, and which was exhibited to him, were correct; and it is not error for the court to refuse to limit the inquiry addressed to such witness as to the correctness of the line shown on the map at the particular point in dispute. *Barratt v. Kelly*, 131 Ala. 378, 30 So. 824.

Safety of Track in Mine.—The question, asked an expert as to latches in a switch in a coal mine, where an accident occurred by derailment of cars, "State whether or not these latches are safe on main slopes," and his answer thereto, "I did not take them to be safe," call for and give his opinion, and are not open to the objection of calling for and containing a conclusion. *Southern Coal & Coke Co. v. Swinney*, 149 Ala. 405, 42 So. 808.

Consequences of Injury.—Where a physician had testified to the nature of plaintiff's injuries, it was not error to allow him to state what were the probable consequences of such injuries, as the opinion of experts may be based on facts of which they have actual knowledge, as well as on a hypothetical statement. *Louisville & N. R. Co. v. Stewart*, 128 Ala. 313, 29 So. 562.

Question Involving Credibility of Preceding Witness.—Questions to a witness, calling for his knowledge as an expert, should be so framed as not to submit to him the credibility of a preceding witness who has testified in respect to the facts

hypothesized. *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 284, 47 So. 279.

Damage from Construction of Railroads.—It was not error to refuse to exclude testimony of witnesses to the damages resulting to plaintiff's real estate from the construction of defendant's railway, on the objection that their opinion of the difference in value of the property before and after the construction of the railway took account of the usefulness of the property for residential purposes only, and not its usefulness for manufacturing purposes; the objection not going to the admissibility, but to the weight and credibility, of the evidence. *Enterprise Lumber Co. v. Porter*, 165 Ala. 579, 51 So. 723. See, also, the title EMINENT DOMAIN.

§ 420. Questions and Answers Based on Testimony of Others.

§ 420 (1) In General.

Dangerous Running of Empty Cars.—In an action for the death of a minor servant while riding a string of seven empty coal cars down an incline twenty feet high, a question asked of an expert railroad man as to whether the letting of seven empty cars down an incline twenty feet high was dangerous and perilous to the person who rides them down was not objectionable for irrelevancy. *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362.

Compensation of Executor.—On the taking of an account before a master in chancery to ascertain the compensation to which an executor is entitled, a witness can not be asked, after the pleadings and depositions in the cause have been read in his hearing "to state, from his own knowledge and the facts disclosed by the pleadings and evidence, what would be a reasonable compensation to the executor." *Gould v. Hays*, 25 Ala. 426.

§ 420 (2) Medical Experts.

Injury from Fall.—A question: "What injuries could be inflicted on him by such a fall * * * as that wouldn't give out any external evidences—the accident occurring on the third of August last—that would not give external evidences in that time? * * * As a medical man, what

would you say might exist?"—is proper; plaintiff having testified to pains at certain places, and there being testimony that no objective evidences of injury such as would cause pain could be discovered; the fact inquired about relating to the present existence of injury, and not to what might have existed. *Louisville & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40.

Condition of Slave.—A physician can not be asked his opinion as to "whether, from the condition of" a slave, "as described by two witnesses" named, whose testimony was conflicting, "the attention of a physician was necessary." *Wilkinson v. Moseley*, 30 Ala. 562, cited in note in 24 L. R. A., N. S., 254.

§ 421. Hypothetical Questions and Answers.

§ 422. — In General.

Hypothetical Questions Proper.—Where there is evidence to show the facts substantially as they are embraced in a hypothetical question asked, and the witness was competent to give evidence as an expert, it was not error to allow him to answer the hypothetical question. *Birmingham Ry., Light & Power Co. v. Moore*, 148 Ala. 115, 42 So. 1024.

Witness' Willingness to Submit to Operation.—In an action for personal injuries, the question of whether witness, a medical expert, would, if his arm were in the condition of plaintiff's, submit to a certain operation, which he had testified would probably result in a cure, but would be attended with some danger to life and intense pain, should not be allowed to be answered. *Montgomery & E. Ry. Co. v. Mallette*, 92 Ala. 209, 9 So. 363.

§ 423. — Form and Sufficiency of Questions.

§ 423 (1) In General.

Discovery of Intestate on Track.—Where one of plaintiff's witnesses testified that intestate was walking on the ends of the ties in front of defendant's approaching train, and was run down while so walking, apparently unconscious of his danger, and it also appeared that the engineer saw intestate about one hundred yards in front of the train, though

he claimed intestate was not in a place of danger, a question hypothesizing that the engineer discovered intestate on the ends of the ties with something in his hand and with his back to the train, apparently unconscious of its approach, and asking for the duty of the engineer, was not objectionable as not based on the evidence. *Louisville, etc., R. Co. v. Bogue (Ala.)*, 58 So. 392.

Proper Medical Attention.—The character of the injury not being in dispute, there is no harm in allowing an expert to give his opinion as to how long it is reasonably prudent to stay away after setting an arm before returning to see the patient, though the question does not hypothesize the facts as to the injury otherwise than an injury "such as was shown in this case." *Carpenter v. Walker*, 170 Ala. 659, 54 So. 60.

Bursting of Pipe.—A question to an expert witness as to what, in his opinion, caused the bursting of a pipe, was properly excluded, because not hypothesized on any facts. *Mitchell Square Bale Ginning Co. v. Grant*, 143 Ala. 194, 38 So. 855.

How Far Headlight Could Be Seen.—A hypothetical question to an experienced locomotive engineer as to how far a headlight could be seen was not objectionable as calling for a conclusion. *Southern Ry. Co. v. Bonner*, 141 Ala. 517, 37 So. 702.

Value of Machinery.—An expert, called to testify to the value of machinery, can not be asked, "If said machinery cost \$3,200, and was warranted to cut 3,000 feet of inch boards in a day, and yet could cut but 1,500 feet in a day, how much would it be worth?" *Winter v. Burt*, 31 Ala. 33.

§ 423 (2) Facts Which May Be Assumed.

Description of Facts by Witness.—A hypothetical question containing an hypothesis corresponding with the description of the facts by a witness is properly allowed. *Louisville & N. R. Co. v. Young*, 168 Ala. 551, 53 So. 213.

Value of Estate of Deceased.—In an action to recover for medical services rendered, a hypothetical question propounded to expert witnesses to prove the value of such services is objectionable where one of its postulates is the value of the de-

ceased patient's estate. *Morrisette v. Wood*, 123 Ala. 384, 26 So. 307.

Facts Necessary to Formation of Opinion.—A hypothetical case calling for an expert opinion should be limited not only to facts in evidence, but to those necessary to the forming of an opinion. *Birmingham Ry. & Electric Co. v. Butler*, 135 Ala. 388, 33 So. 33.

Opinion of One Theory of Case.—It is not error to permit a physician, testifying in an action for injuries to a servant, to be asked whether, if the plaintiff lived to be about forty years old and never had any trouble with the injured limb, and that it developed as well as the other limb, whether that would indicate there was not likely to be tubercular trouble there, where the doctor had testified that the shortening of the limb was due to tubercular trouble, and there was evidence tending to show the facts hypothesized, as each party may take the opinion of the expert on his theory of the facts. *Grasselli Chemical Co. v. Davis*, 166 Ala. 471, 52 So. 35.

"While it is true that the jury may be misled, by allowing the opinion of experts on hypothesis not in accordance with the evidence, yet each party has the right to take the opinion of the expert on his theory of the facts. 1 Wigmore on Evidence, §§ 672, 682; *Page v. State*, 61 Ala. 16, 18; *Birmingham R., etc., Co. v. Enslen*, 144 Ala. 343, 39 So. 74; *Parrish v. State*, 139 Ala. 16, 36 So. 1012; *Rogers on Expert Testimony*, § 28, p. 39." *Grasselli Chemical Co. v. Davis*, 166 Ala. 471, 52 So. 35, 37.

Conduct Showing Mental Condition.—"And a witness in a will contest in which insanity is alleged may be asked if the deceased said or did anything showing a want of soundness of the mind, and if so what it was. *Watson v. Anderson*, 11 Ala. 43." Cited in note in 38 L. R. A. 740.

§ 423 (3) Facts Unsupported by Evidence.

Technical Accuracy Not Required.—A hypothetical question should not contain matter which the evidence does not support, but technical accuracy is not required. *Long Distance Telephone & Telegraph Co. v. Schmidt*, 157 Ala. 391, 47 So. 731.

"It is urged in support of assignment

No. 25 that the court erred in permitting the hypothetical question to be asked the witness Gengles against appellant's objection, for the reason that the question assumed that the strip of land sought to be condemned was not the width stated in the question. It is true that a hypothetical question should not contain matter which the evidence does not tend to support, but technical accuracy is not required as to this. *Parrish v. State*, 139 Ala. 16, 36 So. 1012. But we apprehend that, in order for the appellant to avail itself of the exception based upon the overruling of its objection, it was necessary to point out definitely and specifically the vice in the question. The general objection that was interposed will not suffice for this. 8 Ency. Pl. & Pr. 223 et seq.; 2 Elliott on Ev., § 882 et seq." *Long Distance, etc., Tel. Co. v. Schmidt*, 157 Ala. 391, 47 So. 731, 733.

Number of Times Things Had Been Done.—A hypothetical question that if a certain thing had been done as "many as a hundred times," would not a certain result happen, is properly supported by testimony that the same thing had been done three or four times a day for a month. *Kansas City, M. & B. R. Co. v. Webb*, 97 Ala. 157, 11 So. 888.

Facts Having No Bearing on Case.—Where a claim is made by one who alleges that he sold the goods attached to defendant on fraudulent representations as to his ability to pay, questions by claimant as to whether it is usual or safe to invest so largely in such goods, considering the bad crop year, in the absence of evidence to support the hypothesis, are properly excluded. *Wollner v. Lehman, Durr & Co.*, 85 Ala. 274, 4 So. 643.

Stopping Train Going at Certain Speed.

—Where the evidence showed that a train was going eighteen or twenty miles an hour, it was error to permit a party to ask a witness in what distance he could stop a train at fifteen miles an hour; the question not being asked to test the skill or knowledge of the witness as an expert. *Alabama Great Southern R. Co. v. McWhorter*, 156 Ala. 269, 47 So. 84.

Necessity for Physical Operation.—In an action for personal injuries, a question, asked a physician, whether, if the

plaintiff's organs which were removed had been removed without any fall, would she be in the same condition as she now is? was improper, as assuming that a necessity for removal of the organs existed before the injury, which was not shown by the evidence introduced. *Town of Elba v. Bullard*, 152 Ala. 237, 44 So. 412.

§ 424. Facts Forming Basis of Opinion.

Physical Injuries.—Where a doctor who had testified that he attended the plaintiff who had been injured and made a medical examination of him at that time was asked, "From what you saw of his injuries, would you say he was permanently injured?" the question was properly excluded, for it did not state how that information was obtained or upon what facts he was basing his opinion. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, 54 So. 48.

The questions, asked a physician, whether or not, in making up an opinion as to the permanency or not of injuries of the character in question, he takes into consideration the condition of the patient for weeks and months, and even years, after the accident, and if plaintiff on account of that injury, if his back pains or troubles him owing to this injury all the time, or to such an extent that he can not do work he was formerly accustomed to do, would or would not that pain in his back, and being so he could not work on account of it, and taking into consideration the swelling spoken of, and that pain being there to the present time, would or would not that indicate permanent injury to the kidneys, are proper. *Southern Ry. Co. v. Hobbs*, 151 Ala. 335, 43 So. 844.

Mental Condition.—"A witness who is not an expert can not testify as to his opinion with reference to the mental capacity of another without stating the facts or reasons upon which his opinion is based. *Roberts v. Trawick*, 13 Ala. 68; *Burney v. Torrey*, 100 Ala. 157, 14 So. 685." Cited in note in 38 L. R. A. 735.

Mental Capacity.—Evidence of a witness in a will contest that he had lived in the same house with the testatrix and that he saw her act strangely, does not show a sufficiently long and intimate acquaintance with her to authorize him to give his opinion as to her mental capac-

ity without stating the facts upon which it was based. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264, cited in note in 38 L. R. A. 732.

Where witnesses' acquaintance and opportunity for observation was only during one year, they can not give their opinion as to the mental capacity of the testatrix without stating the facts on which the opinion is passed. *Murphree v. Senn*, 107 Ala. 424, 18 So. 264, cited in note in 38 L. R. A. 732.

Effective Method of Stopping Car.—In an action against an electric railway company for injury to one crossing the track, the motorman could state whether he used the most effective method of stopping the car as quickly as possible; he being an expert, and having detailed what he did to stop the car. *Birmingham Ry., Light & Power Co. v. Hayes*, 153 Ala. 178, 44 So. 1032.

"The trial court erred in not permitting the defendant to ask the witness Ray if he used the most effective method of stopping the car in the quickest space of time? He was an expert, and had detailed what he did to stop the car, and could testify that what he did do was the quickest way to stop the car. *Alabama, etc., R. Co. v. Linn*, 103 Ala. 134, 15 So. 508." *Birmingham R., etc., Co. v. Hayes*, 153 Ala. 178, 44 So. 1032, 1036.

§ 425. Cross-Examination and Re-Examination.

§ 425 (1) Cross-Examination in General.

Use of Documents.—Documents used on cross-examination merely to show mental operations of a testator were admissible, without producing or accounting for the originals thereof. *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Mental Operation Shown by Letters.—An expert having testified to testator's insanity and inability to attend to any business requiring mental concentration, it was not error to permit him to be asked on cross-examination whether he regarded such mental operations as were shown by letters written by testator as indicative of a sound mind. *Councill v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Ability to Frame Legislative Bill.—An

expert having testified to testator's insanity, it was not improper to ask him on cross-examination whether in his opinion a person of unsound mind could have framed a legislative bill like one claimed to have been framed by testator. *Council v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Comprehension of Act of Signing Checks.—A witness having testified to testator's insanity, it was not reversible error to ask him on cross-examination whether he "supposed" that testator knew what he was doing when he signed checks given witness for professional services. *Council v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Capacity to Make Will.—On cross-examination of an expert witness who has testified to sanity or insanity of testator, he may be asked as to testator's capacity to make a will in order to test the witness, but not to establish the fact of capacity. *Council v. Mayhew*, 172 Ala. 295, 55 So. 314, cited in note in 37 L. R. A., N. S., 595.

Matters Not Pertinent to Issues.—Where an expert testified for defendant in an action for injuries to a servant, it was within the discretion of the court to widen the range of cross-examination, even to include matters not pertinent to the issues, to test the witness' means of knowledge, memory, accuracy, or credibility. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348.

"Dr. Phillips was examined in chief by the defendant as a medical expert. From the manner in which his testimony appears in the record, we can not say that he did not testify on his examination in chief with respect to the kidney not being detached. If he did, then, of course, the trial court properly allowed the plaintiff on cross-examination to inquire of him as to the symptoms of a kidney detached from its moorings. We do not decide that it was not a proper subject for cross-examination, even if he had not testified on the examination in chief about the kidney. Being an expert, it was within the discretion of the court to widen the range of cross-examination, even to the inclusion of matter not pertinent to the issues, to test the witness' means of

knowledge, memory, accuracy, or credibility. *Stoudenmeir v. Williamson*, 29 Ala. 558; *Braham v. State*, 143 Ala. 28, 38 So. 919." *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348, 351.

Existence of Hysteria.—The physician having testified that it was taught that people who have lawsuits pending, and who are claiming to have been injured by accidents, and claiming money for them, imagined they were hurt, etc., and having further stated that he did not say such persons were necessarily hysterical, plaintiff was entitled to ask him on cross-examination, "Are they hysterical?" *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

Symptoms of Physical Injury.—Where a medical expert testified in chief with respect to plaintiff's kidney being detached, he was properly allowed on cross-examination to state the symptoms of a detached kidney. *West Pratt Coal Co. v. Andrews*, 150 Ala. 368, 43 So. 348.

§ 425 (2) Irrelevant, Collateral, or Immaterial Matters.

Division of Brain.—Where testatrix died of consumption, and in the contest of her will a physician testified that as a rule consumptives had control of their mind until death, the question, on cross-examination, if the witness knew in how many parts the brain was divided, was irrelevant. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687.

§ 425 (3) Testing Knowledge or Competency of Witness.

Knowledge of Hysteria.—Where, in an action for personal injury, a physician called by defendant had testified that plaintiff was hysterical, and as to the symptoms and effects of such condition, it was proper cross-examination to ask him, "Is a patient any more responsible for a hysterical condition than for any other condition?" to test his knowledge as an expert on hysteria. *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

§ 425 (4) Re-Examination.

Manner of Injury.—On cross-examination of a physician called by plaintiff in a personal injury case, defendant sought to show that, if she had been injured as

claimed, she could not have walked as she afterwards did. On redirect, the physician was asked whether, supposing she had limped and hobbled along, stopping frequently to rest, "couldn't she still have received the injury she complains of now, and done that?" Held, that the question was not objectionable as calling for "a conclusion from the facts stated that the jury should draw, and not the witness, as an expert." *Birmingham Ry. & Electric Co. v. Ellard*, 135 Ala. 433, 33 So. 276.

Professional Standing of Other Experts.—Where testatrix died of consumption, and in the contest of her will a physician testified that prominent physicians in a certain city agreed with him in the belief that consumptives had control of their mind until death, and on cross-examination he was made to give the names of the physicians he referred to, it was proper, on redirect examination, to allow plaintiff to question the witness as to the professional standing of such physicians. *Schieffelin v. Schieffelin*, 127 Ala. 14, 28 So. 687.

§ 426. Contradiction.

Possibility of Engine Setting Fire.—Where an expert testified that defendant had for more than a year previous to the fire used engines of like construction and appliances as the one alleged to have set the fire, and that it was impossible for engines of such construction and appliances to set fires, it was proper to rebut such evidence by proof that, a year before the fire, other fires have been set by defendant's engines. *Louisville, etc., R. Co. v. Malone*, 109 Ala. 509, 20 So. 33, cited in note in 42 L. R. A. 762.

(E) COMPARISON OF HANDWRITING.

§ 427. Grounds for Allowing Comparison.

Proving Origin of Disputed Handwriting.—"There is, perhaps, no branch of the law" says Byrd, J., in *Kirksey v. Kirksey*, 41 Ala. 626, cited in note in 62 L. R. A. 817, speaking of comparison of handwriting, "which has given rise to such a contrariety of adjudications in this country as that which relates to the evidence above referred to. It would be a laborious, if not an useless, task to attempt to review, or to reconcile, the various deci-

sions on this recondite offshoot of American jurisprudence."

As to proof of handwriting by comparison, the following general rules may be laid down, as the result of the authorities: first, that it is not allowable for either witnesses or juries to compare the handwriting of papers not in evidence for other purposes, with the disputed writing or signature, with the view of arriving at a conclusion as to the genuineness of the latter; second, that there is no difference, in this respect, between the competency of an expert and of a person who has never seen the party write; third, that the jury may institute a comparison between the disputed writing or signature and other writings or signatures which are proved to be genuine, and which are in evidence before them for other purposes, in order to arrive at a conclusion as to the genuineness of the former; and, fourth, that the doctrine as to experts, in such cases, "relates to ancient writings, which are not proved by their authority, and to giving their opinion as to the genuineness of a signature or writing, founded on a knowledge of the handwriting of the party by whom it is said to be written; or, in the case of bank bills, on a knowledge of the genuineness of bills of a similar character, and some skill and experience possessed by the witness in detecting counterfeits, which are not possessed by the mass of men; and, perhaps, to an opinion as to whether a signature is genuine or counterfeit, without having an acquaintance with the handwriting in dispute, but not by comparison." *Kirksey v. Kirksey*, 41 Ala. 626.

The decision in *Kirksey v. Kirksey*, 41 Ala. 626, was doubtless intended to cover the whole field of comparison of handwriting, in the statement of the following rules: First, that it is not allowable for witnesses or juries to compare the handwriting of papers not in evidence for other purposes with the disputed writing or signature in evidence, with the object of arriving at a conclusion as to the genuineness of the latter. Second, that in this respect there is no distinction between the competency of a witness who has seen the party write and an expert who has never seen him write. Third, that the jury may institute a comparison between

writings or signatures in evidence before them for other purposes, proved to be genuine, and the disputed one, in order to arrive at a conclusion as to the genuineness of the latter. This was followed as to the first rule, excluding comparison of irrelevant writings by witnesses, in *Snider v. Burks*, 84 Ala. 53, 4 So. 225, and *Curtis v. State*, 118 Ala. 125, 24 So. 111, cited in note in 63 L. R. A. 835.

§ 428. Competency of Expert.

Person Skilled in Handwriting.—An expert on handwriting is a person accustomed to and skilled in the matter of genuine and spurious handwriting. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521.

"As to the competency of a witness to testify his opinion as an expert it was said by this court in *Moon v. Crowder*, 72 Ala. 79: 'To legalize such testimony, the witness must be first shown to be an expert; that is, accustomed to and skilled in the matter of handwriting, genuine and spurious.' With this standard or rule, the question of competency of the witness seems to be one addressed to the sound judgment and discretion of the court, and its ruling is not reviewable on appeal, unless there is shown an abuse of this discretion. *Louisville, etc., R. Co. v. Sandlin*, 125 Ala. 585, 28 So. 40; *White v. State*, 133 Ala. 122, 32 So. 139. Because of the inconclusive nature of opinion evidence, much latitude should be allowed upon the cross-examination of a witness testifying his opinion, whether as an expert or non-expert, in order to afford the jury full opportunity of determining what weight should be given to the opinion of the witness." *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, 607.

Detective and Chief of Police.—A witness who testifies that he has had much experience in comparing handwriting from many years service as a detective and chief of police is competent to testify as an expert. *United States, etc., Ins. Co. v. Hill (Ala.)*, 62 So. 954.

Examination of Checks and Papers.—Where a witness showed himself qualified to testify as to the genuineness of the signature to a will, his testimony was not rendered incompetent by a statement on

cross-examination that, for the purpose of refreshing his memory, after he had expressed the opinion that the signature to the alleged will was not genuine, he had examined checks and other papers signed by deceased. *Venable v. Venable*, 165 Ala. 621, 51 So. 833.

"The witness N. B. Campbell testified that he was bookkeeper for the First National Bank for ten or twelve years; that his duty was to keep the accounts of customers, charge the checks, and enter the deposits; that in that position he became familiar with the signature of W. R. Venable; that, while he had not seen said Venable write, yet those checks were charged to his account and paid, and most of them were afterwards returned to Venable; that he knew what the bank always accepted as his signature; that he was familiar with the card that was accepted when the account was opened, and that was given him to go by; that he had been handling this signature for five years or more. This testimony qualified the witness to testify as to the genuineness of the signature, and the fact that, on cross-examination, he stated that, for the purpose of refreshing his memory, after he had expressed the opinion that the signature to the paper was not that of Venable, he had examined the checks and other papers, did not render him incompetent to testify. *Johnson v. State*, 35 Ala. 370; *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 11 So. 365; *Nelms v. State*, 91 Ala. 97, 9 So. 193; 17 Cyc. 159, 160, 161." *Venable v. Venable*, 165 Ala. 621, 51 So. 833, 835.

Identity of Ink.—A witness, though "not an expert, and not an expert in ink," may testify whether all of a note was written in the same ink, when for twenty-two years he has been in a business which necessitates the handling of a great many letters, notes, accounts, etc., and he appears to be qualified to testify on the point in question. *Glover v. Gentry*, 104 Ala. 222, 16 So. 38, cited in note in 68 L. R. A. 986.

Person Who Has Seen Writings.—Handwriting can not be proved by comparison; nor can one who has merely seen writings which purported to be those of a certain person, but who is not shown to have personally communicated with said

person respecting them, or to have acted upon them as his, be permitted to testify to his belief as to the genuineness of the said writings. *McClellan, J., dissenting. Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 11 So. 365, cited in note in 63 L. R. A. 977.

"In one respect the register fell into an error, and the exception on that account ought to have been sustained. We refer to the proof of the handwriting of Estes by the witness Kyle. In this state handwriting can not be proved by comparison. *State v. Givens*, 5 Ala. 747; *Bishop v. State*, 30 Ala. 34. Nor was the testimony of Godbey brought within the rule. It is not pretended he had seen Estes write, and so the question of his competency to testify as to the genuineness of the signatures to the writings offered was narrowed to the second of the rules on this subject. 1 *Greenl. Ev.*, § 577, states the rule thus: 'The second mode is from having seen letters, bills, or other documents, purporting to be the handwriting of the party, and having afterwards personally communicated with him respecting them, or acted upon them as his, the party having known and acquiesced in such acts, founded upon their supposed genuineness; or by such adoption of them into the ordinary business transactions of life as induces a reasonable presumption of their being his own writings.' See, also, 1 *Whart. Ev.*, § 708. The testimony of Godbey, on which he was permitted to testify to his belief that certain papers were in Estes' handwriting, was as follows: 'In the year 1889 I saw considerable writing of J. L. M. Estes, and I think I am acquainted with his handwriting.' On this he was, against objection and exception, permitted to testify to his 'belief' that certain writings were those of Estes." *Gibson v. Trowbridge Furniture Co.*, 96 Ala. 357, 11 So. 365, 366, cited in note in 63 L. R. A. 977.

§ 429. Standard of Comparison.

§ 429 (1) In General.

"Extraneous papers may not be presented before the jury or court, or shown to a witness, that he may institute a comparison between such papers, although admitted to be genuine, and the one in controversy; but, where both parties in-

troduced extraneous writings for comparison without objection, the evidence was properly considered by the court." *Moon v. Crowder*, 72 Ala. 79, cited in note in 62 L. R. A. 836.

Writing Signature to Show Basis of Comparison.—Where a witness who has denied his signature is compelled on cross-examination to write his name, the alleged signature may be compared with the witness' name thus written. *United States, etc., Ins. Co. v. Hill (Ala.)*, 62 So. 954.

"As said by Brickell, C. J., in writing the opinion of the court, in *Williams v. State*, 61 Ala. 33, 41: 'There are cases in which a witness denies his signature, and may on cross-examination be compelled in the presence of the court to write his name for the purposes of comparison.' The signature written in the presence of the court becomes a part of the examination of the witness and takes it out of the rule against making a comparison between the writing in question and extraneous papers not in evidence. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605." *United States, etc., Ins. Co. v. Hill (Ala.)*, 62 So. 954, 956.

§ 429 (2) Genuineness.

Signature to Will.—Where a will offered for probate was contested as a forgery by a sole beneficiary under a prior will admitted to be genuine, and such prior will was pleaded by contestant and was treated as having been introduced in evidence, it was permissible, on the question of forgery of the proposed will, to compare testator's signature thereon with his signature on such prior will. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521.

§ 429 (3) Papers in Evidence or Relevant to Issues.

Writing Must Be Relevant.—A comparison of handwriting may not be instituted between the writing in question and extraneous papers, though genuine, which are not otherwise relevant and admissible in evidence. *Griffin v. Working Woman's Home Ass'n*, 151 Ala. 597, 44 So. 605, cited in note in 18 L. R. A., N. S., 521.

To determine the genuineness of the signature of a deceased person, it is im-

proper to exhibit to a witness papers not in evidence, purporting to be signed by deceased, for comparison. *Snider v. Burks*, 84 Ala. 53, 4 So. 225, cited in note in 62 L. R. A. 835.

§ 430. Cross-Examination.

Effect of Acids in Removing Ink.—Where experienced cashiers were allowed to testify as experts to the genuineness of a check, and chemical experts had testified that writing could be removed by the use of acids without any trace being left, the cashiers could be cross-examined as to their knowledge of the use and effect of acids in removing ink. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 304, 312.

It was error to refuse to allow a party to cross-examine experts in handwriting as to the effect of acids on writing, and as to whether, in their opinion, the writing could be altered or removed by the use of such means so as to escape detection, upon the ground that the witnesses were not experts in the use and effect of acids upon ink. In this case the court stated that, if the witnesses had declared that they knew nothing of the effect of acids upon ink, their testimony as to the genuineness of the check in question, and that it had not been altered, would have been properly considered in connection with the admission on their part that they had no knowledge or experience of the effect of acids on writings; it is right, and in fact necessary, that expert testimony should be subjected to every legitimate test on cross-examination, in order properly to weigh it. *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 So. 791, cited in note in 64 L. R. A. 310.

(F) EFFECT OF OPINION EVIDENCE.

§ 431. Opinions of Witnesses in General.

§ 431 (1) In General.

Binding Effect of Testimony.—“Whether the subject of the opinion or expert testimony be sanity vel non, value of services, skillfulness in the use of selection of means to effect a purpose requiring skill, or that of handwriting, the principle is the same, viz., that such testimony is but a conclusion, and, if such testimony is made binding on the jury,

as the affirmative charge did here, the result is a substitution of the conclusion of the witnesses for that of the jury, which, of course, can not be allowed.” *Harris v. Nashville, etc., Railway*, 153 Ala. 139, 44 So. 962, 966.

Can Not Control Judgment of Jury.—So, an instruction that the jury are not to substitute for their own views of what is established by the whole evidence—substantive and opinion, expert and nonexpert—the opinions of expert witnesses, as this would make the witnesses and not the jurors the triers of the cause, is not objectionable as an instruction on the weight to be accorded the opinion evidence. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, cited in note in 42 L. R. A. 766.

“The opinions of witnesses in certain matters are always admissible in evidence for the purpose of aiding, but never of controlling the judgment or opinion of the jury on that matter. Any other rule would amount to substituting the judgment of the witness for that of the jury.” *Cleveland v. Wheeler (Ala.)*, 62 So. 309, 310.

The general rule adopted by the courts is that the opinions of expert witnesses are not, as a matter of law, to be accepted by the jury in the place of their own judgment. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, cited in note in 42 L. R. A. 753.

Credibility of Physician's Testimony.—In an action for personal injuries, the fact that the physician who attended plaintiff failed to call in a surgeon to perform an operation which he knew would cure plaintiff, but which he did not deem himself competent to perform, will not affect the credibility or value of his testimony as an expert. *Alabama G. S. R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, cited in note in 42 L. R. A. 753, 757, 766.

But the value of the testimony of a physician as an expert in an action for damages for alleged negligence, who had testified that the condition of a bone was the cause of much pain to the person injured, and that this condition could be cured by its removal by a surgical operation to which he did not deem himself equal, is not affected by the reason of his omission to call in some other surgeon to remove

it, and the overruling of the question calling for such reasons is not error. *Alabama, etc., R. Co. v. Hill*, 93 Ala. 514, 9 So. 722, cited in note in 42 L. R. A. 757.

Effect of Drugs.—The opinions of witnesses whether the use of drugs by a testatrix, who was afflicted with great physical infirmities, affected her testamentary capacity, are entitled to but little weight. *Mullen v. Johnson*, 157 Ala. 262, 47 So. 584.

Testing Opinions of Witness.—"And, while in reaching their judgment or conclusion as to the particular matter, they [the jury] can not act on particular facts material to the injury resting in their private knowledge, but as to these must be governed by the evidence adduced; yet they should, and must in order to act intelligently, test out the opinions of witnesses by their own general knowledge of the subject, and should and do of necessity have the power to reject or accept such opinions according as they correspond or not with their general knowledge as applied to and considered in connection with the facts of the case." *Cleveland v. Wheeler (Ala.)*, 62 So. 309, 310.

§ 431 (2) Value.

Market Value Distinguished from Market Price.—Opinions of witnesses are admissible to show market value as distinguished from market price, in order to aid but not to control the judgment or opinion of the jury. *Cleveland v. Wheeler (Ala.)*, 62 So. 309.

Value of Land Per Acre.—Where a witness testified to the value of land per acre, the fact that he had in mind one hundred acres, instead of fifty acres, which was the area of the land in question, would not affect the value of his testimony. *Tennessee Coal, Iron & R. Co. v. McMillion*, 161 Ala. 130, 49 So. 880.

Value of Timber.—Where witnesses testified to the market value of standing timber, in an action for breach of a contract for the sale thereof, the jury might deal with such testimony as it pleased, giving it credence or not as their experience or general knowledge of the subject might dictate. *Cleveland v. Wheeler (Ala.)*, 62 So. 309.

Jury Should Carefully Consider Evidence.—The opinions of witnesses as to

the market value of property should be weighed by the jury in the light of the other evidence, and regard should be had to the opportunity of the witnesses to know such value and the reasonableness of their opinions. *Meighan v. Birmingham Terminal Co.*, 165 Ala. 591, 51 So. 775.

§ 432. Testimony of Experts.

§ 433. — In General.

Jury to Determine Weight.—The jury need not, as a matter of law, accept the conclusions of expert witnesses, but they must determine for themselves the weight to be accorded to the expert testimony, and base their verdict on their own judgment of the facts. *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23.

"A number of the questions which arose during the progress of the trial were of such character, were so far apart from the field of general knowledge, and so peculiarly within the scope of professional learning and experience, that the testimony of the expert witnesses was entitled to great consideration by the jury. Still the jury could not be required, as matter of law, to accept the conclusions of such witnesses. They were to determine for themselves, theoretically at least, the weight to be accorded to the expert testimony, and to base their verdict upon their own judgment of the facts. *McAllister v. State*, 17 Ala. 434; *Andrews v. Frierson*, 144 Ala. 470, 39 So. 512. Charge forty-four was properly refused to the defendant." *Robinson v. Crotwell*, 175 Ala. 194, 57 So. 23, 27.

§ 434. — Nature of Subject.

§ 434 (1) In General.

Method of Stopping Engine.—In the absence of proof to the contrary, expert testimony that a locomotive can be stopped quicker by not reversing it, when the air brakes are applied, than by both reversing and applying the brakes, is conclusive on the court or jury; common knowledge, if resorted to, corroborating such testimony. *Harris v. Nashville, C. & St. L. Ry.*, 153 Ala. 139, 44 So. 962.

Need Not Conform to Jury's Experience.—It is error to authorize the jury to reject as untrue the statement of an expert merely because it is not confirmed

by their own experience and observation. *Louisville & N. R. Co. v. Malone*, 109 Ala. 509, 20 So. 33, cited in note in 42 L. R. A. 762.

§ 434 (2) Mental Condition or Capacity.

Jury May Disregard Opinion of Experts.—Although the opinions of medical men are entitled to more weight than those of others on a question of sanity, yet on such issue the jury should find according to the whole evidence, although they find against the opinion of the medical witnesses examined. *Watson v. Anderson*, 13 Ala. 202, cited in note in 39 L. R. A. 332.

§ 434 (3) Value.

Value of Auctioneer's Services.—In a proceeding to determine the value of an auctioneer's services, the register was not bound to give credit to unimpeached expert opinion evidence of the value of such services, but was entitled on the whole case, as developed before him, to determine for himself what would be a reasonable compensation for the services. *Andrews v. Frierson*, 144 Ala. 470, 39 So. 512.

§ 434 (4) Cause and Effect.

Expert testimony as to physical condition, disease, injury, etc., goes to the jury to be weighed by them, with other evidence, in passing on the true cause of the disease in question, if a material subject of inquiry. *Central, etc., R. Co. v. Clements*, 2 Ala. App. 520, 57 So. 52.

"The most difficult practical science of which we have knowledge is the science of medicine. It is a matter of common knowledge that the most eminent diagnosticians frequently disagree as to the true nature or actual cause of a disease. While for some of the simple and common ailments, such as colds, indigestion, headaches, etc., the ordinary man suffering therefrom may, in a rough, practical way, assign the cause, nevertheless, when the cause of a disease or of some material ailment of an important organ of the human body is the subject of inquiry, only the opinion of a diagnostician, of a man skilled in the mysteries of medicine, can ordinarily be resorted to. And when this is done the law knows that the opinion of an expert is not infallible,

and such opinion, when rendered upon a given state of facts, goes to the jury as evidence to be weighed by them, along with the other evidence, in passing on the question as to the true cause of the disease or ailment, if that is a subject of material inquiry before them. *Mobile Life Ins. Co. v. Walker*, 58 Ala. 290; *Zinn v. Rice*, 161 Mass. 571, 37 N. E. 747." *Central, etc., R. Co. v. Clements*, 2 Ala. App. 520, 57 So. 52.

§ 435. — Knowledge or Skill of Expert.

Knowledge of Physician.—Although the opinion of a physician as to the length of time a disease has existed, predicated upon present symptoms, is not equal to positive proof of the fact of its existence, yet, where he testifies to the existence of certain diseases from a personal examination, upon which he founds his opinion as to the length of time they have existed, it is error to instruct the jury "that the testimony of physicians is matter of opinion merely." *Bennett v. Fail*, 26 Ala. 605.

XIII. EVIDENCE AT FORMER TRIAL OR IN OTHER PROCEEDING.

§ 436. Grounds for Admission in General.

Ability to Produce Witness.—Testimony of a witness on a former trial is not admissible if the witness can be produced. *Adams v. Thornton*, 82 Ala. 260, 3 So. 20.

Testimony in Another Suit.—In trover for the conversion of certain dogs, evidence as to what plaintiff's husband testified as to the ownership of a dog, in the trial of a lawsuit between him and another witness, was inadmissible except to impeach the husband after laying a proper predicate in the course of his own examination. *Hooper v. Dorsey*, 5 Ala. App. 463, 58 So. 951.

§ 437. Death or Disability of Witness.

Death of Witness.—The testimony of a witness, since deceased, in a former suit, is admissible in a subsequent suit between the same parties or their privies in reference to the same subject-matter. *Goodlett v. Kelly*, 74 Ala. 213; *Jeffries v. Castleman*, 75 Ala. 262, cited in note in 42 L. R. A., N. S., 318.

Where a witness testifying at the first trial of a case was dead at the time of

the second trial, his testimony at the former trial was properly received on the second trial. *Phillips v. Pippen*, 4 Ala. App. 426, 58 So. 111.

Testimony given in a prior suit involving the present issue is admissible; witness being dead. *Coulson v. Scott*, 167 Ala. 606, 52 So. 436.

Death of Expert Witness.—A witness who qualified as an expert as to the operation of street cars gave his opinion as to the distance at which a car could be stopped running at the speed of the car in question. No objection was raised on the ground that the question asked related to the distance the particular motorman could stop the car in. Held, that his testimony, he having died before the second trial, was properly received as against the objection that the question should have been as to the distance a properly equipped car could be stopped by a motorman of experience. *Randle v. Birmingham Ry., Light & Power Co.*, 158 Ala. 532, 48 So. 114.

§ 438. Absence of Witness.

Outside Jurisdiction of Court.—Testimony of a witness at a former trial is admissible when at the time he is out of the jurisdiction of the court. *Long v. Davis*, 18 Ala. 801; *Mims v. Sturdevant*, 36 Ala. 636.

"Mr. Greenleaf says, generally, in his text, that such proof is received 'if the witness, though not dead, is out of the jurisdiction, or can not be found after diligent search, is insane, is sick and unable to testify, or has been summoned and is kept away by the opposite party.' 1 Greenl., § 163. As to the admissibility of such depositions generally, see *Holman v. Bank*, 12 Ala. 369, 408. In our opinion the deposition in this case was properly admitted. We think the more liberal doctrine, which allows a permanent absence from the jurisdiction as an excuse, is more consonant with legal analogies, and is sustained by the preponderance of authority." *Long v. Davis*, 18 Ala. 801, 803.

The permanent absence of a witness from the state authorizes the admission of his testimony as given on a former trial of the case. *Birmingham Nat. Bank v. Bradley* (Ala.), 30 So. 546.

Evidence as to what was testified to on a former trial is only admissible where the witness has left the state permanently, or for such an indefinite time that his return is uncertain. *Southern Ry. Co. v. Bonner*, 141 Ala. 517, 37 So. 702.

"An error which must work a reversal occurred in the admission, against defendant's objection, of evidence as to what one Everly testified on a former trial. Such evidence is admissible where a witness has left the state permanently, or for such indefinite time that his return is contingent or uncertain; but it is 'admitted with great caution, only from necessity, and to prevent a failure of justice,' and the necessity for it 'ought to be shown clearly.' *Harris v. State*, 73 Ala. 495; *Thompson v. State*, 106 Ala. 67, 17 So. 512." *Southern R. Co. v. Bonner*, 141 Ala. 517, 37 So. 702, 704.

Person Staying Within the State.—Under Code 1896, §§ 1825, 1833, authorizing the compulsory attendance of witnesses residing within one hundred miles, and the taking of depositions of witnesses residing beyond such distance, from the place of trial, a party was not entitled to introduce a witness' evidence on a former trial on a showing that the witness was not present, but was staying indefinitely at another city within the state. *Southern Car & Foundry Co. v. Jennings*, 137 Ala. 247, 34 So. 1002.

§ 439. Identity of Issues.

Issues Not Identical.—After the removal of a witness from the state, his testimony taken in a former suit is admissible in a subsequent suit between the same parties or their privies, touching the same subject-matter, though the issues involved in the two suits may not be identical. *Long v. Davis*, 18 Ala. 801.

§ 440. Identity of Parties.

Action between Different Parties.—Proof of the testimony of a deceased witness given in a former action of ejectment against a tenant is inadmissible in a subsequent action of ejectment against a grantee of the landlord. *Patton v. Pitts*, 80 Ala. 373.

Technical Variation of Parties.—An action of ejectment was brought by a party in her individual capacity, and a subsequent action of ejectment brought by her

as a representative against the same parties for the same land. Held, the variation of parties was too technical to exclude in the latter case a deposition of one, since deceased, taken in the former. *Smith v. Keyser*, 115 Ala. 455, 22 So. 149.

"In *Patton v. Pitts*, 80 Ala. 373, 375, it was said, that the conditions on which such evidence is admissible in the trial of a subsequent suit 'are that the matters in issue and the parties are essentially the same in both actions—parties as thus used comprehending privies in blood, in law, or in estate. A mere technical or nominal variation of parties on both trials will not exclude the evidence; but the adversary parties on both trials must be substantially the same.' *Clealand v. Huey*, 18 Ala. 343; *Goodlett v. Kelly*, 74 Ala. 213. The parties in both these suits were substantially or essentially the same, and it is not pretended that the adverse parties did not have and avail themselves of the opportunity to cross-examine the witness. *Marler v. State*, 67 Ala. 55, 62; 1 Greenl. Ev., § 63. The variation of parties relied on is too technical or nominal for the exclusion of the evidence." *Smith v. Keyser*, 115 Ala. 455, 22 So. 149, 150.

Nominal Identity of Parties.—The admissibility in evidence of what a deceased witness swore on a former trial does not depend on the nominal identity of the parties. It is sufficient if the second trial, in reference to the same subject matter, is between those who represent the parties to the first by privity in blood or estate. *Clealand v. Huey*, 18 Ala. 343.

Action Prosecuted by Administrator.—Where an action for wrongful death was originally begun by decedent's administrator, the fact that a subsequent trial was prosecuted by decedent's administrator de bonis non did not render inadmissible evidence given at the former trial, otherwise admissible. *Alabama Consol. Coal & Iron Co. v. Heald*, 171 Ala. 263, 55 So. 181.

"It is next insisted that the court erred in admitting the evidence on a former trial of the absent witness, Enslin. We find no error in the rulings of the trial court in this respect. The proper predicate sufficient in all respects, as has been held by this court, was laid for the introduction of such evidence. It is chiefly

insisted that the evidence was not admissible because it was given on a former trial of the case, when the suit was by the original administrator, and that the suit is now being prosecuted by the administrator de bonis non. There is no doubt there is a difference between the duties of an administrator in chief and those of one de bonis non. The actions brought by them may be different. Often there is no privity between the administration in chief and that de bonis non, and a judgment against the one representative is not binding on the other; but those rules of law do not prevent the testimony given in an action brought by the one from being admissible on a subsequent trial of the same action and for the same cause of action as that involved in the first trial. *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362." *Alabama, etc., Iron Co. v. Heald*, 171 Ala. 263, 55 So. 181, 184.

Where a party dies subsequent to the trial, and the subject matter is relitigated between his administrator and the other party, testimony given on the first trial is admissible in the second. *Long v. Davis*, 18 Ala. 801.

§ 441. Preliminary Evidence.

Necessity of Predicate.—The stenographic report of the evidence of witnesses on a former trial was properly excluded, where no sufficient predicate was laid for its admission. *Louisville & N. R. Co. v. Dilburn (Ala.)*, 59 So. 438.

Sufficient Predicate.—Where a subpoena issued for a witness had been returned by the sheriff "Not found" after diligent search and inquiry, and it appeared that the witness had left the county, intending to return to his home in Tennessee, such facts constituted a sufficient predicate for the introduction of his testimony on a former trial of the same case. *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362.

"There was no error in allowing proof of what the absent witness, Fipps, swore on the former trial. A sufficient predicate had been laid therefor in the evidence of Olive, Hubbard, Woodruff and Boozer. It was shown that a subpoena issued for him as a witness in the case, by the sheriff of Calhoun county; that

the sheriff made diligent search and inquiry for him and could not find him, and that Fipps left the county and said, on leaving, that he was going back to his home in Tennessee where he lived.

Percy v. State, 125 Ala. 52, 27 So. 844; *Jacobi v. State*, 133 Ala. 1, 32 So. 158; *Perry v. State*, 87 Ala. 30, 6 So. 425; 3 *Mayfield's Dig.* 498, § 1235." *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362, 364.

Insufficient Predicate.—Testimony of a witness that he did not know where one who testified on a former trial lived, but that, several months previously he saw the former witness, who told him that he was living in Texas, was not a sufficient predicate for evidence as to the testimony of the former witness. *Southern Ry. Co. v. Bonner*, 141 Ala. 517, 37 So. 702.

"It was not competent to allow the witness Purnell to testify, from information received from others, that the papers of defendant had been sent from Mobile to New York, and sold to a paper mill. In 1 *Greenl. Ev.*, § 163, the rule as to proof of the testimony of a witness given on a former trial is stated as follows: 'Where the testimony was given under oath in a judicial proceeding in which the adverse litigant was a party, and where he had the power to cross-examine, and was legally called upon so to do, the great and ordinary test of truth being no longer wanting, the testimony so given is admitted after the decease of the witness in any subsequent suit between the same parties. It is also received if the witness, though not dead, is out of the jurisdiction, or can not be found after diligent search, or is insane or sick, and unable to testify, or has been summoned but appears to have been kept away by the adverse party.' That the witness was examined under oath in a judicial proceeding, and that the opposite party had an opportunity, and was legally called upon, to cross-examine, are essential requisites to admissibility. It sufficiently appears that the witness Culp was beyond the jurisdiction of the court, that interrogatories were filed, and an affidavit of his non-residence made, and that his answers to the interrogatories were taken; but it is not shown that his deposition was used in evidence on the former trial, or that

defendant had notice of the filing of the interrogatories, or was called upon to cross-examine." *American Union Tel. Co. v. Daughtry*, 89 Ala. 191, 7 So. 660, 662.

Evidence Regularly and Judicially Taken.—The record and testimony of deceased witnesses in a previous suit between the same parties, in actions respecting property, are admissible as evidence in a subsequent suit to contest the same right, either for or against the same parties, or privies in blood, in estate, or law. But such privity must first appear to exist, and such testimony to have been regularly and judicially taken. *Bryant v. Owen*, 2 Stew. & P. 134.

"It is the settled rule of the law of evidence, to permit testimony of what a deceased witness swore to, on a former trial of the same cause, between the same parties. In England, formerly, and in some of the courts of this country, it has been sometimes held, that the precise language of the deceased witness must be depoted to; but this strictness has been relaxed, at least in this country, if not in England, and the rule as now established, is, that it is sufficient if the witness can state the whole of the substance of what the deceased witness swore, although he can not give his very words. *Caton v. Lenox*, 5 Rand. 36; *Ballenger v. Barnes*, 14 N. C. 460; *Wolf v. Wyeth*, 11 Serg. & R. 149; *Watson v. Gilday*, Id. 337; *Cornell v. Green*, 10 Serg. & R. 15." *Gildersleeve v. Caraway*, 10 Ala. 260, 262.

Ability to State Facts.—A witness called to prove the testimony given on a former trial by another witness must profess and be able to state all the facts testified to. *Gildersleeve v. Caraway*, 10 Ala. 260.

§ 442. Mode of Proof.

§ 442 (1) In General.

Entire Testimony.—Where evidence is offered of testimony given by a deceased witness at a former hearing, the whole of the testimony touching the matter in controversy must be given. *Magee v. Hallett*, 22 Ala. 699.

§ 442 (2) Testimony of Witnesses.

Substance of Former Testimony.—To permit a witness to testify as to what a

witness swore to on a former trial, it is necessary only that the witness can state the substance of the former testimony, and he need not state the exact words; but a witness who shows that he does not remember even the substance of parts of the testimony is incompetent. *Central, etc., R. Co. v. Carleton*, 163 Ala. 62, 51 So. 27.

"The court erred in refusing to exclude the testimony of J. H. Lynch as to what Will Shearly testified to on a former trial. While it is true, in order to testify as to what a witness swore to on a former trial, it is necessary only that the witness can state the substance, and not the exact words that were spoken, yet it is necessary that he remember the substance of all of the testimony. The witness in this case showed, on cross-examination, that he did not remember even the substance of certain parts of the testimony. *Magee v. Hallett*, 22 Ala. 699, 720; *Davis v. State*, 17 Ala. 354, 357; *Gildersleeve v. Caraway*, 10 Ala. 260, 263." *Central, etc., R. Co. v. Carleton*, 163 Ala. 62, 51 So. 27, 30.

A witness need not state the very language in which the testimony of a witness was given, but should give the substance thereof. *Clealand v. Huey*, 18 Ala. 343.

§ 442 (3) Minutes and Notes of Testimony.

Transcript Competent but Not Conclusive.—Act March 4, 1901 (Loc. Laws 1900-01, p. 2256), § 5, providing that the shorthand notes of the official stenographer shall be evidence of the correctness thereof, and shall control in the event of disagreement construed with Code 1907, § 3986, providing that papers and transcripts from books and proceedings required to be kept by any sworn officer are presumptive evidence in any case, makes such transcript competent, but not conclusive, evidence on a subsequent trial of the same case as to the testimony of witnesses who have since gone beyond the reach of process. *Alabama Western R. Co. v. Downey (Ala.)*, 58 So. 918.

§ 442 (4) Bills of Exceptions, Statements of Fact, etc.

Bill of Exceptions.—A bill of exceptions is inadmissible to prove the testimony of a witness on a former trial. *Central, etc., R. Co. v. Carleton*, 163 Ala. 62, 51 So. 27.

One of two witnesses at a former trial being dead, and the other being beyond the jurisdiction, a witness who testified that a bill of exceptions on the former trial was prepared by him and another, that the two compared it with the stenographic report, and that he remembered independently of the bill that it was substantially correct, and contained all the evidence of the witnesses, was competent to give the previous testimony, and to read the bill in doing so. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348, cited in note in 37 L. R. A., N. S., 598.

XIV. WEIGHT AND SUFFICIENCY.

§ 443. Weight and Conclusiveness in General.

§ 443 (1) In General.

Insufficient to Establish Ownership of Property.—On the trial of title to about \$2,000 worth of chattels seized on execution against a husband, to which the wife interposed a claim of ownership, the execution creditor showed the property, when seized, was in the possession of the husband. The claimant did not testify on her own behalf, and her husband, after testifying that he had sold his wife a part of the property for cash, admitted that he had no property except his wearing apparel; that a part of the property his wife purchased from certain persons, and took receipts for the purchase price, but failed to state, in answer to a direct question, who paid the money. He further testified that his wife had, since their marriage, \$475 in her own right, but failed to show how it had so increased as to enable her to own the property in suit. Held, that the evidence failed to establish ownership of the property in the wife. *Vaught v. Oehmig*, 95 Ala. 306, 11 So. 416.

Agreed Statement of Testimony of Witnesses.—The written statement of what an absent witness would testify to, if present, when accepted in lieu of the witness, must have the same force, so far as credibility is concerned, as the oral statement of the witness would have. *Snodgrass v. Clark*, 44 Ala. 198; *Crawford v. State*, 44 Ala. 382; *Hughes v. Hughes*, 44 Ala. 698.

§ 443 (2) Depositions.

Different Weight to Testimony by Depositions.—The weight to be given the evidence of a witness testifying by depo-

sition is different from that to be given one who testifies *ore tenus*. *Mann v. Darden*, 6 Ala. App. 555, 60 So. 454.

§ 443 (3) Number of Witnesses.

Three against One.—In a bill for specific enforcement of a contract to sell land, plaintiff testified positively that he notified defendant of his acceptance within the time specified in the contract, which defendant denied with equal emphasis. One witness confirmed plaintiff partially, while the evidence of three witnesses tended to confirm defendant. Held, that the chancellor properly found that plaintiff failed to prove his case. *Moses v. McClain*, 94 Ala. 601, 10 So. 533.

§ 444. Positive and Negative Evidence.

§ 444 (1) Nature.

Testimony Not Conflicting.—As against positive testimony that the personal property of deceased consisted only of a cow and calf, a finding to that effect on application to sell real estate to pay debts can not be disturbed on testimony merely tending to show a large income to intestate and his frugal habits. *Curtis v. Hunt*, 158 Ala. 78, 48 So. 598.

§ 444 (2) Effect of Negative Testimony.

Negative Testimony of More Weight.—The slightly confirmed testimony of a witness, to whom complainant made payment of a note, that he, witness, held such note for collection, does not overcome the positive denial of executors, to whom the note was payable, that he had no authority to collect it. *Richardson v. Stovall*, 57 Ala. 422.

Submission to Jury.—In an action against one superintending the construction of a building for an injury caused by bricks falling from one of the walls on account of its negligent construction, the admitted fact that the bricks fell is evidence, conflicting with the negative evidence of defendant that they could not have fallen without some external force, which should be submitted to the jury. *Mayer v. Thompson, etc., Bldg. Co.*, 104 Ala. 611, 16 So. 620.

§ 444 (3) Weight in General.

Positive Testimony Superior.—Testimony negative in form and quality can not be regarded as entitled to the same

weight as positive testimony, when other circumstances are equal. *Pool v. Devers*, 30 Ala. 672.

The testimony of a witness who speaks positively to a fact is entitled to more consideration than that of several whose statements are merely negative. *Kennedy v. Kennedy*, 2 Ala. 571.

Notice of Mortgage.—Evidence of a purchaser of land that he does not recollect having received notice of the existence of an unrecorded mortgage is not sufficient to establish that fact, where not only the mortgagor and mortgagee, but a third person, testify that he was notified of the mortgage before he signed the contract of sale. *Harrison v. Yerby* (Ala.), 14 So. 321.

Testimony as to Conversation.—The rule that where one witness swears that at a certain conversation he heard a party use particular language, while another, who was present at the same time, testifies that he did not hear it, the law gives more weight to the positive than to the negative testimony, does not apply when one witness testifies that a conversation had reference to the particular slave in controversy, while the other testifies that it did not relate to her, but to another slave, and each witness swears that he heard and remembers the whole conversation. *Harris v. Bell*, 27 Ala. 520.

Positive Testimony Countervailed by Negative Testimony.—Affirmative evidence may be countervailed by negative testimony. *Stoddard v. Kelly's Adm'r*, 50 Ala. 452.

Attestation of Instrument.—The positive testimony of a witness that he was called upon to attest an instrument will outweigh that of many witnesses who state only collateral facts and circumstances, which are inconclusive, and at most only persuasive. *Todd v. Hardie*, 5 Ala. 698.

§ 444½. Circumstantial Evidence.

"Circumstantial evidence is of two kinds, namely, certain, or that from which the conclusion in question necessarily follows; and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by a process of reasoning. In civil cases, where the mischief of an erroneous conclusion is not deemed remediless, it is not

necessary that the minds of the jurors be freed from all doubt; it is their duty to decide in favor of the party, on whose side the weight of evidence preponderates, and according to the reasonable probability of truth. *Hopper v. Ashley*, 15 Ala. 457, 467.

§ 445. Credibility of Witnesses in General.

May Consider Entire Evidence.—The jury need not take the version of any one witness, but may consider the entire evidence and accept or reject any part of the testimony in arriving at a verdict. *Alabama Steel & Wire Co. v. Thompson*, 166 Ala. 460, 52 So. 75.

Effect of False Statement to Material Fact.—The jury satisfied that a witness has sworn falsely to a material fact may reject his entire testimony, or accept as true a part, and reject the remainder. *Pilcher v. Smith*, 4 Ala. App. 444, 58 So. 672.

Witness Guilty of Criminal Offense.—In a chattel mortgagee's action against a partnership for purchasing mortgaged property from the mortgagor and converting it, the jury in weighing the testimony of the mortgagor and partner, and a person aiding in the sale, that the mortgagor did not sell such property to such partner, was entitled to consider the fact that, if such sale was made, they were guilty of a criminal offense. *Kilgore & Son v. Shannon & Co.*, 6 Ala. App. 537, 60 So. 520.

Proof of Conversation.—A single witness, who heard a conversation set up in complainant's bill between complainant and a deceased executor, is sufficient to prove the declarations made in such conversation, as against a surviving executor, who does not, in denying that there was such a conversation, show how he acquired knowledge justifying his denial. *Waters v. Creagh*, 4 Stew. & P. 410.

Conflicting Testimony.—When there is a conflict in the testimony of two witnesses, which can not be reconciled, regard must be had, in determining which one is mistaken, to the capacity of the witnesses, their respective opportunities of knowing the facts to which they depose, and the nature of the facts deposed to, as calculated to impress themselves with more or less force on the memory. *Hitt v. Rush*, 22 Ala. 563.

§ 446. Testimony of Party.

Uncontradicted Testimony of Plaintiff.—Where the plaintiff testified as to the existence of a certain contract and was uncontradicted, the trial court could render a judgment based on his evidence alone. *Birmingham & G. Ry. & Nav. Co. v. Jackson*, 170 Ala. 496, 54 So. 512.

§ 447. Testimony of Interested Persons.

Scrutinized Carefully.—Where the witnesses testifying to the forgery or falsity of a certificate of acknowledgment to a deed are interested, their testimony will be carefully scrutinized; and, if it is full and direct, it is entitled to the same credit which would be given to the evidence of witnesses not interested. *Freeman v. Blount*, 172 Ala. 655, 55 So. 293.

"Where the witnesses, testifying in the affirmative on the issue of forgery, or falsity vel non of the certificate of acknowledgment, are interested, their testimony will be carefully scrutinized; and, 'if it is full and direct, it is entitled to the same credit which will be given to the evidence of the other witnesses whose credibility was affected only by reason of interest.' *Barnett v. Proskauer & Co.*, 62 Ala. 486." *Freeman v. Blount*, 172 Ala. 655, 55 So. 293, 296.

Employees of a party to an action are interested witnesses; this being especially true in actions against a master for the negligence of his servant. *Mobile Light & R. Co. v. Davis*, 1 Ala. App. 338, 55 So. 1020.

Interested Party of Bad Character.

The testimony of a witness in a chancery cause, whose general character for honesty is shown to be bad—who was the active agent of the party who called him, in a transaction with a trustee involving a breach of trust, of which he had cognizance—being intimate with and related to the trustee, etc., should be disregarded, except so far as it may be corroborated by other testimony. *Smyth v. Oliver*, 31 Ala. 39.

§ 448. Conclusiveness of Evidence on Party Introducing it.

Answers to Interrogatories.—Under Code 1907, § 4056, where a party obtains answers to interrogatories and offers them in evidence in his own behalf, he is not precluded from adducing other proof

of the same facts or from contradicting them. *Louisville & N. R. Co. v. Winn*, 166 Ala. 413, 51 So. 976.

Letter of Plaintiff Offered by Defendant.—In an action for libel, a letter written by plaintiff to defendant concerning the publications complained of, and giving plaintiff's version of the transaction, was legal evidence both for and against him when offered by the defendant. *Parsons v. Age-Herald Pub. Co. (Ala.)*, 61 So. 343.

Deposition Taken by Adversary.—When a party reads in evidence to the jury a deposition taken by his adversary, which the latter declined to offer, he thereby makes it his testimony, and it does not lie with him to say that any portion of it is illegal or incompetent. *Jewell v. Center*, 25 Ala. 498.

§ 449. Evidence Improperly Admitted.

Illegal evidence may be considered, if admitted without objection and not afterwards excluded. *Higdon v. Kennemer*, 112 Ala. 351, 20 So. 470.

"Parties may try their causes on illegal evidence if they choose to do so." These parties so elected here. The evidence is to be considered. *Moon v. Crowder*, 72 Ala. 79; *McCalman v. State*, 96 Ala. 98, 11 So. 408; *Billingsley v. State*, 96 Ala. 126, 11 So. 409; *Watson v. Simmons*, 91 Ala. 567, 8 So. 347." *Higdon v. Kennemer*, 112 Ala. 351, 20 So. 470, 471.

§ 450. Inferences from Evidence.

Meaning of "Inference."—"Inference," in legal parlance, as respects evidence, is a very different thing from "supposition." The former is a deduction from proven facts, while the latter requires no such premise for its justification. Courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, can not pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference (citing *Words & Phrases*, vol. 4, p. 3579; vol. 8, p. 6807). *Miller-Brent Lumber Co. v. Douglas*, 167 Ala. 286, 52 So. 414.

Receipt and Note Dated Different Days.—Where a receipt bears date five days prior to a note, and is for another sum, the court can not, in the absence of proof explaining the incongruities, infer that

they were given for the same debt. *Hollingsworth v. Martin*, 23 Ala. 591.

Fair and Reasonable Inferences.—The jury may draw such inferences from the facts proven to their reasonable satisfaction as they believe to be fair and reasonable, and consistent with the other evidence. *Southern Ry. Co. v. Gullatt*, 158 Ala. 502, 48 So. 472.

Existence of Debt on Different Dates.—The fact that a creditor obtained a judgment against his debtor on the second Monday of November, 1838, is not proof that the debt on which the judgment was founded existed on October 3, 1838. *Dubose v. Young*, 14 Ala. 139.

§ 451. Degree of Proof in General.

§ 451 (1) In General.

Reasonably Satisfactory Proof.—To justify a verdict in a civil case, the jury need only be reasonably satisfied of the facts on which their verdict is based. *Phillips v. Morris*, 169 Ala. 460, 53 So. 1001.

The material facts need only be proved to the "reasonable satisfaction" of the jury, or so as to "reasonably satisfy them;" plaintiff not being required absolutely to "prove" or "satisfy" the jury thereon. *Batson v. Bank (Ala.)*, 60 So. 313.

"Both of these charges are faulty, in that they incorrectly state the measure of proof to be required of plaintiff; for it is not necessary to absolutely 'prove to the jury' or 'satisfy the jury,' but only to prove to their reasonable satisfaction, or reasonably satisfy them. Hence, as frequently held by this court, the trial court was not in error in refusing to give these charges as thus framed. *Louisville, etc., R. Co. v. Sullivan Timber Co.*, 126 Ala. 95, 27 So. 760." *Batson v. Bank (Ala.)*, 60 So. 313, 316.

A party in a civil suit, on whom the burden of proving a fact rests, is required only to reasonably satisfy the jury of the existence of the fact, and is not required to show absolutely that the fact exists. *Dorough v. G. M. Harrington & Son*, 149 Ala. 305, 42 So. 557.

The burden of proof need not be sustained by evidence that "satisfies" the jury. *Torrey v. Burney*, 113 Ala. 496, 21 So. 348, cited in note in 37 L. R. A., N. S., 598.

Even where a legal presumption is to be overcome, the evidence is only required to reasonably satisfy or convince the minds of the jury. *Coghill v. Kennedy*, 119 Ala. 641, 24 So. 459.

The evidence is sufficient to authorize recovery if it "satisfactorily convinces" the jury, and a charge requiring them to be "clearly and satisfactorily convinced from the evidence" requires too much. *Wilkinson v. Searcy*, 76 Ala. 176.

"Charge three, given at the request of the plaintiff, required too high a degree of proof of the facts postulated. In civil cases facts are not required to be proved with reasonable certainty. To the reasonable satisfaction of the jury is sufficient. *Anniston Mfg. Co. v. Southern R. Co.*, 145 Ala. 351, 40 So. 965; *Battles v. Tallman*, 96 Ala. 403, 11 So. 247; 3 *Mayfield's Dig.*, pp. 597-598." *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663, 664.

"In the case of *Wollner v. Lehman*, 95 Ala. 274, 4 So. 643, the trial court had charged the jury: 'If the evidence in the case leaves in a state of doubt or uncertainty' any part which it is necessary for the claimants to establish, the jury must find for the plaintiff. In commenting on this charge this court said: 'The charge should not have been given. The claimants were not required to prove any one of the essentials of their claim beyond doubt. We have frequently had occasion to condemn similar charges.' Citing *Adams v. Thornton*, 78 Ala. 489; *Pollak v. Searcy*, 84 Ala. 259, 4 So. 137. Webster defines 'doubt' to mean 'uncertainty; uncertainty of mind;' and defines 'uncertain' to be that which is 'doubtful; not sure; dubious.' After a careful examination of all the authorities, we hold that a charge which declares that, if the evidence leaves a fact 'in a state of doubt and uncertainty,' then the jury must consider it as not proven, exacts too high a measure of proof; and we repeat the true rule to be that when the proof establishes 'a rational belief of the existence of the fact,' or 'if the jury shall be reasonably convinced that the fact exist,' that is sufficient. *Thompson v. Louisville, etc., R. Co.*, 91 Ala. 496, 8 So. 406; *Vandeventer & Co. v. Ford*, 60 Ala. 610; *Lehman Bros. v. McQueen*, 65 Ala. 570; *McWilliams v. Phillips*, 71 Ala. 80; *Hopper v. Ashley*, 15 Ala. 457, 464." *Rowe v. Baber*, 93 Ala. 422, 8 So. 865, 866.

In an action for labor and material, an instruction that plaintiff must make out his case to the reasonable satisfaction of the jury, and that, if the evidence leaves the jury in reasonable doubt as to any item of plaintiff's account, plaintiff can not recover as to such item, is properly refused. *Birmingham Fire-Brick Works v. Allen*, 86 Ala. 185, 5 So. 454.

"By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof, can never be previously defined; the only legal test of which they are susceptible, is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon the conviction, in matters of the highest concern and importance to his own interest." *Hopper v. Ashley*, 15 Ala. 457, 467.

"Clear and convincing" proof of a fact in issue is not required in civil cases. *Morrow v. Campbell*, 118 Ala. 330, 24 So. 852.

The measure of proof necessary to authorize a verdict in a civil case is that the jury should be reasonably satisfied, and charges which require satisfaction beyond a reasonable doubt exact too high a degree of proof, and are properly refused. *Decatur, etc., Mfg. Co. v. Mehaffey*, 128 Ala. 242, 29 So. 646.

"There was no error in giving charge No. 4. A jury can not be reasonably satisfied of the existence of a disputed fact, unless there is a preponderance of the evidence in its favor. In *Acklen v. Hickman*, 60 Ala. 568, it was held that the preponderance, unless it reasonably satisfied the mind of the jury, is not enough; and in the case of *Vandeventer & Co. v. Ford*, 60 Ala. 610, the rule was laid down that a charge should not be given which instructed the jury that they should base their verdict upon a mere preponderance of the evidence. In *Rowe v. Baber*, 93 Ala. 422, 8 So. 865, it is said that the true rule is that, to justify a verdict, the evidence must reasonably satisfy the minds of the jury that the facts exist upon which their verdict is based." *Behrman v. Newton*, 103 Ala. 525, 15 So. 838, 839.

Conclusive Evidence.—To entitle a

plaintiff to recover, it is not necessary that the proof offered by him should be conclusive. It is sufficient that it presents a prima facie case. *Catlin v. Gilders*, 3 Ala. 536.

Number of Bricks Laid.—In an action for work done in the construction of a brick kiln, where the main issue concerns the number of bricks laid, it is not necessary that plaintiff should prove the number laid with mathematical certainty. *Birmingham Fire-Brick Works v. Allen*, 86 Ala. 185, 5 So. 454.

Proof of Genuineness of Receipt.—The genuineness of a receipt being in issue, the court charged the jury "that if the evidence, although it preponderated in favor of the receipt being genuine, still, if, upon a fair and full examination of it, their minds were left in a state of doubt and uncertainty, as to its being genuine, they should find in favor of the plaintiff upon that point." Held, that this charge could not be supported, as the jury were authorized to infer that demonstrative evidence was required, and that moral evidence was insufficient. *Hopper v. Ashley*, 15 Ala. 457.

Ancient Transactions.—It is not required that ancient transactions should be as clearly proved as affairs of recent occurrence. *Smith v. Wert*, 64 Ala. 34.

§ 451 (2) In Civil Actions to Recover Statutory Penalties or Involving Criminal Offense.

Principles of Criminal Prosecutions Do Not Apply.—The principle prevailing in a criminal prosecution, that if the jury entertain a reasonable doubt they must acquit, does not apply to civil suits for the recovery of statutory penalties. *Jordan v. Mann*, 57 Ala. 595.

§ 451 (3) Parol Evidence to Change Writing.

The proof of a parol alteration of a written contract must be clear and satisfactory, where the change is denied. *Huntsville Elks' Club v. Garrity-Hahn Bldg. Co. (Ala.)*, 57 So. 750.

§ 452. Sufficiency to Support Verdict or Finding.

Reasonably Satisfies and Convinces the Mind.—Evidence is sufficient to justify a verdict, if it reasonably satisfies and con-

vinces the mind. *Moore v. Heineke*, 119 Ala. 627, 24 So. 374.

Minds of Jurors Confused.—Where the minds of the jurors in a civil cause are in a state of confusion as to whether plaintiff should recover, a verdict for the plaintiff is not warranted. *Birmingham Ry., Light & Power Co. v. Saxon (Ala.)*, 59 So. 584.

§ 453. Preponderance of Evidence.

§ 453 (1) In General.

See ante, § 451 (1).

Weight Not Dependant upon Number of Witnesses.—The weight of the testimony does not necessarily depend upon the number of witnesses on either side. *Newton Loan & Banking Co. v. Reeves*, 2 Ala. App. 411, 56 So. 255.

In determining the preponderance of evidence, courts should rather give weight to the testimony tending to produce a proper conviction in their minds than to the number of witnesses. *Life Ass'n of America v. Neville*, 72 Ala. 517.

In ascertaining the preponderance of proof, the court should weigh the evidence rather than count the witnesses, and the finding should not be made on the mere preponderance of evidence which fails to produce proper conviction or satisfaction. *Life Association of America v. Neville*, 72 Ala. 517.

The law is properly stated in a charge that the jury are not to count witnesses simply, but to weigh testimony, and that rendering their verdict in accordance with the weight of evidence does not mean in accordance with the number of witnesses alone, but in accordance with the evidence which convinces them. *Alabama G. S. R. Co. v. Frazier*, 93 Ala. 45, 9 So. 303.

In a suit to redeem a mortgage, when one witness on behalf of the plaintiff and two on behalf of the defendant testify as to the amount of the tender, and all differently, the plaintiff's witness is not necessarily discredited by the other two; the integrity of neither witness being questioned, the former being sent by the plaintiff under a power of attorney to make the tender, and it being his business to tender the proper amount and to remember it. *Bugbee v. Howard*, 32 Ala. 713.

Charge as to Preponderance of Evidence.—A charge in a civil action, requir-

ing proof of an issue by a "preponderance of the evidence," is erroneous, as exacting too high a degree of proof. *McBride v. Sullivan*, 155 Ala. 166, 45 So. 902.

"Charge No. 9 was also improperly given. In addition to what has been said, the requirement of 'preponderance of the evidence' has been frequently condemned by this court. *Southern R. Co. v. Riddle*, 126 Ala. 244, 28 So. 422." *McBride v. Sullivan*, 155 Ala. 166, 45 So. 902, 904.

An instruction in a civil case that the burden of proving every material issue is on plaintiff, and unless it has been met by a preponderance of the evidence it is the jury's duty to find a verdict for defendant, was properly refused. *Alabama Security Co. v. Dewy*, 156 Ala. 530, 47 So. 55.

A charge that the burden of proof is on plaintiff to show certain facts, and that he must reasonably satisfy the jury by preponderance of evidence on these points, is misleading by the use of the words "preponderance of." *Kansas, etc., R. Co. v. Henson*, 132 Ala. 528, 31 So. 590.

It is not error to charge that the jury must be satisfied by a preponderance of evidence of the existence of a fact. *Behrman v. Newton*, 103 Ala. 525, 15 So. 838.

A charge to find according to the preponderance of the evidence is erroneous, the measure of proof being such as shall reasonably convince the jury that the facts sought to be proved exist. *Pullman Palace-Car Co. v. Adams*, 120 Ala. 581, 24 So. 921.

In order to authorize a verdict in a civil case, a mere "preponderance of the evidence" is not sufficient, but the jury must be "reasonably satisfied" that the facts essential to the cause of action or defense have been established. *Alabama Mineral R. Co. v. Marcus*, 115 Ala. 389, 22 So. 135.

A charge requiring one to satisfy the jury by a preponderance of evidence places on him too high a duty. *Carter v. Fulgham*, 134 Ala. 238, 32 So. 684.

An instruction in a civil case that the jury must believe the facts by a preponderance of the evidence is erroneous, belief to reasonable satisfaction being sufficient. *Arndt v. City of Cullman*, 132 Ala. 540, 31 So. 478.

In a civil case, issuable facts need not be proved with "reasonable certainty," but only by a preponderance of the evidence. *Eagle Iron Co. v. Baugh*, 147 Ala. 613, 41 So. 663.

A party is bound to establish his case in a civil action only by a preponderance of the evidence, and not by proof beyond a reasonable doubt. *Louisville & N. R. Co. v. Jones*, 83 Ala. 376, 3 So. 902.

In a civil case, a mere preponderance of evidence is not sufficient to authorize a verdict for the plaintiff, unless it is sufficient to satisfy the minds of the jury; but a charge asked, asserting "that a preponderance of evidence merely, inclining the minds of the jury to sustain the plaintiff's claim, can not be regarded as sufficient," is calculated to mislead the jury, and is properly refused. *Acklen v. Hickman*, 60 Ala. 568.

Proving Signature of Instrument.—On an issue as to whether the signature to an instrument was that of complainant, he denied it, and nine persons acquainted with his handwriting expressed the opinion that the signature was not complainant's. Eight experts testified, from a comparison of handwritings, that the signature was not complainant's, but was the signature of the person who filled in the blanks of the instrument, who was another person. Eight experts testified to the contrary. Held not to sustain the burden of showing the genuineness of the signature. *Land, Mortgage Investment & Agency Co. of America v. Preston*, 119 Ala. 290, 24 So. 707.

§ 453 (2) Testimony of Parties.

Testimony of Plaintiff and Defendant Alone.—In a case where the parties are allowed to testify, if there are no other witnesses, and the defendant denies on oath all the facts stated by the plaintiff, it leaves the case as if no testimony had been offered by plaintiff. *Anderson v. Collins*, 6 Ala. 783.

A charge that when plaintiff and defendant each testify in a case, and contradict each other on material points, and neither is corroborated by other circumstances or evidence, and are equally credible and worthy of belief, the verdict should be for defendant, is erroneous. *Howard v. Taylor*, 99 Ala. 450, 13 So. 121.

§ 454. Matters of Defense and Rebuttal.

The assignment of an account by the party to whom it purports to be due, and testimony that he (having since died) kept correct accounts, does not sufficiently establish its justness to authorize the assignee to set it off to a suit in equity against him, brought by the person charged with it. *Dunn v. Dunn*, 8 Ala. 784.

§ 455. Particular Facts or Issues.

Contract between Railroad and Detective.—Where a detective contracts to work for defendant railroad company in ferreting out theft from defendant's cars, evidence that the persons arrested by the detective were convicted of stealing from the cars of another company, and that the latter company delivered to defendant a

box containing shoes similar to two pairs claimed to have been stolen from defendant's cars, and that a shortage was found in the box when delivered, is insufficient to warrant a finding for the detective in assumpsit. *Louisville & N. R. Co. v. Morgan*, 95 Ala. 608, 10 So. 834.

Right to Sue upon Note.—Where the holder of a bill of exchange constitutes an agent for its collection, either by the indorsement of it himself, or through the blank indorsement of a prior holder, his subsequent possession of it is prima facie evidence that it has been restored to him, and that the legal title is in him, as to thereby authorize him to sue on it as though it had never been made payable to the agent. *Phillips v. Poindexter*, 18 Ala. 579.

Examination of Account.

See the titles ACCOUNT; GRAND JURY; REFERENCE.

Examination of Accused.

See the title CRIMINAL LAW. See, also, the title EXTRADITION.

Examination of Adverse Party.

See the title DISCOVERY.

Examination of Applicants.

See the titles ATTORNEY AND CLIENT; MUNICIPAL CORPORATIONS; PHYSICIANS AND SURGEONS.

Examination of Body.

See the titles DAMAGES; EVIDENCE; HOMICIDE.

Examination of Debtor.

See the titles CREDITORS' SUIT; EXECUTION.

Examination of Defendant.

See the title ATTACHMENT.

Examination of Expert.

See the titles CRIMINAL LAW; EVIDENCE.

Examination of Insured.

See the title INSURANCE.

Examination of Juror.

See the titles GRAND JURY; JURY.

Examination of Witness.

See the titles DEPOSITIONS; EQUITY; WITNESSES.

Examination Post Mortem.

See the titles CORONERS; HOMICIDE.

Excavations.

See the titles HIGHWAYS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NEGLIGENCE.

EXCEPTIONS, BILL OF.

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Cross References.

See the title APPEAL AND ERROR.

As to bill of exceptions in criminal cases, see the title CRIMINAL LAW. As to exceptions in proceedings and equity, see the title EQUITY. As to exceptions in admiralty, see the title ADMIRALTY. As to taking and noting exceptions at trial, see the title TRIAL. As to exceptions to report of referee, see the title REFERENCE. As to necessity for exceptions in lower court to preserve error on appeal, see the title APPEAL AND ERROR. As to continuance for correction of bill of exceptions, see the title APPEAL AND ERROR. As to necessity of bill of exceptions, see the title APPEAL AND ERROR. As to making and contents of bill of exceptions, see the title APPEAL AND ERROR.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 1. Nature and Purpose of Remedy in General.

The office of a bill of exceptions is to afford the appellate court a history of the proceedings below. *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759.

The object of a bill is to bring upon the record such matters as would not otherwise appear, and not to show facts that are properly matters of record. *Petty v. Dill*, 53 Ala. 641; *Caldwell v. Guinn*, 54 Ala. 64; *Steele v. Tutwiler*, 57 Ala. 113; *Morgan v. Wing*, 58 Ala. 301; *Sternau v. Marx*, 58 Ala. 608; *Tyree v. Parham's Ex'rs*, 66 Ala. 424; *Euford v. Leob*, 82 Ala. 429, 3 So. 3; *Odum v. Rutledge & J. R. Co.*, 94 Ala. 488, 10 So. 222; *Brooks v. Rogers*, 101 Ala. 111, 13 So. 386; *Hunter*

v. Wood, 54 Ala. 71, 72; *Buckley v. Wilson*, 56 Ala. 393, 395; *Sivoly v. Scott*, 56 Ala. 555, 557; *Pounds v. Hamner*, 57 Ala. 342, 344; *Young v. O'Neal*, 57 Ala. 566, 568; *Tuscaloosa, etc., Art Ass'n v. Murphy*, 58 Ala. 54, 59; *Chapman v. Holding*, 60 Ala. 522, 533; *Ex parte Knight*, 61 Ala. 482, 486; *Ross v. State*, 62 Ala. 224, 228; *Diggs v. State*, 77 Ala. 68, 70; *Baker v. Keith*, 77 Ala. 544, 545; *Camp v. Marion County*, 91 Ala. 240, 8 So. 786; *De Butts v. Vandiver*, 129 Ala. 666, 30 So. 905; *Durrett v. State*, 133 Ala. 119, 32 So. 234.

"The appropriate office of a bill of exceptions is to introduce on the record rulings of the court which are not 'intrinsic to the cause,' but arise incidentally in its progress; as the admission or rejection of evidence, instructions to the jury given or refused." *Rolater v. Rolater*, 52 Ala. 111.

The bill of exceptions can only be examined for the purpose of reviewing the motion for a new trial, and not to review the rulings at the trial. *Bank of Dothan v. Wilks*, 132 Ala. 573, 31 So. 451, citing *Alabama Mid. R. Co. v. Brown*, 129 Ala. 282, 29 So. 548.

Statutory Origin.—Bills of exceptions are the mere creatures of statute, being entirely unknown to the common law, either in the criminal or civil procedure. *Pearce v. Clements*, 73 Ala. 256; *Ned v. State*, 7 Port. 187; *Bourne v. State*, 8 Port. 458; *Rolater v. Rolater*, 52 Ala. 111; *Petty v. Dill*, 53 Ala. 641, 643.

"At common law a writ of error would not lie except for error apparent on the record; and therefore, if plaintiff or defendant alleged anything *ore tenus*, which was overruled by the judge, the party aggrieved was without redress." *Petty v. Dill*, 53 Ala. 641, 643.

As Part of Record.—A bill of exceptions is no part of the record of the trial court, and a judgment shown only by bill of exceptions can not be presented for consideration or revision on appeal. *Wallace v. Crosthwait*, 139 Ala. 338, 36 So. 622.

But when signed by the proper judicial officer, or established in the manner authorized by law, bills of exceptions become incorporated as a part of the several records in this court, to which they may respectively belong. *Pearce v. Clements*, 73 Ala. 256, 257.

As Judicial Determination.—A bill of exceptions is not a judicial action in the sense of adjudging or enforcing the rights of the parties. *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759.

§ 2. Statutory Provisions.

Under Code, § 12, providing that "proceedings" commenced before the adoption of the Code must be governed by the old law, though the trial is had after that time, the bill in actions commenced prior to the adoption of the Code is a proceeding within the meaning thereof, and must be prepared according to the old law. *Godden v. Le Grand*, 28 Ala. 158; *Moore v. Appleton*, 34 Ala. 147.

§ 3. Actions and Proceedings in Which Bill Is Authorized.

Under Code 1907, c. 59, relating to bills of exceptions, and §§ 2846, 2863, 6243, re-

lating to bills of exceptions as to new trials and as to those in probate, proceedings and in criminal cases, and § 3227, recognizing rules of the supreme court not contrary to the Code, and rules 32 and 33, for the practice of circuit and inferior courts, authorizing bills of exceptions, bills of exceptions may be reserved in any civil case, though the Code omits Code 1896, § 612, authorizing either party in any civil case to reserve by bill of exceptions any charge or decision of the court forming a part of the general law regulating the right to reserve a bill of exceptions in civil cases. *Lee v. Raiford*, 171 Ala. 124, 54 So. 543.

In Equity.—A bill is unknown in chancery practice. *Barnett v. Montgomery & E. R. Co.*, 51 Ala. 555.

A bill can not be reserved to the rulings of the chancellor, on the trial of an issue of fact before him by a jury. The remedy is an application to the chancery court for a new trial. *Barnett v. Montgomery & E. R. Co.*, 51 Ala. 555.

It is not competent to revise on error a question of law reserved by bill on the trial of an issue out of chancery. *Alexander v. Alexander*, 5 Ala. 517.

§ 4. Right to Make Bill.

No individual has the right to intervene in the court of commissioners of roads and revenue, and put questions on the record by bills, in the matter of a public road; the statute (*Clay's Dig.*, p. 307, § 5) authorizing bills of exceptions giving the privilege only to parties to a suit and in the trial of a cause. *Moore v. Hancock*, 11 Ala. 245.

§ 5. Scope and Contents of Bill in General.

A bill should contain nothing but what is material to the questions of law presented. *Seawell v. Henry*, 6 Ala. 226; *Tyree v. Parkham's Ex'rs*, 66 Ala. 424.

A judge is not bound to sign a bill of exceptions reserved and tendered in the court below, unless it contains "the point, charge, opinion, or decision, wherein the court is supposed to err, with such a statement of the facts as is necessary to make it intelligible." *Rev. Code*, § 2755. *Strawbridge v. State*, 48 Ala. 308, cited in *Ex parte Mayfield*, 63 Ala. 203, 205; *Poscy v. Beale*, 69 Ala. 32, 33; *Pearce v. Clements*,

73 Ala. 256, 257; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478.

Must Be Complete in Itself.—A bill of exceptions, when signed by the presiding judge, becomes a part of the record, and it must be perfect within itself; its defects, if any, can not be supplemented or corrected by parol evidence. *Pearce v. Clements*, 73 Ala. 256; *Parsons v. Woodward*, 73 Ala. 348, 352; *Clark v. McCrary*, 80 Ala. 110; *Markland v. Albes*, 81 Ala. 433, 2 So. 123; *Powell v. Sturdevant*, 85 Ala. 243, 4 So. 718; *Beal v. State*, 138 Ala. 94, 35 So. 58, 59; *Stearn v. Lehman*, 169 Ala. 441, 2 So. 708, 710.

"Hence, it is a rule now inflexibly settled in our practice, by a long current of decisions, that this court will not establish a bill of exceptions, nor award a certiorari to bring it up as a part of the record, even if signed, where there are blanks in material parts of the instrument, and the papers intended to be inserted are not properly identified. *Tuskaloosa County v. Logan*, 50 Ala. 503; *Strawbridge v. State*, 48 Ala. 308; *Garlington v. Jones*, 37 Ala. 240; *Looney v. Bush*, Minor 413." *Pearce v. Clements*, 73 Ala. 256, 257. But, see post, "Documentary Evidence," § 12.

Setting out Pleadings.—A bill of exceptions, which sets out the motion to strike pleadings and the ruling thereon, need not contain a copy of the pleadings which are copied into the record. *St. Louis & S. F. R. Co. v. Phillips*, 165 Ala. 504, 51 So. 638.

It is insisted by counsel for appellee that the action of the trial court in striking out certain pleas can not be here considered for the reason that these pleas are not set out in the bill of exceptions. We concede that such was the effect of the ruling of this court in the case of *Ætna Life Ins. Co. v. Lasseter*, 153 Ala. 630, 45 So. 166, 167. In several other decisions of this court, where this question was not squarely before the court, it is intimated that it is necessary, where motion is made to strike a pleading from the file, that the motion, pleading, and the ruling of the court thereon must appear in the bill of exceptions before this court can consider the same. But, upon careful consideration of this question, we are of opinion that, where the bill of exceptions sets out

the motion and the ruling of the court thereon, it is not necessary to copy the pleading into the bill of exceptions, provided the pleading is copied into the record, as it should be, and is sufficiently designated in the motion, so that there can be no doubt as to the particular pleading which the motion asks to be stricken. We therefore overrule the case in *Ætna Life Ins. Co. v. Lasseter*, 153 Ala. 630, 45 So. 166, 167, so far as this rule is concerned, and confine the other cases to the facts of those cases, where this question does not directly appear, and which intimate that pleadings must, in all cases, be set out in the bill of exceptions, where motion has been made to strike them, before this court can consider them. *St. Louis, etc., R. Co. v. Phillips*, 165 Ala. 504, 51 So. 638, 642.

§ 6. Setting Forth Errors or Irregularities.

A bill merely reciting that certain evidence was offered and excluded, without showing when, by whom, or on what grounds it was excluded, is insufficient. *Milliken v. Maund*, 110 Ala. 332, 20 So. 310.

The bill of exceptions, in an action for money due on account for work and labor and on an account due and unpaid, stated that after argument the court announced its intention of charging that plaintiff could recover nothing under the contract, and that only a certain item was in controversy, and that it would charge that if plaintiff paid out more in defraying his expenses than was paid him by defendant, he could only recover the excess, but if defendant paid out more for plaintiff's expenses than plaintiff had paid, the jury should find for defendant for the overplus, and that the court so charged, and plaintiff took a nonsuit. Held, that the bill of exceptions sufficiently showed that the nonsuit was taken because of adverse rulings. *Graden v. Buford*, 1 Ala. App. 668, 56 So. 77.

§ 7. Setting Forth Objections, Rulings, and Exceptions.

If the bill shows that the ruling of the court was "objected to" on the trial, it is sufficient, without showing that it was excepted to. *Sackett v. McCord*, 23 Ala. 851; *Howe Mach. Co. v. Ashley*, 60 Ala. 496.

Ruling on Motion.—Two defendants, sued before a justice, filed pleas in abatement. One of the defendants was dismissed, and judgment rendered in favor of plaintiff, and an appeal taken to the circuit court, where the judgment was affirmed. The bill of exceptions recited that in the circuit court defendant renewed his "motion" made in justice court to dismiss the cause for want of jurisdiction, which motion was tried on issue joined, and testimony as follows, etc., but no motion was disclosed by the transcript of the justice's judgment or appeared in the record or bill of exceptions. Held, that the motion mentioned in the bill could not be treated as intended for the plea in abatement, and that the general statement as to the purpose of the motion was insufficient to present any question for review on appeal to the supreme court. *Eagle Iron Co. v. McCord*, 152 Ala. 542, 44 So. 648.

As to Evidence.—A bill is insufficient which states only the evidence and the rulings of the court, without stating that any objection was made on the trial, except indirectly, by the words, "And this is signed and sealed as plaintiff's bill of exceptions." *Foster v. Hightower*, 40 Ala. 295, citing *Milton v. Rowland*, 11 Ala. 732; *Mahoney v. O'Leary*, 34 Ala. 97.

A bill of exceptions recited that defendant renewed his motion made in justice's court to dismiss the cause for want of jurisdiction, and that after disposing of such motion the main trial was proceeded with, testimony introduced, and judgment rendered for plaintiff; that "the cause was further tried before the same jury" on the merits on issues joined on plaintiff's pleadings, the following evidence being before the jury, etc. Held, that such recital was ineffective to bring up for review the action of the court on the admission of testimony on the hearing of a motion to dismiss, which testimony was treated as before the jury on the trial on the merits. *Eagle Iron Co. v. McCord*, 152 Ala. 542, 44 So. 648.

A bill which recites that plaintiff offered in evidence a certain deed, to the introduction of which defendant objected, and that the court overruled the objection, and permitted it to be read to the jury against the objection of the defend-

ant, does not show that an exception was reserved to the ruling of the court. *Gager v. Gordon*, 29 Ala. 341.

Same—Competency of Witness.—Where a bill, after stating that the defendants objected to the reading of a deposition on the ground that the witness was incompetent, recited, "This objection was overruled, and the defendants, by their counsel, then objected to the entire deposition as improper and illegal testimony, and the objection was overruled, and the defendants excepted," the exceptions will be deemed to apply to the overruling of the objection that the deposition was improper and illegal testimony, and does not reserve for review the question of the competency of the witness. *Chamberlain v. Masterson*, 29 Ala. 299.

Same—Evidence Excluded.—Where a bill recited that "the court refused to receive certain testimony offered by defendant, wherefore defendant prays the court to sign and seal this, his bill of exceptions to the ruling of the court," such bill of exceptions does not show that an exception was taken during the trial of the case to the ruling of the court excluding the testimony, and it will be disregarded on appeal. *Croft v. Ferrell*, 21 Ala. 351.

As to Instructions.—Where error is assigned in the giving of certain instructions, a bill which merely recites that the court "decided certain things" does not sufficiently show that the decision was given as a charge to the jury, or intended for their hearing. *Cotten v. Bradley*, 38 Ala. 506.

Granting New Trial.—On appeal from a judgment, when the error assigned is that the court improperly refused to grant a new trial, a statement in the bill of exceptions that "the court refused to grant said motion" is a sufficient statement of the decision, under acts 1890-91, p. 779. *Wilk v. Key*, 117 Ala. 285, 23 So. 6.

A statement in a bill of exceptions on appeal from a judgment granting a new trial that "the court granted said motion, and set aside the verdict of the jury and granted the defendant a new trial," is insufficient to present a judgment for review. *Randall v. Worthington*, 141 Ala. 497, 37 So. 594.

Arrest of Judgment.—Where the bill does not show any action was taken by

the court on a motion in arrest of judgment, error assigned thereon will not be considered. *Wiggins v. Witherington*, 96 Ala. 535, 11 So. 539.

§ 8. Stating Facts Not Shown by Record.

If an alternative state of facts is presented for the determination of the primary court, one of which will sustain, and the other reverse its judgment, it devolves upon the party against whom its decision has been made to negative, in his bill of exceptions, either by positive statement, or by a recital of all the evidence, the alternative which supports the judgment. *Patton v. Hayter, etc., Co.*, 15 Ala. 18.

§ 9. Incorporating Evidence.

§ 10. — Setting Forth Evidence in General.

As to presumptions on appeal on failure to set out evidence, see the title APPEAL AND ERROR.

Code 1896 (chancery practice, rule 94), provides that, in filing exceptions to the report of a register, it shall be the duty of the solicitor to note, at the foot of each exception to conclusion of facts drawn by the register, the evidence relied on in support of such exception. Held, that where the solicitor merely cited page 15 of the testimony to support an exception, and the paging of the testimony used at the trial and the transcript of such testimony used on appeal was not the same, the exception would not be reviewed. *Woodruff v. Smith*, 127 Ala. 65, 28 So. 736.

Where the bill of exceptions does not set out testimony of a witness in full, the objection that such testimony is hearsay can not be sustained. *Thomas v. State*, 107 Ala. 13, 18 So. 229.

A bill of exceptions which recited that: "This was substantially all the testimony. The court, on the testimony introduced, rendered judgment," etc., showed that all the evidence on which the court acted was set out. *Tallman v. Drake*, 116 Ala. 262, 22 So. 485.

Findings on Evidence.—Where a cause was tried by the court, and the bill of exceptions set forth the evidence and the several rulings of the court on the admissibility of testimony, but contained no statement of the findings or conclusion and judgment of the trial judge on the ev-

idence as provided by acts 1888-89, pp. 727, 800, § 7, the appellate court has no jurisdiction to review the action of the trial court. *Williams v. Woodward Iron Co.*, 106 Ala. 254, 17 So. 517.

§ 11. — Stenographer's Report.

Under rule 32 of circuit court practice (Civ. Code 1907, p. 1526), providing that bills of exceptions shall not contain a statement of the testimony, except under certain conditions, where a bill of exceptions contained nothing other than the stenographic report, it did not constitute a proper record. *Hester v. Cantrell*, 169 Ala. 490, 53 So. 1009; *Gassenheimer Paper Co. v. Marietta Paper Mfg. Co.*, 127 Ala. 183, 28 So. 564; *Southern R. Co. v. Jackson*, 133 Ala. 384, 31 So. 988; *Woodward Iron Co. v. Herndon*, 130 Ala. 364, 30 So. 370; *Lucas v. Mays*, 2 Ala. App. 497, 56 So. 593.

§ 12. — Documentary Evidence.

Documents sought to be preserved in the bill should be placed therein before the signature of the trial judge, and should be accompanied by proper words of identification. *Stapp v. Wilkinson*, 80 Ala. 47.

Where written documents are mentioned in the bill as constituting part of it, but are neither copied into it nor described by such identifying features as to leave no room for doubt, they can not be regarded as part of the bill. *Garlington v. Jones*, 37 Ala. 240; *Farmer v. Wilson*, 34 Ala. 75; *Ware v. Brewer*, 34 Ala. 114, 115; *Condon v. Enger*, 113 Ala. 233, 21 So. 227.

When it is intended to incorporate into the bill papers or documents which were read or offered in the court below, they must be copied into the bill before it is signed by the presiding judge, or must be so described, by names of parties, amounts, or other identifying features, as to leave no room for mistakes in the transcribing officer. *Tuskaloosa County v. Logan*, 50 Ala. 503; *Parsons v. Woodward*, 73 Ala. 348.

In the case of *Looney v. Bush*, Minor 413, it is declared that a copy of the instrument must be set out in the bill of exceptions, or it must so describe the paper by its date, amount, parties, or other identifying features as to leave no room

for mistake in the transcribing officer. This rule has never been departed from in this state. *Moore v. Helms*, 77 Ala. 379, 380; *Pearce v. Clements*, 73 Ala. 256; *Strawbridge v. State*, 48 Ala. 308; *Tuska-loosa County v. Logan*, 50 Ala. 503; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478.

By Reference.—Where a bill refers to certain papers, this does not make such papers a part of the bill, and the court will not consider them. *Farmer v. Wilson*, 34 Ala. 75.

Where transcripts of records are referred to by the bill, but are not certified with the record as a part of it, although attached to the transcript, the court will not consider them, as there is nothing to show that they were the same used at the trial. *Quigley v. Campbell*, 12 Ala. 58, cited in *Garlington v. Jones*, 37 Ala. 240, 241; *Strawbridge v. State*, 48 Ala. 308, 310.

Deeds.—A statement in a bill of exceptions that a deed attached to interrogatories to a witness was the original deed of the grantor was sufficient to show that the original was before the witness when he was examined; he having testified, when asked to examine the deed attached to the interrogatories, that he was present when it was executed, that he saw the grantor sign it, and that his own certificate was attached thereto. *Harper v. Reaves*, 132 Ala. 625, 32 So. 721.

Foreign Laws.—Where a bill contained a mere statement, "The plaintiff then read in evidence the statutes of Mississippi," such statutes not being set out, and there being no agreement in reference to them, held, that they were not brought before the court by the bill. *Minniece v. Jeter*, 65 Ala. 222.

Document Pleaded.—A blank left in a bill of exceptions for a copy of a note offered in evidence, where the declaration contains but one count, and is on the note; the plea, is payment—held the blank is immaterial, and the exception will be heard. *Richardson v. Farnsworth*, 1 Stew. 55.

Letters of Administration.—In an action brought by an administrator, a recital in the plaintiff's bill of exceptions, which purports to set out all the evidence, that "the plaintiff proved his demand as administrator," is sufficient to show that he

read in evidence his letters of administration. *Bell's Adm'r v. Andrews*, 34 Ala. 538.

Report Read in Evidence.—A bill in a probate case tried before the court without the intervention of the jury recited that the appellants "objected to the fifth volume of Porter's Reports," which was "offered and read in evidence" by appellee, "being read for the purpose of proving any fact or facts; but the court overruled their objection, and they accepted. Held insufficient to show that the volume was read in evidence to prove any fact or facts. *Bartee v. James*, 33 Ala. 34.

§ 13. — Abridgement.

Court rule 33 (Code 1896, p. 1201), providing for the framing of bills of exceptions, does not require or authorize the setting out of all the evidence in order to properly present rulings of the trial court on the admissibility of evidence for review. *Callaway v. Gay*, 143 Ala. 524, 39 So. 277.

The practice of bringing before the supreme court voluminous books or papers, by attaching them to the bill of exceptions or as references, is irregular and improper; but only such parts of records, books, or documents as are pertinent to matters to be considered on appeal, should be inserted in the bill. *Chamberlain v. Darrington*, 4 Port. 515.

In an action for work and labor done on a house, the bill of exceptions recited that the court took the case under advisement, and afterwards rendered a judgment to rendition, of which defendant excepted, and that the evidence tended to show a contract between the parties for the wiring of a house and the completion before it was burnt of the part denominated "roughing in," and that the burning thereof rendered it impossible to complete the job. Held, that the bill did not violate rule of court 32 (Civ. Code, p. 1526), forbidding the statement of testimony or any portion thereof in extenso. *Baumhauer v. Mobile Electrical Supply Co.*, 167 Ala. 439, 52 So. 732.

The court "takes occasion again to condemn the practice, so often indulged, of incorporating redundant and superfluous matter in bills of exceptions, thus ren-

dering the record confused and unnecessarily voluminous." The pleadings, and the rulings of the court thereon, are a part of the record proper, and should not be set out in the bill of exceptions; nor should the general charge of the court be set out, when not excepted to; nor should the cumulative testimony of several witnesses, when substantially the same, be stated at length. *Tyree v. Parham*, 66 Ala. 424, cited in *Allen v. State*, 74 Ala. 557, 560; *Euford v. Loeb*, 82 Ala. 429, 3 So. 3.

Code, p. 1201, rule 33, provides that a bill of exceptions shall not contain a statement of the testimony in extenso, save in certain cases; and subdivision five declares that the bill shall not contain a mere repetition of previous statements, but that the substance of such additional testimony may be given, and that any bill violating the rule may be disallowed. Held, that where, under the rule, there was no reason for setting out testimony in the bill, and the bill was in fact a stenographic report of the trial, excepting arguments to the jury and a part of the charge, the bill would be disallowed by the appellate court. *Gassenheimer Paper Co. v. Marietta Paper Mfg. Co.*, 127 Ala. 183, 28 So. 564.

Where testimony set out in extenso in a bill of exceptions, relating to a material point in the case, was given by several witnesses and could not well be condensed into a general statement, the bill would not be stricken for failure, to comply with circuit court rule 33, subd. 5 (Code 1896, p. 1201), requiring condensation of testimony. *Boyett v. Standard Chemical & Oil Co.*, 146 Ala. 554, 41 So. 756.

Code, p. 1201, § 33, subd. 1, providing that, where a general charge is asked in good faith, the bill of exceptions may contain a statement of the evidence in extenso, does not authorize the insertion in such bill of the stenographic record of the trial, including questions and answers, and everything said by judge and counsel, but authorizes only a full statement of the evidence, in narrative form. *Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603.

Evidence Set Out in Narrative Form.—In the preparations of the bill of excep-

tions, the evidence adduced and its tendencies should be set out in narrative form, and the provision of the rule that bills of exceptions should contain a statement of the testimony in extenso when the general affirmative charge has been asked does not contemplate or authorize the setting forth therein of the stenographic report of questions and answers, but only that the testimony shall be stated in full and in narrative form; and therefore, when in the preparation of a bill of exceptions there is a palpable disregard of the rule by setting forth therein a stenographic report of the questions and answers of witnesses, making the bill of exceptions unduly prolix, it should be stricken from the record. *Woodward Iron Co. v. Herndon*, 130 Ala. 364, 30 So. 370.

Cumulative testimony of several witnesses, when, substantially the same, should not be stated at length in the bill of exceptions. *Tyree v. Parham's Ex'rs*, 66 Ala. 424.

Under Direction of Court.—The fact that a bill of exceptions is prepared with the wishes of the trial judge is no excuse for the violation of Code, p. 1201, § 33, providing that bills of exceptions shall not contain the testimony in extenso. *Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603.

§ 14. Incorporating Evidence Excluded.

A bill of exceptions recited that "plaintiff offered in evidence the following statement in writing, with its indorsements thereon. (Clerk will here set out statement and indorsements.) To the admission of said evidence defendant objected, and the court sustained the objection." Held, that the bill of exceptions did not sufficiently identify any offered evidence to authorize the clerk to make any insertion. *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478.

Where a bill of exceptions stated that the defendant thereupon offered in evidence "so much of said book as applied to plaintiffs' account in connection with the evidence of the witness," it appearing that the witness had testified to at least two other books besides defendant's "semiannual book," and it not appearing that the entries in one of the

other books were correct, the court on appeal could not, as the matter was presented, hold that the "semiannual book" was erroneously excluded, notwithstanding it of itself may have been competent. *Bienville Water Supply Co. v. Hieronymus Bros.*, 149 Ala. 265, 43 So. 124.

The bill of exceptions recited that plaintiff read to the jury the following part of the cross interrogatory No. 5, to a witness, to the effect that the first knowledge we had that any payment was made by defendant was when we received their letter, and further recited that this part of the answer to the cross interrogatory was read without objection; but, when plaintiff proceeded to read the remainder, defendant objected on the ground that the remainder, was not responsive, and "the court sustained such objection and refused to permit the plaintiff to read the remainder of said answer, * * * and the plaintiff then and there objected." Held, that the record showed that the part of the answer, to the reading of which an objection was taken and sustained, following the part which was actually read, was excluded from evidence. *Standard Talking Mach. Co. v. Matthews Supply Co.*, 6 Ala. App. 189, 60 So. 481.

§ 15. Incorporating Instructions Given.

A reference in a bill of exceptions to a charge, with the words, "here set out the charge," or "here insert it," does not make the charge thus referred to a part of the bill of exceptions. *Rev. Code*, § 2758; *Bradley v. Andress*, 30 Ala. 80; *Stodder v. Grant*, 28 Ala. 416; *Branch Bank v. Moseley*, 19 Ala. 222; *Quigley v. Campbell*, 12 Ala. 58; *Looney v. Bush*, Minor 413; *Strawbridge v. State*, 48 Ala. 308, 310; *Pearce v. Clements*, 73 Ala. 256, 257; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478.

Charge Not Excepted to.—"Only those charges should be inserted in bills of exceptions to which an exception was taken. We have often before had occasion to condemn this practice as one tending to render the record confused and unnecessarily voluminous." *Alabama Fertilizer Co. v. Reynolds*, 85 Ala. 19, 4 So. 639, 642.

Recital of Evidence.—Where a charge to the jury depends upon the evidence which was adduced, and is proper, or

otherwise according to the proof, the bill of exceptions should recite so much of the evidence as shows the error of the charge, in order to authorize a reversal of the judgment. *Brewer v. Strong*, 10 Ala. 961.

§ 16. Incorporating Instructions Refused.

A bill of exceptions, reciting that at the conclusion of the court's oral charge, defendant in open court and in the presence of the jury requested the court separately and severally in writing to give each of the charges set out, and that the court separately and severally refused to give each of them and indorsed on each the word "refused," sufficiently shows that the charges were requested separately and were separately considered by the presiding judge and marked "refused." *Birmingham R., etc., Co. v. Leach*, 5 Ala. App. 546, 59 So. 358.

Where charges refused, appearing on the record of the trial court, are merely referred to in the bill of exceptions by number, but are not copied therein, the ruling of the court thereon can not be reviewed. *Southern Ry. Co. v. Jones*, 132 Ala. 437, 31 So. 501.

Recital of Evidence.—When the court refuses to give a charge requested, the party wishing to revise such refusal must set out in his bill of exceptions so much of the evidence as will show that the charge requested was pertinent to the evidence, and was not abstract. *Leverett v. Carlisle*, 19 Ala. 80; *Wyatt v. Stewart*, 34 Ala. 716, 722; *Turbeville v. State*, 40 Ala. 715, 716; *Hughes v. Parker*, 1 Port. 139; *Hollinger v. Smith*, 4 Ala. 367; *McGehee v. Powell*, 8 Ala. 827, 828; *Milton v. Rowland*, 11 Ala. 732, 733.

Where the bill of exceptions states mere tendencies of the evidence, instead of setting it out in extenso, the rulings of the court in refusing to grant a request for affirmative instructions will not be reviewed. *Northern Alabama R. Co. v. Brakefield*, 123 Ala. 605, 26 So. 646, citing *Rule 33*, 89 Ala. ix, 8 So. v; *Louisville, etc., R. Co. v. Malone*, 109 Ala. 509, 20 So. 33.

§ 17. Form and Arrangement of Bill.

A bill is taken most strongly against the excepting party, and it devolves on him to show the error affirmatively; and to do so he must state the point sought to

be revised with clearness and precision, leaving nothing to surmise or conjecture. *Lewis v. Paull*, 42 Ala. 136.

A recital in the bill of exceptions that the defendant offered evidence to which "the plaintiff objected, but his objection was overruled and plaintiff excepted," sufficiently shows that the evidence was actually given to the jury. *Yarbrough v. Hudson*, 19 Ala. 653.

A record, with the caption, "On the trial of this cause the following proceedings were had," contained the proceedings and concluded, "And the defendant's attorneys now assign each and all of the said rulings of the court as errors." Held not to constitute a bill of exceptions, there being no evidence that it was so intended. *Weems v. Weems*, 69 Ala. 104.

When copies of papers are made exhibits to a bill of exceptions which states that an offer was made to read in evidence the originals, which were identified by a witness, and referred to by others, and no objection to their competency appears to have been made, the papers will be considered as in evidence in the case. *Rice v. Schloss*, 90 Ala. 416, 7 So. 802.

When the entire transcript is made out in the form of a bill, setting out the summons and complaint, the pleas, demurrers, and rulings thereon, the evidence adduced on the trial, the charges of the court to the jury, and the judgment entry; stating exceptions reserved to rulings of the court on the pleadings, but none to rulings on evidence, nor to charges given or refused; and concluding: "The above contains everything in the case necessary to set out, wherefore defendant tenders this, her bill of exceptions," which is signed and sealed in term time, this can not be regarded as a bill of exceptions for any purpose. *Euford v. Loeb*, 82 Ala. 429, 3 So. 3.

§ 18. Insertion of Documents.

Identification of Document.—Documents copied into the transcript as exhibits, but not made part of the record by appropriate reference in the bill of exceptions, can not be considered as any part of the record. *Stodder v. Grant*, 28 Ala. 416; *Farmer v. Wilson*, 34 Ala. 75, 78; *Garlington v. Jones*, 37 Ala. 240, 241; *Kirk v. McAllister*, 39 Ala. 343, 344; *Strawbridge v. State*,

48 Ala. 308, 310; *Diston v. Hood*, 83 Ala. 331, 3 So. 746; *Bradley v. Andress*, 30 Ala. 80; *Branch Bank v. Moseley*, 19 Ala. 222; *Tuskaloosa County v. Logan*, 50 Ala. 503; *Pearce v. Clements*, 73 Ala. 256, 258; *Moore v. Helms*, 77 Ala. 379, 380; *Stapp v. Wilkinson*, 80 Ala. 47, 50; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478; *Nelson v. Shelby Mfg., etc., Co.*, 96 Ala. 515, 11 So. 695; *Tennessee, etc., R. Co. v. Danforth*, 99 Ala. 331, 13 So. 51; *Alabama, etc., R. Co. v. Dobbs*, 101 Ala. 219, 12 So. 770; *Stearn v. Lehman*, 169 Ala. 441, 2 So. 708, 710; *Girard Fire Ins. Co. v. Boulden (Ala.)*, 11 So. 773, 774; *Parsons v. Woodward*, 73 Ala. 348; *Elliott v. Round Mountain Coal, etc., Co.*, 108 Ala. 640, 18 So. 689; *Looney v. Bush*, Minor 413; *Anniston Mfg. Co. v. Southern R. Co.*, 145 Ala. 351, 40 So. 965, 966.

It is a rule now inflexibly settled, by a long current of decisions, that this court will not establish a bill of exceptions, nor award a certiorari to bring it up as a part of the record, even if signed, where there are blanks in material parts of the instrument, and the papers intended to be inserted are not properly identified. *Anniston Mfg. Co. v. Southern R. Co.*, 145 Ala. 351, 40 So. 965.

When a document is sought to be made a part of a bill of exceptions by reference, and not by copy, it must be so described by its date, amount, parties, or other identifying features, that the transcribing officer can, unaided by memory, readily and with certainty determine, from the description itself, what document or paper is referred to, without room for mistake. *Parsons v. Woodward*, 73 Ala. 348.

Where it is attempted to incorporate a paper into a bill by means of the words "Here insert," the instrument must be so clearly identified that nothing remains for the clerk to do but to copy it into the bill at the place indicated. *Moore v. Penn*, 95 Ala. 200, 10 So. 343; *Kyle v. Gadsden Land & Improvement Co.*, 96 Ala. 376, 11 So. 478.

If a bill refers to a paper, and does not set it out or so describe it as to leave no room for the clerk, by mistake or otherwise, to transcribe some other paper into the record, the court will not consider such paper as spread on the record. *Looney v. Bush*, Minor 413, cited in *Branch*

Bank v. Moseley, 19 Ala. 222, 223; *Garlington v. Jones*, 37 Ala. 240, 241; *Strawbridge v. State*, 48 Ala. 308, 310; *Tuskaloosa County v. Logan*, 50 Ala. 503, 505; *Pearce v. Clements*, 73 Ala. 256, 258; *Parsons v. Woodward*, 73 Ala. 348, 352; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478; *Alabama, etc., R. Co. v. Dobbs*, 101 Ala. 219, 12 So. 770; *Anniston Mfg. Co. v. Southern R. Co.*, 145 Ala. 351, 40 So. 965, 966.

A bill of exceptions, in an action of unlawful detainer, reciting that it was agreed that the clerk might set out the demand made by the plaintiff on defendant for possession of the premises, and a letter of a certain date written by plaintiff's president, do not sufficiently identify the instruments to authorize the clerk to set them out after the bill was signed. *Elliott v. Round Mountain Coal & Iron Co.*, 108 Ala. 640, 18 So. 689.

Inserted after Signing.—A bill of exceptions reciting that it was agreed that the clerk might insert certain instruments, so identified, by reference to their dates, subjects, and parties, as to insure against mistake in copying them, authorized the insertion of said instruments after the bill was signed. *Elliott v. Round Mountain Coal, etc., Co.*, 108 Ala. 640, 18 So. 689.

Transcript of Record.—When the bill of exceptions states that "defendant then read a transcript in the words and figures following," but the transcript is not set out, and the clerk certifies that it is not on file in his office, a transcript which is afterwards sent up on certiorari, and which can not be identified by any reference to it in the original record, must be rejected as forming no part of the bill of exceptions. *Branch Bank v. Moseley*, 19 Ala. 222, cited in *Bradley v. Andress*, 30 Ala. 80, 82; *Farmer v. Wilson*, 34 Ala. 75, 77; *Garlington v. Jones*, 37 Ala. 240, 241; *Strawbridge v. State*, 48 Ala. 308, 310; *Tuskaloosa County v. Logan*, 50 Ala. 503, 505; *Pearce v. Clements*, 73 Ala. 256, 258.

Where the bill of exceptions directs the clerk to incorporate a document read in evidence, but the document itself is not set out or identified by description, a document in another part of the transcript will not be considered on appeal, though by memorandum the clerk stated that "the pieces of evidence were mislaid at the

time the above part of the transcript was made out, but have since been found, and are here copied as part of this record." *Moore v. Helms*, 77 Ala. 379.

A bill referred to a transcript of judgment by the name of the court and parties, and to a deed simply by names of the grantor and grantee, and provided: "It is agreed that the clerk may here set out in full said transcript and deed, together with all the indorsements thereon." Held, that the papers were not sufficiently identified to become part of the bill, and that papers found copied elsewhere in the record could not be incorporated therein. *Pearce v. Clements*, 73 Ala. 256; *Parsons v. Woodward*, 73 Ala. 348, 352; cited in *Moore v. Helms*, 77 Ala. 379, 380; *Moore v. Penn*, 95 Ala. 200, 10 So. 343; *Kyle v. Gadsden Land, etc., Co.*, 96 Ala. 376, 11 So. 478; *Tennessee, etc., R. Co. v. Danforth*, 99 Ala. 331, 13 So. 51; *Elliott v. Round Mountain Coal, etc., Co.*, 108 Ala. 640, 18 So. 689.

Decision of Railroad Commission.—Where a bill of exceptions recited that two certain opinions of the railroad commission were introduced in evidence, but did not set out the opinions, merely reciting that opinions of certain dates were introduced, and then instructed the clerk to set out one of a different date, such defect was not cured by a certificate of the clerk that the opinions of such commission set out were the only ones on file. *Anniston Mfg. Co. v. Southern Ry. Co.*, 145 Ala. 351, 40 So. 965.

Sheriff's Deed.—Where a bill of exceptions, taken on the trial of a statutory real action in the nature of ejectment, shows that the plaintiff claimed title through a sheriff's deed executed to her, and that the sheriff was examined as a witness, and, while he was on the witness stand, a deed was handed to him, which he identified as the deed executed by him to the plaintiff; stating the date of sale, the date and consideration of the deed, the parties thereto, its subsequent delivery to the plaintiff, and acknowledgment by him; and he further testified that he never made but the one deed to the plaintiff, and no other deed in regard to the lands described therein; all of which is set out in the bill of exceptions, with the recital that the deed was read in evidence, followed

by this language: "(It is agreed that the clerk may here set out said deed in full, with its indorsements);"—held, that a deed copied in the bill of exceptions by the clerk as the deed referred to, corresponding in all particulars with it, was sufficiently identified and described to preclude mistake in copying, and constituted a part of the bill of exceptions. *Parsons v. Woodward*, 73 Ala. 348.

Admission of Absent Witness.—A bill set forth that "defendant then offered the admissions of what the witness H. and others would swear if present. [These admissions are with the file of papers in the circuit clerk's office, and the clerk will set them out.]" The clerk, in filling the blank, copied what purports to be a showing for a continuance on account of the absence of witness H. only, which showing contains the title of the case, statement of the reasons for the witness' absence, and what he would prove if present. It did not appear that there was any other witness named H. Held, that the paper containing the admissions was sufficiently identified. *Alabama G. S. R. Co. v. Dobbs*, 101 Ala. 219, 12 So. 770.

§ 19. Construction of Bill.

Exceptions are construed most strongly against the party excepting, and if the bill is capable of two constructions, one favorable to the lower court and the other unfavorable, that construction will be adopted which will sustain, rather than that which will reverse the judgment. *Milliken v. Maund*, 110 Ala. 332, 20 So. 310; *Yellow Pine Lumber Co. v. Alabama State Land Co.*, 171 Ala. 77, 54 So. 608, 609; *Perminster v. Kelly*, 18 Ala. 716; *Patton v. Hayter, etc., Co.*, 15 Ala. 18; *Andress v. Broughton*, 21 Ala. 200, 204; *Croft v. Ferrell*, 21 Ala. 351, 358; *Donnell v. Jones*, 17 Ala. 689; *Buford v. Gould*, 35 Ala. 265, 268; *Guilford v. Hicks*, 36 Ala. 95, 97; *Dudley v. Chilton County*, 66 Ala. 593; *Rowland v. Ladiga*, 21 Ala. 9, 35; *Carpenter v. Joiner*, 151 Ala. 454, 44 So. 424, 425; *Hunnicutt Lumber Co. v. Mobile, etc., R. Co.*, 2 Ala. App. 436, 57 So. 73; *Sloss-Sheffield Steel, etc., Co. v. Redd*, 6 Ala. App. 404, 60 So. 468; *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831; *Alabama Constr. Co. v. Wagnon Bros.*, 137 Ala. 383, 34 So. 352; *Louisville, etc., R. Co. v. Mc-*

Mullan, 5 Ala. App. 662, 59 So. 683, 686; *Mallory v. Stodder*, 6 Ala. 801; *Sammis v. Johnson*, 22 Ala. 690, 691; *Harris v. Rowland*, 23 Ala. 644; *Furlow v. Merrell*, 23 Ala. 705; *Nash v. Shrader*, 27 Ala. 377; *McReynolds v. Jones*, 30 Ala. 101, 104; *Thompson v. Drake*, 32 Ala. 99; *Firemen's Ins. Co. v. Crandall*, 33 Ala. 9; *Thomasson v. Groce*, 42 Ala. 431; *Shelton v. St. Clair*, 64 Ala. 565; *Massey v. Smith*, 73 Ala. 173; *German v. Browne*, 145 Ala. 364, 39 So. 742; *Kabase v. Jebeles, etc., Confectionery Co.*, 155 Ala. 254, 46 So. 581; *Lewy Art Co. v. Agricola*, 169 Ala. 60, 53 So. 145; *Smith v. Garrett*, 31 Ala. 492, 493; *Goodgame v. Clifton*, 13 Ala. 583; *Stephens v. Brodnax*, 5 Ala. 258; *Duffee v. Pennington*, 1 Ala. 506; *Agee v. Medlock*, 25 Ala. 281, 283; *Chamberlain & Co. v. Masterson*, 29 Ala. 299; *Gager v. Gordon*, 29 Ala. 341, 345; *Glawson v. Wiley*, 35 Ala. 328, 330; *Tuskaloosa Wharf Co. v. Tuskaloosa*, 38 Ala. 514, 516; *Frank v. State*, 40 Ala. 9, 18; *Johnson v. State*, 29 Ala. 63, 68; *Spear v. Lomax*, 42 Ala. 576, 578; *Thrash v. Bennett*, 57 Ala. 156, 160; *Chapman v. Holding*, 60 Ala. 522, 536; *Barnes v. Mobley*, 21 Ala. 232, 238; *Gaines v. Harvin*, 19 Ala. 491; *Bryan v. Ware*, 20 Ala. 687; *McElhaney v. State*, 24 Ala. 71; *Morris v. State*, 25 Ala. 57; *Deslonde v. Darrington*, 29 Ala. 92; *Mitchell v. Cowser*, 20 Ala. 186, 189; *Bank v. M'Dade*, 4 Port. 252; *Milton v. Rowland*, 11 Ala. 732; *Fletcher v. Weisman*, 1 Ala. 602; *School Comm'r's v. Godwin*, 30 Ala. 242, 244.

When the bill of exceptions does not show whether a notice was written or verbal, the appellate court, construing the bill most strongly against the plaintiff in error, will presume, if necessary, that it was written. *Harris v. Rowland*, 23 Ala. 644.

In *detinue* by the husband's administrator, after the death of the wife, for a slave bequeathed to her by her maiden name, "entirely for her and her children," the will was construed to give her a life estate only if she was unmarried when the will took effect, but an absolute estate jointly with her children if she was then married and had any, and the record contained no evidence that she was then married. Held that, construing the bill of exceptions most strongly against the plaintiff in error, it would be presumed that

she was then unmarried. *Furlow v. Merrell*, 23 Ala. 705.

In an action on an open account for work done, defendant proved an agreement, made "in the spring of 1852," that goods to be furnished by him to plaintiff's sons, who were over twenty-one years of age, should be received in payment on plaintiff's account for the work then being done; and his accounts against the sons, "for goods furnished in 1852," were also produced and proved, but were not set out in the record. The court ruled out these accounts, and the defendant excepted: held, that it would be presumed, on error, that some of the items in the accounts were for goods furnished to the sons before the making of the agreement proved, since this construction would support the ruling of the primary court. *Nash v. Shrader*, 27 Ala. 377.

Where the bill of exceptions stated, that the slaves sued for were given to the wife of plaintiff's intestate "in the fall of 1833," and that a witness for the defendant, who stated that the slaves were delivered "in 1833," was allowed to testify, against plaintiff's objection, to declarations made by the donor "six or eight months afterwards;" held, that it would be presumed on error, in order to sustain the ruling of the primary court, that the slaves were at first delivered on loan, and that therefore the donor's declarations, though made "six or eight months" after the delivery, were prior to the gift "in the fall of 1833." *Gillespie v. Burleson*, 28 Ala. 551.

A bill, after stating that plaintiff offered in evidence a note sued on, proceeded thus: "The defendant then offered to read the second interrogatory, and answer thereto, of R. B., as follows," etc. "This answer was objected to by the plaintiff. The objection was sustained by the court, and the answer excluded, to which defendant excepted. Defendant then offered to read the third interrogatory, and answer thereto, of said R. B., as follows," etc. "To the reading of which answer plaintiff objected. The court sustained his objection, and excluded the evidence, and defendant objected." Held to mean that the entire deposition was offered, and that the counsel offering it was proceeding to read the answers to

the several interrogatories in their regular order. *Bryant v. Hutchinson*, 30 Ala. 441.

In an action to recover for the conversion of lumber sawed from timber taken from plaintiff's land, defendant's bill of exceptions stated that F., who cut the timber, stacked the lumber in his mill yard, and some time before the attachment was levied sold it to defendant, and that the lumber was stacked on the yard at the time of the attachment, "except about 75,000 feet that had been moved." Held, that the bill did not authorize a finding that there was no conversion by defendant because the evidence showed that, while it had purchased the lumber from F., it still remained in F.'s yard, and that defendant had assumed no dominion or control over it, though the bill in another part recited that the lumber was stocked in the mill yard, and that at the time suit was begun defendant had not removed any part of it. *Yellow Pine Lumber Co. v. Alabama State Land Co.*, 171 Ala. 77, 54 So. 608.

A bill of exceptions which merely states that preliminary proof of the loss or destruction of a written instrument was introduced will be construed, against the party excepting, as showing that such preliminary proof was properly addressed to the court, and not to the jury, and its admission will not be held erroneous. *Thomasson v. Groce*, 42 Ala. 431.

A bill of exceptions must always be taken most strongly against the party excepting, and where it states facts which show that a person at a considerable length of time previously became the purchaser of land, and his right to occupy it was during all that time undisputed, it will be intended against the party excepting, and in favor of his adversary, that the purchaser was in possession. *Mallory v. Stodder*, 6 Ala. 801.

Construed Literally.—A statement in a bill of exceptions that "thereupon the defendant made a motion to exclude all the testimony of the witness S. concerning the agency of said G. as an agent of defendant company, on the ground that the declarations and actions of the alleged witness are not proof of agency, and no independent proof of agency had been introduced," was insufficient to present for review the objection that the acts and

declarations of an agent are not admissible to prove his agency, though it might be suggested that the party objecting meant to use the word "agent," instead of the word "witness," following the word "alleged," since a bill of exceptions is to be construed most strongly against the party taking exceptions, and the appellate court will not indulge any intention to put the trial court in error. *Union Naval Stores Co. v. Pugh*, 156 Ala. 369, 47 So. 48.

Construed Reasonably.—A bill, though construed most strongly against the party excepting, must nevertheless receive a reasonable construction. *Smith v. Garrett*, 31 Ala. 492.

Construed in Favor of Validity.—Where a bill of exceptions stated that there was no evidence of indebtedness, and this was repugnant to other statements in the bill, the court construed the expression to mean that there was no positive proof. *Goodgame v. Clifton*, 13 Ala. 583.

Construed with Reference to Context.—When a bill sets out several distinct rulings of the court adverse to the plaintiff in error, and concludes with the words, "To which defendant excepted," the exception will be construed to apply only to the ruling of the court immediately preceding it. *Sammis v. Johnson*, 22 Ala. 690.

When the bill of exceptions sets out several distinct charges and refusals to charge on request, and concludes with the words, "to which defendant excepted," the exception will be construed to apply only to the charge and refusal contained in the paragraph immediately preceding it. *Andress v. Broughton*, 21 Ala. 200, cited in *Saltmarsh v. Bower & Co.*, 22 Ala. 221, 224; *Sammis v. Johnson*, 22 Ala. 690; *Agee v. Medlock*, 25 Ala. 281, 283; *Chamberlain & Co. v. Masterson*, 29 Ala. 299, 301.

Natural Meaning.—In construing a bill, the appellate court will, for the purpose of sustaining the ruling of the primary court, give to the words used their natural import and meaning. *Thompson v. Drake*, 32 Ala. 99.

Aids to Construction.—The validity of a bill can not be affected by the admissions of the judge signing it, made afterwards. *Weir v. Hoss*, 6 Ala. 881.

Incorporating Evidence.—Recitals in a bill of exceptions that it contains substantially "all the testimony" is equivalent to a statement that it substantially contains all the "evidence," and the case will be so considered on appeal. *Wager Lumber Co. v. Sullivan Logging Co.*, 120 Ala. 558, 24 So. 949.

When the bill of exceptions recites, in detail, the evidence introduced by both parties, and then adds, "Upon this evidence, the defendants asked the court, in writing, to charge the jury as follows: 'If the jury believe all the evidence, they will find for the defendants,'" this shows with sufficient certainty that the evidence recited is the substance of all that was introduced. *Walker v. Carroll*, 65 Ala. 61, overruling *Kirksey v. Hardaway*, 41 Ala. 330, and *Bridges v. Cribbs*, 41 Ala. 367.

"This court has held, in the case of *Hunnicutt Lumber Co. v. Mobile, etc., R. Co.*, 2 Ala. App. 436, 57 So. 73, applying the rule that a bill of exceptions is to be construed most strongly against the party excepting, that, notwithstanding a bill states in so many words that it contains all the evidence, yet, if the bill contains other statements affording a reasonable inference that admits of a different conclusion, that construction unfavorable to the party excepting will be adopted." *Sloss-Sheffield Steel, etc., Co. v. Redd*, 6 Ala. App. 404, 60 So. 468, 470.

Incorporating Instructions.—When the bill, after setting out a charge requested by the defendant, concludes with these words, "Which charge the court refused, and the defendant excepted," the exception applies only to the refusal to charge as asked, and can not be extended to charges previously given. *Agee v. Medlock*, 25 Ala. 281.

While Code 1907, § 5364, requires the trial court to write "given" or "refused" on written charges, and to sign his name thereto, where a bill of exceptions recites that, at the conclusion of the evidence, plaintiff requested the court to give in writing a charge set out, "and the court thereupon indorsed upon said charge the word 'refused,'" the language, under a fair and reasonable interpretation, shows that the appellant requested the court, in writing, to give the charge, and that

the court refused to do so, and it is therefore sufficient to assign such refusal as error. *Louisville, etc., R. Co. v. McMullan*, 5 Ala. App. 662, 59 So. 683.

While Code 1907, § 5364, requires the court to write "given" or "refused" on charges and to sign the same, a bill of exceptions, reciting "the court thereupon indorsed upon said charge the word 'refused,'" held sufficient to assign the refusal of an instruction as error. *Louisville, etc., R. Co. v. McMullan*, 5 Ala. App. 662, 59 So. 683.

A bill of exceptions, reciting that "the defendant requested the court, separately and severally in writing, to give the jury each of the following charges. The court thereupon separately and severally refused to give each of said written charges so requested by defendant"—does not show that the charges for defendant were asked in bulk. *Birmingham Ry., Light & Power Co. v. Camp*, 161 Ala. 456, 49 So. 846.

§ 20. Effect on Bill of Motion for New Trial.

A motion for a new trial does not abandon all previous exceptions, not incorporated in it. *West v. Cunningham*, 9 Port. 104.

If the trial court does not require a party to waive his exception as a condition on which an application for a new trial will be entertained, but considers and overrules the motion, the appellate court will not reject the bill of exceptions; and where the motion for a new trial is rested on grounds not embraced by the bill, the primary court can not put the party excepting to an election. *Sorrelle v. Craig*, 9 Ala. 534.

II. SETTLEMENT, SIGNING, AND FILING.

§ 21. In General.

"Settlement" of a bill of exceptions means an agreement upon the bill between the trial judge and appellant. *Tapia v. Williams*, 172 Ala. 18, 54 So. 613.

An instrument purporting to be a bill of exceptions not appearing to have been signed by the presiding judge can not be considered as such. *Rewe v. Buttram* (Ala.), 61 So. 258.

§ 22. Authority to Allow or Settle.

The judge who presides on the trial is alone authorized to sign and seal a bill of exceptions in the cause; and where the judge of one circuit court opens court in another circuit and tries causes during part of the term, he may, after ceasing to hold the court, sign and seal bills of exceptions in such causes, in a county and circuit other than that in which the court was held, if he does so during the term, though the judge of the circuit is then presiding in that court and continues to do so for the remainder of the term. *Ex parte Nelson*, 62 Ala. 376.

The statute of 1844 and subsequent amendments (Code, § 3133), providing that a bill of exceptions can not be signed after the adjournment of the court during which the exceptions were taken, changed the practice in vogue prior to such enactment with reference to the time of signing only, and did not prevent the judge of one circuit court, who had opened court during part of the term, from signing and sealing bills of exceptions in such causes in a county and circuit other than that in which the court was held. *Ex parte Nelson*, 62 Ala. 376.

A bill of exceptions may be settled by the judge who tried the case after he has ceased to be a judge. *Ex parte Nelson*, 62 Ala. 376.

Judge in Vacation.—A judge has no authority to allow a bill of exceptions in vacation, and, if the record disclose that it was so allowed, it will not be considered. *Powers v. Wright*, Minor 66.

Judge Presiding at Time of Ruling.—To preserve the right to review rulings on motions to vacate the return of process, and amendments thereto, made at a term prior to the term at which the trial was had and the judgment appealed from rendered, and before a different judge, a bill of exceptions should be signed by the judge presiding when the rulings were made. *Northern Alabama Ry. Co. v. Counts*, 166 Ala. 550, 51 So. 938.

Where Special Judge Appointed.—Under Code 1886, §§ 2760, 2761, the circuit judge before whom a cause is tried can sign the bill of exceptions at any time before adjournment of the term, though after the trial, and before the bill is signed, a special judge is appointed, under

act Feb. 18, 1895, who continues to preside until final adjournment. *McGhee v. Reynolds*, 117 Ala. 413, 23 So. 68.

The judge who tried a case may sign the bill of exceptions, though at the time, because of his illness, a special judge is sitting to try cases in his place, under acts 1907, p. 255, which does not create a vacancy in the judge's term of office, but which is enacted in obedience to Const. 1901, § 161, authorizing the legislature to provide for the holding of courts when the judge fails to attend. *Birmingham R., etc., Co. v. Fox*, 174 Ala. 657, 56 So. 1013.

Judge Absent from County.—Under acts 1907, p. 562, and Code 1907, § 3300, the judge of the Mobile law and equity court may sign a bill of exceptions while temporarily outside of Mobile county. *Brue v. McMillan*, 175 Ala. 416, 57 So. 486.

"In *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843, decided at a time when, under the statute, judges might extend the time for signing bills of exception, the bill was stricken, because the judge of probate made the order extending the time for a bill while absent from his county; this on the ground that the judicial power of probate judges is limited to the territory of the counties in which they are elected. On the other hand, it was held, in *Ex parte Nelson*, 62 Ala. 376, that a circuit judge might validate a bill of exceptions while in a circuit different from that in which the trial was had; this for the reason that his jurisdiction is coextensive with the state." *Brue v. McMillan*, 175 Ala. 416, 57 So. 486, 487.

§ 23. Time for Presentation, Allowance, and Filing.

§ 24. — In General.

§ 24 (1) In General.

"As the paper purporting to be a bill of exceptions was not signed within the time authorized by law, it can not be considered by this court." *Broadus Cotton Mills v. Alston*, 155 Ala. 272, 46 So. 450.

A bill of exceptions which bears no date will not be considered on appeal, where the record fails to show either that it was signed in term time, or that by agreement of parties it was signed in vacation. *Morris v. Brannen*, 103 Ala.

602, 15 So. 865, citing *Wood v. Brown*, 8 Ala. 563; *Kitchen v. Moye*, 17 Ala. 143; *Haden v. Brown*, 22 Ala. 572; *Markland v. Albes*, 81 Ala. 433, 2 So. 123; *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 So. 430; *Ladd v. State*, 92 Ala. 58, 9 So. 401; *Rosson v. State*, 92 Ala. 76, 9 So. 357.

§ 24 (2) In Vacation.

A judge has no authority to allow a bill of exceptions in vacation, and, if the record disclose that it was so allowed, it will not be considered. *Powers v. Wright*, Minor 66.

Under Statute.—The authority to sign a bill of exceptions is regulated by statute (Code, §§ 716-719), and the same may be signed in vacation when an order to that effect is entered during the term; but, if not signed within the time prescribed by such order or a subsequent order of extension made before the expiration of the first order, it constitutes no part of the record, and can not form the basis of an assignment of error. *Alabama Mineral R. Co. v. Marcus*, 128 Ala. 355, 30 So. 679.

§ 24 (3) Effect of Motion for New Trial.

Where a motion for a new trial is made at a regular term, but not disposed of until at an adjourned term, the court may then fix the time for filing the bill of exceptions, and a bill filed within the time so fixed can not be assailed. *Barron v. Barron*, 122 Ala. 194, 25 So. 55.

Where the bill of exceptions contained in a transcript was signed at a subsequent term to that at which the trial was had, and at the term at which the motion for a new trial was held and acted on, it was available only for the purpose of reviewing the decision on the motion for a new trial. *People's Savings Bank & Trust Co. v. Keith*, 136 Ala. 469, 34 So. 925.

A bill of exceptions, though not signed in time to present for review questions arising on the trial, is sufficient to present for review questions arising on the motion for a new trial, where it is signed within thirty days after the overruling of such motion. *Montgomery Traction Co. v. Knabe*, 158 Ala. 458, 48 So. 501.

Where an agreement extended the time for signing a bill of exceptions beyond

the beginning of the next term, and the bill was signed at that term, a motion for a new trial having been ruled on at such term, the bill of exceptions might be considered as to such ruling. *Birmingham Ry. & Electric Co. v. James*, 138 Ala. 594, 36 So. 464.

Practice rule 30 (Code, p. 1200) prohibits the extension by agreement of the time for signing a bill of exceptions beyond the beginning of the term next succeeding that at which the trial was had. Held, that where an agreement was that the bill was not to be signed until after a ruling on a motion for a new trial, and such motion had been continued by the agreement to the next term of court, the agreement was a violation of the rule. *Birmingham Ry. & Electric Co. v. James*, 138 Ala. 594, 36 So. 464.

Under acts 1896-97, p. 270, § 18, and Code 1907, § 3019, a bill of exceptions, presented more than ninety days after rendition of judgment, but within ninety days after the court had overruled motion for new trial, presented for review only the act of the trial court in overruling the motion for a new trial. *Yolande Coal & Coke Co. v. Norwood*, 4 Ala. App. 390, 58 So. 118.

§ 24 (4) Effect of Appeal.

The time for signing bills of exceptions, and the extension of such time, as fixed by statutes and rules applicable thereto, can not be limited by reason of an appeal, and the failure of the presiding judge to sign a bill of exceptions until after an appeal had been taken is not sufficient ground for striking such bill from the record. *Capital City Ins. Co. v. Cofield*, 131 Ala. 198, 31 So. 37.

It is no objection to a bill of exceptions that it was signed after the appeal bond was filed and approved, and after the appeal was perfected. *Louisville, etc., R. Co. v. Murphree*, 129 Ala. 432, 29 So. 592.

§ 25. — At or after Trial.

Where on March 25, 1907, the trial court rendered final judgment for plaintiff, and also overruled defendant's motion to vacate the judgment and dismiss the cause, and thereafter, on September third, defendant's motion to retax the costs was denied, and he was allowed

thirty days to present his bill of exceptions, a paper in the record on appeal dated October 1, 1907, and purporting to be a bill of exceptions, could be considered only for the purpose of reviewing the ruling on the motion to retax the costs. *McCrary v. Brown*, 157 Ala. 518, 50 So. 402.

A bill of exceptions dated on the day on which, as it appears on its face, the cause was tried, sufficiently appears to have been signed during the term at which the cause was tried. *Myers v. Segars*, 41 Ala. 383.

Thirty Days after Judgment.—Where the bill of exceptions in a case was not signed until after thirty days from the trial, and no extension of time was made by the court within the thirty days, the bill of exceptions can not be considered on appeal for the purpose of reviewing the rulings of the court on the trial. *Cobb v. Owens*, 150 Ala. 410, 43 So. 826; *Ledbetter & Co., etc., Ass'n v. Vinton*, 108 Ala. 644, 18 So. 692; *Central, etc., R. Co. v. Ashley*, 160 Ala. 580, 49 So. 388.

Ninety Days after Judgment.—Under Code 1907, § 3019, providing that bills of exceptions may be presented at any time within ninety days from the day on which the judgment is entered, and not afterwards, the judge can not receive a bill after such time has expired, and, if he does so, it will be stricken. *King v. Hill & Shaffer Co.*, 163 Ala. 422, 51 So. 15.

The bill of exceptions was presented to the trial judge, and signed by him, within ninety days from the date of the judgment overruling the motion for a new trial. This being true, so far as it pertains to the motion for a new trial, it was presented and signed in time. Code, § 3019; *Cassels' Mills v. Strater Bros. Grain Co.*, 166 Ala. 274, 51 So. 969. It follows that the motion to strike the bill of exceptions must be overruled. *McCloud v. Flournoy*, 3 Ala. App. 547, 57 So. 630.

Where bill of exceptions was filed within three months after denial of motion for new trial, but not within three months after the rendition of judgment, it will be looked to only for the purpose of reviewing the action of the court on the motion for new trial and grounds assigned as error thereunder. *Ewart*

Lumber Co. v. American Cement, etc., Co. (Ala.), 62 So. 560.

Six Months after Trial.—Where the points presented by a bill are reserved at the trial, but the bill itself is not drawn up and sealed until six months thereafter, the appellate court, notwithstanding the delay, will consider the bill as a part of the record, though no note of the points was made by the judge when the exception was taken, since a note is merely to recall the point, and is not indispensable to the legality of the bill perfected after court, if the judge remembers the point with sufficient distinctness to certify it as it arose at the trial. *Pool v. Cahawba & M. R. Co.*, 5 Ala. 237.

Twelve Months after Trial.—A bill of exceptions not filed for more than twelve months after the trial of the case can not be looked to on appeal for the purpose of revising actions or rulings of the trial judge on the main trial, unless the same questions were again presented and renewed on the motion for a new trial. *McCary v. Alabama, etc., R. Co. (Ala.)*, 62 So. 18.

§ 26. — During or after Term.

A bill of exceptions should be settled and signed during the term of court at which the trial is had, unless the time is extended by special order or by consent. *Loosse v. Vogel*, 80 Ala. 308; *Strader, etc., Co. v. Alexander*, 9 Port. 441; *Branch Bank v. Kinsey*, 5 Ala. 9, 11; *Pool v. Cahawba, etc., R. Co.*, 5 Ala. 237, 238; *Weir v. Hoss*, 6 Ala. 881, 885; *Ex parte Nelson*, 62 Ala. 376, 379.

To preserve the right to review rulings on motions to vacate a return of process and amendments thereto made at a term prior to the term at which the trial was had and the judgment appealed from rendered, a bill of exceptions should be of the term at which the rulings excepted to were had. *Northern Alabama Ry. Co. v. Counts*, 166 Ala. 550, 51 So. 938.

An adjourned term of the circuit court held beyond the time fixed at the regular term for signing a bill of exceptions is not to be taken as a part or continuation of the regular term for the purpose of signing the bill. *Hayes v. Woodham*, 139 Ala. 387, 36 So. 545.

Next Term.—A bill of exceptions signed after the succeeding term of the court, can not be considered. *Cooley v. United States Sav., etc., Co.*, 132 Ala. 590, 31 So. 521; *Birmingham R., etc., Co. v. James*, 138 Ala. 594, 36 So. 464; *Abercrombie v. Vandiver*, 140 Ala. 228, 37 So. 296; *Rainer Mercantile Co. v. Deal*, 151 Ala. 306, 44 So. 100, 101; *Vines v. Vines*, 145 Ala. 680, 40 So. 84. See Rules of Practice for Circuit and Inferior Courts No. 30, Code 1896, p. 1200.

The power of the court of probate to keep a term open from day to day for the purpose settling a bill of exceptions can not extend beyond the beginning of the next regular term. *Blake v. Harlan*, 75 Ala. 205.

Court rule 30 (Code 1896, p. 1200), limiting extensions for the signing of bills of exceptions by agreement to a time prior to the next succeeding term of court, does not apply to extensions granted by the presiding judge. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

Under acts 1903, p. 404, providing for the holding of monthly terms of the county courts and referring the matter of the signing of bills of exceptions to the general law in regard to circuit courts, and practice rule 30 (Code 1896, p. 1200), providing that in all circuit and inferior courts the time for the signing of bills of exception may be extended by agreement only to any time before the next succeeding term of such court, a bill of exceptions signed after the next succeeding term of the county court can not be considered, though the parties entered into stipulations extending the time. *Rainer Mercantile Co. v. Deal*, 151 Ala. 306, 44 So. 100.

Where, on overruling a motion for new trial on December 29th, thirty days were given in which to perfect a bill on the motion, and on January 26th the presiding judge as such extended the time to February 7th, which was in the succeeding term, and signed the bill on February 6th, the bill was valid; circuit court practice rule 30 (Code 1896, p. 1200), merely forbidding the extension by agreement of counsel of the time for signing the bill into a succeeding term, and not inhibiting the extension by the presiding judge to the limit of six months, expressly allowed

by Code 1896, § 620. *Central, etc., R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981.

Time Set after Adjournment.—A special term of court was called for the 28th of October, 1907, for two weeks. A case was tried November 2d, and judgment entry stated that defendant had sixty days from adjournment of the term to sign the bill of exceptions. The order calling the term showed the criminal business was to be disposed of during the week commencing November 4th. Held, that a bill of exceptions signed on January 2, 1908, was in time. *Louisville & N. R. Co. v. Huffstutler*, 162 Ala. 619, 50 So. 146.

But a bill of exceptions can not be considered, where it was signed more than twenty days after the date of an order granting appellant twenty days from the court's adjournment in which to have it signed, and it does not appear when the court adjourned. *Gulf Yellow Pine Lumber Co. v. Monk*, 153 Ala. 358, 45 So. 223.

As to construction of bill, see ante, "Construction of Bill," § 19.

§ 27. — Time Prescribed or Allowed.

§ 27 (1) Time Prescribed by Statute or Rule of Court.

A bill of exceptions signed more than six months after the trial and after the commencement of a subsequent term of court, and before the adoption of the present Code, is not available under Rule 30, Circuit Court Practice, Code 1896, p. 1200. *Alabama Steel & Wire Co. v. Sells*, 168 Ala. 547, 52 So. 921.

Unconstitutional Statute.—Gen. Laws 1903, p. 396, provides that if a judge fail or refuse to sign a bill of exceptions, he is guilty of a high misdemeanor, and that the supreme court must receive such evidence of the facts as may be deemed by it satisfactory and proceed to hear the cause as if the bill had been signed by the judge, but that application must be filed within thirty days after the refusal or failure of the judge to sign the bill. Gen. Laws 1903, p. 398, declares that if the judge dies, resigns, is impeached, or his term of office expires, or if for other good cause he does not sign a bill of exceptions within the proper time, the bill may be established in the supreme court, but that the application must be filed on or before the next call of the division of said court

of the causes of the county in which the case was tried after the death, etc., and in no case can such application be filed after a year from the rendition of the judgment or decree. Held, that where a judgment was rendered February 9, 1904, and on March 4th, defendant was given sixty days in which to prepare and tender a bill of exceptions, and an additional ten days was allowed on April 30th, and the bill was signed May 2d, after which the act creating the court was declared unconstitutional, the establishment of the bill by the supreme court was within the first act, and could not therefore be performed after the time specified therein. *Nashville, C. & St. L. Ry. v. Reynolds*, 148 Ala. 680, 41 So. 1001.

Under Act of 1844.—Unless the record shows affirmatively, that the bill of exceptions found in it was signed by the presiding judge before the adjournment of the court, or within ten days thereafter by the written consent of the counsel engaged in the cause, under the statute of the 20th Dec. 1844, it must be rejected as forming no part of the record. *Kitchen v. Moye*, 17 Ala. 143, cited in *Murrah v. Branch Bank*, 20 Ala. 392, 398; *Haden v. Brown*, 22 Ala. 572, 574; *Union India Rubber Co. v. Mitchell*, 37 Ala. 314, 316; *Morris v. Brannen*, 103 Ala. 602, 15 So. 865; *Anniston Elect., etc., Co. v. Cooper*, 136 Ala. 418, 34 So. 931; *Dorsey v. State (Ala.)*, 39 So. 584; *Keller v. State*, 145 Ala. 679, 40 So. 84.

Under Code 1896, § 616, providing that no bill of exceptions can be signed after the adjournment of the term of court during which the exception was taken, unless by consent of counsel in writing, and § 617, authorizing the court in term time to fix a time in which a bill of exceptions may be signed, and in vacation to extend such time, a bill of exceptions which was not signed in term time, where the record did not show any order of court allowing it to be signed in vacation, nor any agreement of counsel, will not be considered. *Stabler v. Bryant*, 127 Ala. 290, 28 So. 659, citing *Morningstar v. Stratton*, 121 Ala. 437, 25 So. 573; *Carter v. Long*, 124 Ala. 330, 27 So. 465; Code 1896, §§ 616, 617.

Code 1907, § 3019, providing that bills of exceptions may be presented at any time within ninety days from date of judg-

ment and not afterwards, and annulling all conflicting local laws, governed the presentation and signing of bills of exceptions in actions tried in the Mobile law and equity court, and not the practice act prescribed for such court. *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147.

Code 1907, adopted by act July 27, 1907 (Gen. laws 1907, p. 499), contains § 10, providing that statutes relating to the jurisdiction and practice of courts in any circuit or county are not repealed by the Code, and § 3019, requiring that bills of exceptions shall be presented within ninety days from the day of the rendition of the judgment and must be signed by the judge within ninety days after presentation. Act Aug. 26, 1909 (laws 1909, p. 174), adopts the printed volumes known as the Political, Civil, and Criminal Codes as the Code, and provides that all acts passed at the special session amending or repealing the sections of the Code or the acts of the legislature passed at the general or special sessions are unaffected thereby. Held, that the act of August 26, 1909, left the practice act of July 29, 1907 (Loc. laws 1907, p. 544), prescribing rules of practice in the circuit court of a county, intact except as to its provision (§ 9) fixing the time for presenting bills of exceptions, and a bill presented and signed within the time prescribed by § 3019 is valid. *City of Montgomery v. Wyche*, 169 Ala. 181, 53 So. 786.

Code 1907, § 3019, providing that bills of exception may be presented at any time within ninety days from the day on which judgment is entered, and not afterwards, and requiring the judge to indorse thereon as a part of the bill the true date of the presentation, is mandatory, and a strict compliance is required therewith in order to impart force to the bill, and entitle it to consideration on appeal. *Leeth v. Kornman, etc., Co.*, 2 Ala. App. 311, 56 So. 757.

"The bill of exceptions was presented and signed within the time prescribed by § 3019 of the Code of 1907, which said section, and not the practice act of the city court on the subject of signing bills of exceptions, is in force. *Montgomery v. Wyche*, 169 Ala. 181, 53 So. 786." *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147, 148.

Act Creating Court.—Act Feb. 18, 1891 (Sess. acts, 1890, pp. 1092-1103), creating the city court of Gadsden, provides (§ 27) that ten days after the rendition of final judgments, they shall be "as completely beyond the control of the court as if the term of the court at which such judgments are rendered had ended." Held, that the signing of a bill of exceptions is not limited to ten days after the rendition of the judgment, as it is not a taking of control of the judgment by the court, within the statute. *Johnson v. Washburn*, 98 Ala. 258, 13 So. 48; *Tennessee & C. R. R. Co. v. Danforth*, 99 Ala. 331, 13 So. 51.

Practice Rule 30 (Code, p. 1200) provides that, in all circuit and common law courts of inferior jurisdiction, bills of exceptions may be signed by the presiding judge at any time during the term at which the trial is had, or, by written consent of the parties, or their counsel, filed in the cause, at any time before the next succeeding term, and not afterwards. Held, that an agreement of counsel to extend the time for the signing of a bill of exceptions beyond the beginning of the next succeeding term after that at which the trial was had was ineffectual; the statutory limitation being prohibitory and not subject to waiver. *Cooley v. United States Savings & Loan Co.*, 132 Ala. 590, 31 So. 521.

Code, § 620, providing that the time allowed for signing a bill of exceptions must not be extended beyond six months from the adjournment of court, does not abrogate Practice Rule 30 (Code, p. 1200), prohibiting any extension of such time by agreement of parties beyond the beginning to the term next succeeding that at which the trial was had, since § 620 applies to extensions either by agreement or order or both, and rule thirty applies only to extensions by agreement; each thus having a field of operation wherein they do not conflict. *Cooley v. United States Savings & Loan Co.*, 132 Ala. 590, 31 So. 521.

Loc. acts 1901, p. 1858, § 7, relative to the Bessemer city court, provides that there shall be one term each year, beginning the 1st day of September and ending the last day of June. Inferior Court Rule No. 30 (Code 1896, p. 1200) requires bills of exceptions to be signed during the

term or, by consent of the parties, at any time before the next succeeding term, and not afterwards. Held that, where a case in the Bessemer city court was tried in June, a bill of exceptions signed in the following September would be stricken, although counsel agreed to an extension of time for filing the same. *Vines v. Vines*, 145 Ala. 679, 40 So. 84.

Practice rule 30 (Code, p. 1200) prohibits the extension by agreement of the time for signing a bill of exceptions beyond the beginning of the term next succeeding that at which the trial was had. Held, that where, by agreement, the time for signing a bill of exceptions was extended beyond the next term, and the bill was signed after the beginning of the next term, the bill could not be looked to on appeal or considered as to matters arising and exceptions taken on the trial. *Birmingham Ry. & Electric Co. v. James*, 138 Ala. 594, 36 So. 464.

§ 27 (2) Time Allowed by Order of Court.

Where, on the overruling of a motion for a new trial, the order of the court recited plaintiff was given thirty days within which to prepare and file his bill of exceptions, the order was sufficient to cover a bill relating to the original trial. *Gaston v. Marengo Imp. Co.*, 139 Ala. 465, 36 So. 738.

Code 1896, p. 1200, Practice Rule 30, providing that bills of exceptions may be signed by the presiding judge at any time during the term at which the trial or proceeding is had, or, by written consent of the parties or their counsel filed in the cause, at any time before the next succeeding term of such court, and not afterwards, has no application to a bill signed within the time fixed by order of the trial judge, and not by consent. *Driver v. King*, 145 Ala. 585, 40 So. 315.

Practice rule 30 of the supreme court, providing that bills of exceptions may be signed by the presiding judge at any time during the term at which the trial is had, or by written consent of parties, or counsel, filed in the cause, at any time before the next succeeding term, applies only to bills signed under agreement of counsel, and not to bills signed under an order extending the time so to do. *Montgomery Tract. Co. v. Knabe*, 158 Ala. 458, 48 So.

501, citing *Driver v. King*, 145 Ala. 585, 40 So. 315.

§ 28. — Extension of Time.

§ 28 (1) In General.

A bill signed within the time extended by the presiding judge, becomes a part of the record. *Alabama Mid. R. Co. v. Brown*, 129 Ala. 282, 29 So. 548; *Central, etc., R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981, 982.

"Subsequent orders of extension must be made within the time fixed in the next preceding order. *Morris v. Brannen*, 103 Ala. 602, 15 So. 865; *Beall v. State*, 99 Ala. 234, 13 So. 783; *Rosson v. State*, 92 Ala. 76, 9 So. 357; *Ladd v. State*, 92 Ala. 58, 9 So. 401; *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 So. 430." *Alabama Mineral R. Co. v. Marcus*, 128 Ala. 355, 30 So. 679, 680.

Code 1896, § 620, provides that the time allowed for the signing of a bill of exceptions must not be extended beyond six months from the adjournment of the court. Acts 1888-89, p. 995, establishing the Birmingham city court, declares that there shall be but one term of the court a year, commencing on the first Monday in September, and ending on the last day of the succeeding June. The act also declares that bills of exceptions must be signed by the presiding judge of the court within sixty days after the date on which the issues were tried, unless the time is extended by agreement or by order of the presiding judge, as authorized by the law concerning bills of exceptions in the circuit court. Code 1896, § 617, authorizes the judge in vacation to extend the time for signing a bill of exceptions, and § 619 declares that the time so fixed may be extended by agreement of parties or their counsel, and the time fixed by agreement may be extended by the judge in vacation. Held, that where a judgment was rendered in such city court on January 31, 1905, and the judge successively extended the time for signing the bill of exceptions to December 1st, a bill was properly signed on November 13, 1905, though it was more than nine months after the date of the judgment and beyond the next succeeding term of court. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

As to One of Several Parties.—Where an appeal was taken from a judgment in

favor of one defendant, but the bill of exceptions was signed out of term time under an order extending the time for signing a bill of exceptions as to the granting of a motion for a new trial as to the other defendant, against whom judgment had been rendered, the bill of exceptions will not be considered. *Henry v. Couch*, 132 Ala. 570, 31 So. 463.

§ 28 (2) Authority to Order Extension.

A judge has no power to extend the time for settlement, signing or filing a bill of exceptions after time prescribed by statute or previously granted by the court has expired. *Kimball v. Penney*, 22 So. 899, 117 Ala. 245; *Alabama Mineral R. Co. v. Marcus*, 30 So. 679, 128 Ala. 355; *Cooley v. United States Savings & Loan Co.*, 31 So. 521, 132 Ala. 590; *City of Florence v. Irvine*, 33 So. 888, 137 Ala. 277; *Anniston Electric & Gas Co. v. Cooper*, 136 Ala. 418, 34 So. 931; *Henderson v. Roy (Ala.)*, 40 So. 59; *Mitchell v. State*, 148 Ala. 662, 41 So. 518.

Judge or Court.—An order extending the time for signing the bill of exceptions, made by the court and not by the judge, is not valid. *Western Ry. of Alabama v. Russell*, 144 Ala. 142, 39 So. 311; *Western Railway v. Arnett*, 137 Ala. 414, 34 So. 997; *Scott v. State*, 141 Ala. 39, 37 So. 366; *Central, etc., R. Co. v. Ashley*, 159 Ala. 145, 48 So. 981.

Under acts 1900-01, pp. 830, 831, regulating the practice of the Montgomery city court, and requiring bills of exceptions relating to the trial of civil cases to be signed by the presiding judge within thirty days after the trial of the issues, unless the time for signing such bill is extended by agreement or by order of the presiding judge, an order for the extension of the time for filing a bill of exceptions must be made by the presiding judge, and not by the court. *Arnett v. Western Ry. of Alabama (Ala.)*, 39 So. 775.

Under Act of 1887.—"It is clearly the law that a judge has no authority to sign a bill of exceptions in vacation after the expiration of the time fixed by the last previous order, nor under any circumstances after six months. Act Feb. 22, 1887 (acts 1886-87, p. 126); *Beall v. State*, 99 Ala. 234, 13 So. 783; *Morris v. Bran-*

nen, 103 Ala. 602, 15 So. 865; *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 So. 430." *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

Under act Feb. 22, 1887, authorizing the court in term to fix the time within which a bill of exceptions may be signed, and allowing him in vacation to extend such time, an extension made in vacation after the time previously fixed has expired is nugatory. *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 So. 430; *Rosson v. State*, 92 Ala. 76, 9 So. 357.

Under Act of 1898.—Under the express provisions of acts 1898, pp. 183, 184, creating the Clay county court, the court, and not the judge, is authorized to grant extension of time for signing bills of exceptions; and hence a bill signed within an extension granted by the judge in vacation would be stricken on motion on appeal. *Dial v. McKay*, 150 Ala. 118, 43 So. 218.

"The mere fact that they were signed by the judge as such judge did not prevent them from being orders of the court, nor make them those of the judge. The facts of the case are therefore different from the facts in the case of *Dial v. McKay*, 150 Ala. 118, 43 So. 218. In that case the order of extension was made by the judge in vacation, and not by the court in term time, as in this case." *Elder v. Jones*, 164 Ala. 652, 51 So. 313.

Under Act of 1901.—Section 10 of the act of February 7, 1901 (acts 1900-01, p. 830), prescribing rules of practice in the city court of Montgomery, requires all bills of exceptions in civil cases to be signed by the presiding judge within thirty days after the issues of fact to which the bill of exceptions relates are tried, unless the time is extended by agreement of the parties or counsel or by order of the presiding judge. Held, that the statute did not authorize the court to extend the time, but only the trial judge. *Montgomery Tract. Co. v. Knabe*, 158 Ala. 458, 48 So. 501, citing *Arnett v. Western Railway (Ala.)*, 39 So. 775; *Western Railway v. Russell*, 144 Ala. 142, 39 So. 311; *Montgomery Tract. Co. v. Bozeman*, 152 Ala. 145, 44 So. 559; *Montgomery Tract. Co. v. Haygood*, 152 Ala. 142, 44 So. 560; *Central, etc., R. Co. v. Geopp*, 153 Ala. 108, 45 So. 65.

To Beginning of Next Term.—See ante, "During or after Term," § 26.

Judge Out of Territorial Limits of Jurisdiction.—An order granting extension of time for signing a bill of exceptions is a judicial act, and, when made without the territorial limits of the judge's jurisdiction, is a nullity. *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843.

§ 28 (3) Time for Allowance.

After Expiration of Term.—An order extending the time for the signing of a bill of exceptions, made after the expiration of the term at which the cause was tried and after the expiration of time previously properly granted, was of no effect. *Riddle v. Regan*, 148 Ala. 679, 41 So. 953.

Code, § 116, provides that no bill of exceptions can be signed after the term at which the exception was taken, unless by stipulation, or order of the court. Trial was had in July, 1900. A motion for a new trial was continued until the November term, and overruled. The record showed an order of the court, made January 2, 1901, that "the time heretofore given plaintiff to file a bill of exceptions is extended twenty days." The bill was signed January 2, 1901, and, just preceding the signature, stated that it was signed "within the time allowed by the orders of this court." Held, that the bill of exceptions could not be considered, as it did not purport to have been signed as required by law. *Andrews v. Meadow*, 133 Ala. 442, 31 So. 971.

Within Thirty Days.—Under the practice act for the city court of Montgomery (acts 1900-01, p. 830, § 10), requiring bills of exceptions to be signed within thirty days after trial unless the time is extended by an order of court, a bill of exceptions, signed within the time fixed by an order made within thirty days of the ruling on the motion for new trial, will be considered on appeal in determining the propriety of overruling the motion for new trial. *Central, etc., R. Co. v. Ashley*, 160 Ala. 580, 49 So. 388.

In Term Time.—Under Code 1896, § 617, providing that the court may in term time fix a time in which the bill of exceptions may be signed, and the judge may in vacation extend such time, the judge of

the Birmingham city court could not extend the time for the signing of a bill of exceptions during the sitting of the court. *Harton v. Avondale*, 147 Ala. 458, 41 So. 934.

After the passage of Pamph. acts 1886-87, p. 126, relating to the signing of bills of exceptions in the circuit court, a bill might be signed at any time during the trial term, and the court in term time might fix the time in which the bill might thereafter be signed, and the judge in vacation might extend the time fixed by the court during the trial term, provided that in no case should the time allowed exceed six months, whether extended by the court, judge, or by agreement of parties, except that the right of the parties to extend the time for signing a bill of exceptions into the succeeding term was denied by Rule 30 (Code 1886, p. 810). Act February 28, 1889 (acts 1888-89, p. 992) establishing the Birmingham city court, § 19 (page 1000), declared that all bills of exceptions relating to the trial of causes in that court must be signed within sixty days after the day on which the issue or issues of fact to which the bill of exceptions relates was tried, unless the time for signing is extended by agreement of the parties, or by order of the presiding judge, as authorized by law respecting the signing of bills of exceptions in the circuit court. Held, that the judge of such court had power in term time to extend the time for the signing of a bill of exceptions. *Moss v. Mosley*, 148 Ala. 168, 41 So. 1012.

In Vacation.—The presiding judge has no authority under the statute (Code, §§ 616-619), in vacation, to make an order extending the time for a bill of exceptions after the expiration of the time made by a prior order. *Alabama Mineral R. Co. v. Marcus*, 128 Ala. 355, 30 So. 679. As to authority under acts of 1887, 1898 and 1901, see ante, "Authority to Order Extension," § 28 (2).

At Adjourned Term.—Under Civ. Code 1896, § 917, authorizing the circuit judge to adjourn any regular term of court, the court at an adjourned term has power to make an order extending the time for presenting a bill of exceptions, and an order so made operates as an order by the court in term time. *Mississippi Lum-*

ber Co. v. Edgar V. Smith & Co., 152 Ala. 537, 44 So. 475.

"The adjourned term was only a prolongation of the regular term, and the court had the power, during the adjourned term, to make the order extending the time previously allowed; and such order, having been made, operates as an order made by the court in term time, and it is properly shown by the record. The motion to strike the bill of exceptions is overruled. Civ. Code 1896, § 917; Van Dyke v. State, 22 Ala. 57; Keith v. State, 91 Ala. 2, 8 So. 353; Mobile, etc., R. Co. v. Worthington, 95 Ala. 598, 10 So. 839; National Bank v. Baker Hill Iron Co., 108 Ala. 635, 19 So. 47." Mississippi Lumber Co. v. Smith & Co., 152 Ala. 537, 44 So. 475, 476.

After Beginning of Next Term.—Code, § 619, providing that the time fixed by agreement of parties for the signing of a bill of exceptions may be extended by the judge, gives the judge no power to revive or continue the period for the signing of a bill, where the continuity of the period has been broken by the expiration of the limit prescribed by Practice Rule 30 (Code, p. 1200), prohibiting such extension by agreement beyond the beginning of the term next succeeding that at which the trial was had. Cooley v. United States Sav., etc., Co., 132 Ala. 590, 31 So. 521.

Where an agreement extending the time for signing a bill of exceptions was invalid, under rule 30, because it extended the time beyond the beginning of the next term, subsequent orders made by the judge after the adjournment of court, extending the time, were inefficacious. Birmingham Ry. & Electric Co. v. James, 138 Ala. 594, 36 So. 464.

After Time Originally Allowed.—An extension of time to sign a bill of exceptions, not made until the original time has expired, is inoperative, and a bill signed within the time so extended is void. Elder v. Jones, 164 Ala. 652, 51 So. 313.

A bill of exceptions was obnoxious to a motion to strike, the order made extending the time for signing the bill being made after the time of the previous order had expired, and after the term. Iron City Min. Co. v. Hughes, 144 Ala. 603, 42 So. 39.

Where the court on August 27, 1907, gave sixty days from the adjournment of the court for a bill of exceptions, and next order extending the time was signed by the judge on November 20th, it not appearing from the second order that it was made within sixty days after the adjournment of court or before the expiration of the time previously given, it was void. Broadus Cotton Mills v. Alston & Gamble, 155 Ala. 272, 46 So. 450.

Where the judge in term time made an order allowing the plaintiff thirty days for preparing and tendering his bill of exceptions, and subsequently in vacation, and within the time previously granted by a second order, further extended the time, which orders were set out in the transcript as a part of the record proper, a bill of exceptions signed within the time fixed by the second order was signed in proper time. Mahan v. Smith, 151 Ala. 482, 44 So. 375.

Successive Extensions.—Before the expiration of sixty days following the trial of the issues of fact in an action brought in the city court of Bessemer, where the judge of such court, by virtue of § 18 of the act establishing the court (acts 1900-01, p. 1863), authorizing the extension of time for signing a bill of exceptions, made an order extending such time, and further time was extended by successive agreements of counsel, a bill of exceptions, signed during the trial term before the expiration of the period fixed by the last agreement and within six months from the date of trial was sufficient. Birmingham Ry., Light & Power Co. v. Martin, 148 Ala. 8, 42 So. 618.

Where an order extending a bill of exceptions five days was made on November 19th, an order made November 25th, further extending the time, was null and void where no intervening order had been made. Kimball v. Penney, 117 Ala. 245, 22 So. 899.

§ 28 (4) Showing Extension in Bill.

An order at an adjourned term extending the time for presenting a bill of exceptions is properly shown by the record. Mississippi Lumber Co. v. Smith & Co., 152 Ala. 537, 44 So. 475.

When the record contains a bill of exceptions signed and sealed in term time,

and also other exceptions which are without date, with nothing on their face to show at what time they were taken, and entirely disconnected from the first bill of exceptions, but purporting to have been taken "during the further progress of the cause," the latter will be rejected as forming no part of the record. *Murrah v. Branch Bank*, 20 Ala. 392.

Under Code 1896, § 617, providing the court may, in term time, fix a time for signing a bill of exceptions in vacation, a bill reciting that it was signed "this, the 6th day of May, within the time allowed by the court. J. J. B., Judge," is not sufficient, since it does not show that the time allowed was granted in term time. *Carter v. Long*, 124 Ala. 330, 27 So. 465.

Where the record does not show an order authorizing the signing of a bill of exceptions in vacation, a bill so signed can not be considered on appeal, though the bill recites that it was signed in pursuance of such an order. *Massillon Engine, etc., Co. v. Arnold*, 133 Ala. 368, 32 So. 594.

A recital in a bill of exceptions that it was presented to the judge for signature within the time allowed by the court is not sufficient to give validity to the bill, where it was presented after term time and the record fails to disclose an order extending the time for presentation of the bill. *Dothan Nat. Bank v. Wiggins*, 147 Ala. 692, 40 So. 967.

A statement by the trial judge that a bill of exceptions was presented to him for signing within the time required, and that owing to press of work, it was not signed, but the judge granted an order extending the time for thirty days, which was not entered upon the record until after the time provided by statute for signing the bill had expired, was insufficient to prevent the application of the rule that a bill of exceptions not signed in time will be stricken on motion. *Cooley v. United States Savings & Loan Co.*, 144 Ala. 538, 39 So. 515.

§ 28 (5) By Stipulation.

If a bill of exceptions is signed after the adjournment of court, without the written consent of counsel as required by statute, it will, on motion, be stricken

from the record. *Wood v. Brown*, 8 Ala. 563; *Pearce v. Clements*, 73 Ala. 258.

Agreements signed by the attorneys for both parties extended the time for the signing of the bill of exceptions. To each agreement there was added the statement, "Filed in office this day," mentioning the date, followed by the signature of the clerk. The agreements were copied in the record with the bill of exceptions, and the clerk certified that the pages of the record contained a complete transcript. Held, that the agreements were sufficiently authenticated. *Rainer Mercantile Co. v. Deal*, 151 Ala. 306, 44 So. 100, citing *Mobile, etc., R. Co. v. Worthington*, 95 Ala. 598, 10 So. 839; *National Bank v. Baker Hill Iron Co.*, 108 Ala. 635, 19 So. 47.

A bill of exceptions, signed by the presiding judge before the expiration of the time fixed by an agreement between counsel for the signing thereof, entered into after the expiration of the period fixed by the court on the last day of the term, will not be considered on appeal; the judge having no authority to sign it at that time. *Jordan v. Simmons*, 145 Ala. 660, 39 So. 670.

Form and Requisites of Stipulation.—Act Dec. 1844, declaring that "it shall not be lawful for any of the judges of the circuit or county courts" to sign bills of exception after the adjournment of the court, unless by counsel's consent in writing a longer time, not beyond ten days, be given, is mandatory in its terms, and intended to provide for an evil which requires that it should be interpreted according to the import of the language employed. Consequently a consent extending the time for perfecting the bill must be in writing. *Wood's Adm'r v. Brown*, 8 Ala. 563.

Time Stipulation Entered into.—An agreement extending the time for presentation of a bill of exceptions is ineffective, unless signed within term time, or within the time of a previous extension order or agreement. *Dothan Nat. Bank v. Wiggins*, 147 Ala. 692, 40 So. 967.

Code, § 616, provides that no bill of exceptions can be signed after the adjournment of the court during which the exception was taken, unless by consent or agreement of counsel in writing, except

as otherwise provided. Section 617 declares that the court may in term time fix a time in which a bill of exceptions may be signed, and the judge may in vacation extend such time. Section 618 prescribes that the parties or their counsel may, by agreement, in term time fix a time in which the bill of exceptions may be signed, and may in vacation extend such time. Held, that the consent of counsel mentioned in § 616 could only be available under § 618 when entered into in term time, unless it was for an extension of the time. *Tisdale v. Alabama & G. Lumber Co.*, 131 Ala. 456, 31 So. 729.

To Beginning of Next Term.—See ante, "During or after Term," § 26.

Under Rule of Court.—See ante, "Time Prescribed by Statute or Rule of Court," § 27 (1).

A bill of exceptions signed after the commencement of the term succeeding that of the trial, though within the time allowed by an extension by agreement, can not be considered; such agreement being in violation of practice rule 30 (Code 1896, p. 1200). *Abercrombie & Williams v. Vandiver*, 140 Ala. 228, 37 So. 296.

Under Act Regulating Practice of Montgomery City Court.—Under acts 1900, p. 830, § 10, regulating the practice of the Montgomery city court, and providing that a bill of exceptions must be signed within thirty days after the day on which the issues of fact to which the bill relates was tried, unless the time is extended by agreement, etc., attorneys may not agree to extend the time for signing after the time previously extended by law or otherwise has expired. *Montgomery Tract Co. v. Bozeman*, 152 Ala. 145, 44 So. 559.

§ 28 (6) Effect of Extension.

Grant of time in which to have a bill of exceptions signed on overruling of a motion for a new trial and after expiration of the time for signing the bill of exceptions to rulings at the trial does not revive the right to file a bill covering such rulings, and a bill filed under such grant of time can be considered only in reviewing the motion. *Herzberg v. Riddle*, 171 Ala. 368, 54 So. 635, citing *Southern R. Co. v. Kirsch*, 150 Ala. 659, 43 So. 796;

People's Sav. Bank, etc., Co. v. Keith, 136 Ala. 469, 34 So. 925; *Alabama Mid. R. Co. v. Brown*, 129 Ala. 282, 29 So. 548.

§ 29. — Compliance with Requirements.

§ 29 (1) In General.

Where a bill of exceptions was signed within a time fixed by the last extension order, and within six months from the adjournment of the court for the term at which the case was tried, as required by Code 1896, § 620, it was in time. *Driver v. King*, 145 Ala. 585, 40 So. 315.

Strict Compliance with Statute.—"An unbroken line of cases from the supreme court since the declaration to that effect in *Kitchen v. Moye*, 17 Ala. 394, hold that a strict compliance with the statutes relating to presenting and signing bills of exception is essential to give validity to the bill, and that, where there has been a failure to comply, the bill is not a record, and must be stricken from the transcript in the appellate court on motion. *Edinburgh-American Land Mortg. Co. v. Canterbury*, 169 Ala. 444, 53 So. 823; *Baker v. Central, etc., R. Co.*, 165 Ala. 466, 51 So. 796; *King v. Hill, etc., Co.*, 163 Ala. 422, 51 So. 15; *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843; *Annis-ton Elect. etc., Co. v. Cooper*, 136 Ala. 418, 34 So. 931; *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897; and authorities cited in note to § 3019 of the Code of 1907." *Leeth v. Korman, etc., Co.*, 2 Ala. App. 311, 56 So. 757, 758.

Code 1907, § 3019, which provides that bills of exceptions may be presented within ninety days from the day on which the judgment is entered, is mandatory; and where it does not affirmatively appear that the bill of exceptions was presented within ninety days from a judgment overruling a motion for new trial, the bill will be stricken out. *Turner v. Spragins*, 172 Ala. 98, 55 So. 118, citing *King v. Hill, etc., Co.*, 163 Ala. 422, 51 So. 15.

Computing Time.—Under acts 1900-01, p. 1863, § 18, requiring bills of exceptions relating to trials in the Bessemer city court to be signed within sixty days after trial of the issues to which the bill relates, a bill of exceptions signed and filed May 9th was signed in time, where the issues to which it related were determined by

verdict returned on March 11th. *Southern Ry. Co. v. Drake*, 166 Ala. 540, 51 So. 996.

May to July.—Act Feb. 18, 1891 (Sess. acts 1890, pp. 1092-1103), creating the city court of Gadsden, provides (§ 5) that regular terms of such court shall be held on the first Monday in January and July in each year, and shall continue open until thirty days before the first day of the next term thereafter. Held, that a bill of exceptions signed May 30, 1892, was signed more than thirty days before the next regular term, to begin on the first Monday of July, 1892. *Danforth v. Tennessee & C. R. Co.*, 99 Ala. 331, 13 So. 51; *Johnson v. Washburn*, 98 Ala. 258, 13 So. 48.

November to January.—"The bill of exceptions in the main case must be stricken on appellee's motion. The record shows that the trial was had on November 6, 1907, and that the bill of exceptions was signed January 1, 1908. It thus affirmatively appears that the bill was signed more than thirty days after the trial without any extension of time as required by the local statute. Acts 1900-01, p. 1299; *Cobb v. Owens*, 150 Ala. 410, 43 So. 826." *Herzberg v. Riddle*, 171 Ala. 368, 54 So. 635, 636.

"Excluding the day on which the issues of fact were tried, to wit, the 13th day of November, 1903, and including the 13th day of January, 1904, the day on which the order of extension was made, gives sixty-one days. Hence the conclusion that the bill was not signed within the time when it might legally have been signed, and the motion to strike the bill of exceptions must be granted. The case of *Loosse v. Vogel*, 80 Ala. 308, cited by appellee, seems to be conclusive of the correctness of the conclusion reached. *Richter v. Koopman*, 131 Ala. 399, 31 So. 32; *Allen v. Elliott*, 67 Ala. 432; *Rosson v. State*, 92 Ala. 76, 9 So. 357." *Cooley v. United States Sav., etc., Co.*, 144 Ala. 538, 39 So. 515, 516.

October to June.—Under Code, § 616, providing that bills of exception must be signed at the term at which the exceptions were taken, unless the time for signing it is extended by an order of the court, a bill of exceptions in a case tried in the October term, 1898, which was signed June 12, 1899, was void, in the absence of an order allowing such bill to be

signed after adjournment, since the October term could not be extended beyond the time fixed by law for the beginning of the February term next ensuing. *Alabama M. Ry. Co. v. Brown*, 129 Ala. 282, 29 So. 548.

§ 29 (2) Presentation in Time and Delay by Judge.

"Only when properly signed do bills of exception become part of the record in the appellate court, and this court, on proper motion, will inquire whether a bill of exceptions has been signed within the time prescribed by law so as to make it a part of the record. *Ex parte Walker*, 149 Ala. 637, 43 So. 130." *Leeth v. Kornman, etc., Co.*, 2 Ala. App. 311, 56 So. 757, 758.

It is not a valid objection to a bill of exceptions that the judge did not sign it until after the adjournment of the court. If the exceptions are taken at the trial, they may be signed at any time, either during the term or afterwards. *Strader v. Alexander*, 9 Port. 441.

"The objection, then, is not that the exception was not taken at the trial, or that the facts are untruly stated, but that the bill was not signed, and sealed by the presiding judge during the term. The objection can not prevail. If the exception be taken at the trial, it may be noted by the judge, and the bill sealed at any time, either during the term or afterwards. Though it is certainly desirable that the bill should be sealed as soon afterwards as possible, while the facts are fresh in the recollection of the judge, and if it be delayed, until from the loss of his note of the points reserved, or from any other cause, it be doubtful what the point was, it would be his duty to refuse to seal the bill. We can not presume that there was any doubt on his mind, as to the correctness of the statement in the bill of exceptions." *Strader, etc., Co. v. Alexander*, 9 Port. 441, 443.

Where a trial on November 13, 1903, and the bill of exceptions was presented to the presiding judge on January 11, 1904, when he made an order extending the time to sign the same for thirty days, but failed to enter such extension of record until January 13, 1904, and signed the bill on January 30, 1904, the bill was

not signed within sixty days after the trial of the issues to which it related, as required by act Feb. 28, 1889, § 10 (laws 1889, p. 801), and was therefore ineffective. *Cooley v. United States Savings & Loan Co.*, 144 Ala. 538, 39 So. 515.

Settlement and Signing.—Code 1907, § 3019, requiring bills of exception to be presented within ninety days from entry of judgment, does not require settlement within that time, nor limit the trial judge's power to the signing of the bill as presented as of that date, but new exceptions can not be incorporated after that time. *Tapia v. Williams*, 172 Ala. 18, 54 So. 613.

§ 29 (3) Commencement of Time.

Acts 1896-97, p. 270, § 18, established Tuscaloosa county law and equity court, and provided that "appeals may be taken from the judgments, orders and decrees of said court" to the supreme court in the same manner, time, and cases as appeals are taken from the circuit court. Code 1907, § 3019, provides that a bill of exceptions must be presented to the presiding judge for his approval within ninety days from the entry of judgment. In a case tried before the Tuscaloosa county law and equity court, judgment was rendered December 7, 1909, a motion for a new trial was made, but not acted on until September 5, 1910, and a bill of exceptions was filed on October 27, 1910. Held that, as the bill of exceptions was presented more than ninety days after the rendition of a judgment, but within ninety days after the court had overruled the motion for a new trial, it presented for review only the act of the trial court in overruling the motion for a new trial. *Yolande Coal, etc., Co. v. Norwood*, 4 Ala. App. 390, 58 So. 118.

An act fixing the powers of a certain city court (acts 1900-1901, p. 1288) provided for appeals to the supreme court in the same manner as from the circuit and chancery courts, and "that all bills of exceptions shall be signed by the judge within thirty days after the trial of the cause," unless the time is extended. Judgment was taken in May, 1900, and after various continuances the motion for a new trial was overruled June 14, 1901. Sixty days having been granted on June

29th for the signing of the bill of exceptions, it was so signed on July 23, 1901. Held, that the bill was signed in time to become a part of the record on appeal from the denial of a new trial. *McCarver v. Herzberg*, 135 Ala. 542, 33 So. 486.

Adjournment.—Where the trial court allowed thirty days, without specifying when the period should begin or end, for the signing of a bill of exceptions, the order extended the time for thirty days from the final adjournment of the term. *Carroll v. Warren*, 142 Ala. 397, 37 So. 687.

Where the time for signing a bill of exceptions is extended for a stated time by the court in term time, the time allowed by the extension begins to run from the adjournment of the term, under Code, § 617, requiring a bill of exceptions to be signed during the term at which the exceptions were taken, unless the court extends the time. *Morningstar v. Stratton*, 121 Ala. 437, 25 So. 573.

Under the act "to regulate the sessions of the circuit and city courts of Mobile"—which provides (Pamph. acts 1853-54, p. 92, § 8) that execution shall issue at the expiration of twenty days from the rendition of any judgment, and "that the said judgment shall be final, in every respect the same as if the minutes of the court had been signed, and the court adjourned; but the defendant shall not be thereby prevented from moving for a new trial, or in arrest of judgment, nor deprived of any right he would otherwise have had"—a bill of exceptions which is not reduced to writing and presented to the judge for signature until after the expiration of twenty days from the rendition of the judgment will be regarded as not presented until after the adjournment of the court. *Stein v. McArdle*, 25 Ala. 561.

§ 29 (4) Showing Compliance.

The appellant was given twenty days after adjournment to present his bill of exceptions. The record does not show when the court adjourned; but as the criminal business was to be taken up on November 4th, and as the bill of exceptions recites that it was presented and signed within the time prescribed, this is a prima facie showing that it was signed within the time prescribed, and it will not be stricken. *Louisville, etc., R. Co. v.*

Huffstutler, 162 Ala. 619, 50 So. 146, 147, citing *Tarver v. State*, 137 Ala. 29, 34 So. 627; *Carroll v. Warren*, 142 Ala. 397, 37 So. 687.

Unless the bill of exceptions is signed in conformity with the requirements of the statute, it forms no part of the record, and can not be looked to by this court for any purpose. *Alabama Mineral R. Co. v. Marcus*, 128 Ala. 355, 30 So. 679, 680.

On April 6th, the day a case was tried, an order giving the defeated party sixty days from the adjournment of court in which to prepare a bill of exceptions was made. On June 5th an order extending the time for signing the bill thirty days beyond the time given was made. On July 12th an order extending the time was made. There was nothing to indicate when the court adjourned. The bill of exceptions signed by the judge recited that it was signed within the time allowed. Held not to show that the bill was signed in time. *Capehart v. McGahey*, 147 Ala. 687, 40 So. 657.

A recital in a bill of exceptions that the signing thereof was within the time allowed therefor is not effective to establish that the signing was in fact in due time, where such recital is not sustained by any order in the transcript. *Emmett v. Farrow*, 136 Ala. 512, 34 So. 932, citing *Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410, 30 So. 674; *Anniston Elect., etc., Co. v. Cooper*, 136 Ala. 418, 34 So. 931.

Where no order for a bill of exceptions in vacation appears in the record of the court below, a bill signed in vacation can not be considered, although it contains a recital that the same was signed "within the period allowed and ordered by the court for the presentation of a bill of exceptions," since this is the mere statement of the judge, and not the order of the court. *Dantzler v. Swift Creek Mill Co.*, 128 Ala. 410, 30 So. 674, citing *Carter v. Long*, 124 Ala. 330, 27 So. 465; *Morningstar v. Stratton*, 121 Ala. 437, 25 So. 573; *Alexander v. State*, 117 Ala. 220, 23 So. 48; *Kimball v. Penney*, 117 Ala. 245, 22 So. 899; *Maddox v. Broyles*, 42 Ala. 436; *Bryant v. State*, 36 Ala. 270.

The concluding paragraph of a bill of exceptions "And now comes the plaintiff, and in term time tenders the foregoing as

his bill of exceptions, and asks that the same be signed, which is accordingly done," shows that the tender and the signing of the bill were contemporaneous and in term time. *Maddox v. Maddox*, 146 Ala. 460, 41 So. 426.

Other Parts of Record.—Act Dec. 26, 1844, requiring the judge of the court below to note on bills of exceptions the true date, was intended merely to furnish evidence of the fact that they were signed during the term, and not to render them unavailing, though the date should not appear upon them, if it is shown by other parts of the record that they were actually signed during the term. *Cox v. Whitefield*, 18 Ala. 738.

Parol evidence is admissible to show that a bill of exceptions was not presented within ninety days after judgment as required by Code 1907, § 3019, and that the bill was therefore not entitled to consideration on appeal, though the judge did not indorse the true date of presentation as required by such section, but, instead, indorsed a date within the ninety days, so as to make the bill appear on its face to have been presented in time. *Leeth v. Kornman, etc., Co.*, 2 Ala. App. 311, 56 So. 757.

Code 1907, § 3019, provides that bills of exceptions may be presented at any time within ninety days from the day on which judgment is entered, and not afterwards; that the judge must indorse thereon as a part of the bill the true date of presenting; and that the bill must, if correct, be signed by him within ninety days thereafter. Held that, where a bill of exceptions is not signed by the judge as a bill within the first ninety days after judgment, it must contain internal evidence that it was presented to the judge within the ninety days; extraneous proof to establish such fact being inadmissible. *Edinburgh-American Land Mortgage Co. v. Canterbury*, 169 Ala. 444, 53 So. 823.

A motion was made to set aside an order of the supreme court striking a bill of exceptions from the record and affirming the judgment below. The bill was without date, and did not show that it had been signed within the time prescribed. Held, that the supreme court could not consider a certificate of the trial judge showing that the time for signing

the bill was extended by consent, since the bill must be perfect on its face, and can not be supplemented by extraneous evidence. *Stearn v. Lehman*, 169 Ala. 441, 2 So. 708.

"Under elder statutes, in which, however, presentation was not a factor of the consequence the present statute makes it, it was regarded as long settled, and never doubted, that the bill must be 'perfect within itself,' and that, where signed by the judge as a bill of exceptions, extrinsic evidence was not receivable to show compliance with the statutory requirement as respected time of signing. *Stearn v. Lehman*, 169 Ala. 441, 2 So. 708; *Union India Rubber Co. v. Mitchell*, 37 Ala. 314; *Bryant v. State*, 36 Ala. 270; *Maddox v. Broyles*, 42 Ala. 436; *Morris v. Brannen*, 103 Ala. 602, 15 So. 865; *Chapman v. Holding*, 54 Ala. 61." *Edinburgh-American Land Mortg. Co. v. Canterbury*, 169 Ala. 444, 53 So. 823, 824.

Presumptions.—On motion to strike a bill, there is no presumption, in the absence of proof, that it was signed within the time required by law, and the burden is on the appellant to show that it was so signed; and this rule is not changed by Code 1907, § 3020, providing that it shall not be stricken by the court *ex mero motu*, but only on motion. *Baker v. Central, etc., R. Co.*, 165 Ala. 466, 51 So. 796.

Where a bill of exceptions purporting to have been signed in term time is dated October 16th, and shows on its face that the case was tried on the fifteenth, to which day it had been regularly continued after the commencement of the term on the twelfth, the appellate court can not presume that the regular term terminated with the trial of the cause on the fifteenth. *Seale v. Chambliss*, 35 Ala. 19.

§ 30. — Presentation and Allowance after Expiration of Time.

A bill of exceptions not presented, allowed, and filed within the time allowed can not be considered. *Larkinsville Min. Co. v. Flippo*, 33 So. 662, 135 Ala. 577; *Fidelity Mut. Life Ins. Co. v. Batson*, 136 Ala. 330, 34 So. 166; *Hayes v. Woodham*, 36 So. 545, 139 Ala. 387; *Browning v. Daniels* (Ala.), 39 So. 571; *Meyer, Wise & Kaichin v. Alverson & Moore* (Ala.), 39 So. 984; *Penton v. Williams*

(Ala.), 41 So. 783; *Wood v. Brown*, 8 Ala. 563; *Kitchen v. Moye*, 17 Ala. 143; *Haden v. Brown*, 22 Ala. 572; *Markland v. Albes*, 81 Ala. 433, 2 So. 123; *Bryant v. State*, 36 Ala. 270; *Union India Rubber Co. v. Mitchell*, 37 Ala. 314; *Bass Furnace Co. v. Glasscock*, 86 Ala. 244, 6 So. 430; *Ladd v. State*, 92 Ala. 58, 9 So. 401; *Rosson v. State*, 92 Ala. 76, 9 So. 357; *Cooley v. United States Sav., etc., Co.*, 132 Ala. 590, 31 So. 521; *Driver v. King*, 145 Ala. 585, 40 So. 315; *Carroll v. Warren*, 142 Ala. 397, 37 So. 687; *Baker v. Central, etc., R. Co.*, 165 Ala. 466, 51 So. 796, 798; *Montgomery Tract. Co. v. Bozeman*, 152 Ala. 145, 44 So. 559; *Emmett v. Farrow*, 136 Ala. 512, 34 So. 932; *Powell v. Sturdevant*, 85 Ala. 243, 4 So. 718; *Pearce v. Clements*, 73 Ala. 256; *Maddox v. Broyles*, 42 Ala. 436; *Morris v. Brannen*, 103 Ala. 602, 15 So. 865.

A bill of exceptions not signed until the day after expiration of the period allowed by law is insufficient as a basis for assignment of error. *Richter v. Koopman*, 131 Ala. 399, 31 So. 32.

Where Time Not Extended.—Where a bill of exceptions was not signed at the term of the court at which the judgment was rendered, and no order was entered during the term extending the time for its signing, it may be stricken out. *Clark v. Jernigan*, 149 Ala. 365, 42 So. 833, citing *Herzberg v. Riddle*, 171 Ala. 368, 54 So. 635.

A paper purporting to be a bill of exceptions will be stricken out, as being no part of the record on appeal, where it was signed in vacation, and there was no order of court nor any agreement of counsel extending the time within which the bill might be presented and signed. *Olderson v. Town of Prattville* (Ala.), 42 So. 986, citing *Dothan Nat. Bank v. Wiggins*, 147 Ala. 692, 40 So. 967; *Watts v. State*, 145 Ala. 683, 40 So. 90; *Peterman v. State*, 139 Ala. 131, 36 So. 767.

Where a bill of exceptions is not signed within the time allowed in the judgment entry, and it does not appear that further time was given by an order of court or agreement of the parties, and it is not affirmed that the bill was signed within any time allowed by order or agreement, in the absence of any assignments of error addressed to rulings which appear by the

record proper of the trial court a judgment will not be disturbed on appeal. *Lawrence v. Bell*, 132 Ala. 308, 31 So. 503.

On appeal from the circuit court a bill of exceptions will be stricken, where it was signed by the judge after the adjournment of court, the record not showing that any time was given for signing the same in vacation in a manner authorized by law; Gen. acts 1903, p. 74, giving twenty days after the rendition of decrees, etc., for signing bills and authorizing an extension, amending Code 1896, § 465, applying only to appeals from the probate court. *White v. Roe*, 151 Ala. 287, 44 So. 211.

Bill Can Not Be Considered.—Code 1907, § 3019, provides that bills of exceptions may be presented within ninety days from the entry of judgment, and not afterwards, and must be signed by the judge within ninety days thereafter. Held that, where a bill of exceptions is not presented within the time required, it is not a bill of exceptions, and can not be considered, though signed. *Hartselle & Co. v. Wilhite*, 3 Ala. App. 612, 57 So. 129.

Presentation in Time Is Jurisdictional.—Code 1907, § 3019, prescribing the time when bills of exceptions must be presented, is not affected by § 2020, which declares that the supreme or appellate court shall not of its own motion strike a bill of exceptions because not signed by the presiding judge within the time required by law; the presentation of the bill within ninety days from the entry of judgment being jurisdictional. *Hartselle & Co. v. Wilhite*, 3 Ala. App. 612, 57 So. 129, citing *Spivey v. State*, 172 Ala. 391, 56 So. 232; *Thomas v. Daniel Bros.*, 149 Ala. 675, 42 So. 623; *McPherson v. Wiggins*, 147 Ala. 692, 40 So. 961; *Smith v. State*, 166 Ala. 24, 52 So. 396.

§ 31. Stipulations as to Allowance or Settlement.

A paper in the transcript on appeal purporting to be a bill of exceptions, but not signed by the judge, can not be considered, though the attorneys stipulated that, the trial judge having died before the bill was signed, such bill should be considered as though duly signed; the statute providing for establishing a bill of exceptions where the judge fails or refuses to sign.

Nashville, C. & St. L. Ry. Co. v. Bates, 133 Ala. 447, 32 So. 589.

"It is attempted to be made a part of the record, as a bill of exceptions, by the agreement of counsel. This can not be done. This subject is controlled by the statute. The statute provides, in cases of failure or refusal of the judge to sign a bill of exceptions, how the same may be established." *Nashville, etc., R. Co. v. Bates*, 133 Ala. 447, 32 So. 589, 591.

§ 32. Allowance or Settlement by Judge or Other Officer.

The fact that the attorneys signed a bill of exceptions does not vitiate it as a bill of exceptions, where the judge wrote under their names his approval and signed the same, as required by Civ. Code 1896, § 15, providing that a bill of exceptions signed by the judge thereby becomes a part of the record. *Roberts v. English Mfg. Co.*, 155 Ala. 414, 46 So. 752.

Showing Allowance or Settlement.—The order of indorsement and signing of a bill was as follows: "And now on this the 28th day of August, the plaintiff presents this his bill of exceptions to Hon. H. A. P., judge of the Twelfth judicial circuit of Alabama, for approval, and asks that the same be signed and approved by him as required by law. [Signed] H. A. P., Judge of the Twelfth Circuit. Filed with me in person this August 28, 1908. [Signed] H. A. P., Judge of the Twelfth Circuit." Held not to show when approved and signed, but only when presented and tendered. *Baker v. Central of Georgia Ry. Co.*, 165 Ala. 466, 51 So. 796.

§ 33. Compelling Allowance or Settlement.

The specific mode of correcting the refusal of a court to sign a bill of exceptions, pointed out in St. 1826 (Dig., p. 254, § 5), is not conclusive of a party's rights. In a case where a judge of the county court holds up a bill tendered him for approval, until after the adjournment of the court, on the promise to seal it, mandamus will lie. *Etheridge v. Hall*, 7 Port. 47.

§ 34. Proceedings to Establish Exceptions.

Where a plea was submitted on a motion to strike the bill of exceptions and on the merits, and five months after its submission appellant filed an affidavit of the trial judge stating that the original bill

of exceptions bore a date seasonably indorsed by him, indicating, if not showing, due presentation of the bill by appellant, none of which facts were contained in the transcript certified by the circuit clerk, the affidavit could not be considered, under the rule that evidence can not be taken after submission, unless the submission is set aside. *Edinburgh-American Land Mortgage Co. v. Canterbury*, 169 Ala. 444, 53 So. 823.

Under Code 1907, § 3021, which provides for the establishment of a bill of exceptions, a judge who fails or refuses to sign the same is not in default, so as to enable the aggrieved party to establish a bill of exceptions, unless a correct bill was tendered; but when a correct bill is presented it is the judge's duty to sign it as presented, and his signing of the bill, after improperly changing it, is not a signing of the bill, but is in effect a failure or refusal which will enable an aggrieved party to establish it under the statute although signed after the change is made. *Hughes v. Albertville Mercantile Co.*, 173 Ala. 559, 56 So. 120.

Where there is no laches by the party excepting, if the judge refuses to sign the bill of exceptions, it will be allowed by the supreme court, and ordered to be filed. *Bartlett v. Lang's Adm'rs*, 2 Ala. 161.

Where Bill Defective.—Where the bill as presented to the judge in term time was defective, and was not corrected until after expiration of the term, the excepting party has no ground for a motion to establish the exceptions. *Blake v. Harlan*, 75 Ala. 205.

Where Bill Not Presented in Time.—Where the bill of exceptions is not presented to the trial court within ninety days from the rendition of judgment, and no application to establish it is made within sixty days from the refusal or failure of the trial judge to sign the same, under Code 1907, §§ 3019, 3021, the court of appeals will overrule a motion to establish it. *Lamb v. Pate*, 4 Ala. App. 628, 58 So. 943.

A bill of exceptions, which was not reduced to writing and presented to the judge for signature within the time prescribed by statute, can not be established (Code, § 2356) upon proof that the cause, which involved less than \$20, was sub-

mitted to the judge without the intervention of a jury, and was held under advisement by him; that the counsel of the party excepting frequently applied to him to know whether he had decided it, and was told by him that he had not; and that a judgment was afterwards rendered by him without notifying the counsel, although they were in daily attendance on court, of which they had no notice whatever until after the expiration of the time prescribed for signing bills of exceptions. *Stein v. McArdle*, 25 Ala. 561.

Where Judge Fails to Sign.—When the bill of exceptions is shown to have been perfected, except as to the signing and sealing by him; the judge, and he fails to act upon it within the time prescribed by law, and his failure is not attributable to the party excepting, the latter may establish his exceptions under act 1814 (Clay's Dig., p. 307, § 5); and he is not precluded from doing this when the judge subsequently signs the bill and it is stricken from the record. *Haden v. Brown*, 22 Ala. 572.

What Amounts to Failure to Sign.—Where the counsel for both parties agree that an exception taken at the trial shall be examined after the adjournment of the court, and the bill of exceptions then sealed and allowed, this is not a failure or refusal of the judge, within the act of 1826, so as to warrant the supreme court to allow the exceptions. *Wood's Adm'rs v. Brown*, 8 Ala. 742.

Time for Taking Proceedings.—When the court refuses to sign a bill, and the party wishes to establish the exceptions by proof, it must be done within the trial term and on notice to the opposite party. *Perkins v. Harper*, 2 Stew. 477.

Where the judge who presided at the trial, after denying a motion for a new trial, resigned on the same day, a motion to the court of appeals to establish a bill of exceptions, made nine days thereafter on the next call of the division, is in time. *Kates Transfer & Warehouse Co. v. Klassen*, 6 Ala. App. 301, 59 So. 355.

Hearing and Decision.—Under Code 1886, § 2762, which provides that, on the failure or refusal of the presiding judge to sign a bill of exceptions, "the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court," evi-

dence which shows without conflict that a bill of exceptions truly states both the facts as they appeared in evidence and the rulings of the court sought to be reviewed, that the bill was tendered to the judge before the adjournment of the term, and that he failed or refused to sign it, warrants the supreme court in declaring the bill of exceptions to be established as if signed. *Montgomery & E. Ry. Co. v. Perryman* (Ala.), 7 So. 383.

§ 35. Certificate, Signature, and Seal of Judge.

§ 35 (1) Necessity for Certificate.

Exceptions not certified by the presiding judge, or noted in writing at the trial, can not be considered as on the record. *Tombeckbee Bank v. Malone & Co.*, 1 Stew. 269; *Perkins v. Harper*, 2 Stew. 477, 478; *Rives v. M'Losky*, 5 Stew. & P. 330, 335; *Etheridge v. Hall*, 7 Port. 47, 54; *Tuskaloosa Wharf Co. v. Tuskaloosa*, 38 Ala. 514, 516.

§ 35 (2) Construction and Operation.

A bill of exceptions signed by the judge who presided below was presented; but the certified record containing one, which the judge stated to be the true one, none other can be received. *Lecatt v. Strang*, 2 Stew. 230.

Though a judge certify that the facts set forth in a paper intended for a bill of exceptions are true, yet if he state that it was not offered "while the thing was transacting," and do not put his seal to it, it will not be regarded as a part of the record, nor noticed in any way, by the court above. *Powers v. Wright*, Minor 66.

§ 35 (3) Signature and Seal.

Nature of Act.—The signing of a bill of exceptions is merely an authentication of the record of the proceedings below. *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759.

Necessity for Signature.—A bill of exceptions never becomes a part of the record until it is legally signed by the presiding judge, or, in case of his refusal to sign, it has been established as provided by law. *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843; *Floyd v. Fountain*, 17 Ala. 700; *Staunton v. Simmons*, 20 Ala. 243; *Godden v. LeGrand*, 28 Ala. 158, 160; *Moore v. Appleton*, 34 Ala. 147, 149; *Rolater v.*

Rolater, 52 Ala. 111; *Southern Exp. Co. v. Black*, 54 Ala. 177, 178; *Baker v. Central*, etc., R. Co., 165 Ala. 466, 51 So. 796; *Haden v. Brown*, 22 Ala. 572; *Union India Rubber Co. v. Mitchell*, 37 Ala. 314, 316; *Alford v. Eubank*, 44 Ala. 276, 277; *Morris v. Brannen*, 103 Ala. 602, 15 So. 865.

A paper in the record, which is not signed or otherwise authenticated, will not be considered as a bill of exceptions. *Cook v. Phonoharp Co.*, 163 Ala. 517, 30 So. 1021.

A bill of exceptions must, in every case, show upon its face that it was signed and sealed, either in term time, or within ten days thereafter, by consent in writing; and whenever these requisites are wanting, it can not be recognized as any portion of the record. *Haden v. Brown*, 22 Ala. 572.

The appellate court, ex mero motu, will disregard an unsigned bill of exceptions, although no motion is made to strike it out of the record. *Rolater v. Rolater*, 52 Ala. 111; *Southern Exp. Co. v. Black*, 54 Ala. 177; *Pearce v. Clements*, 73 Ala. 256.

"A bill of exceptions is purely statutory, and the mode of its authentication, whereby it becomes a part of the record, so that error on it may be assigned, prescribed by statute, is the signature of the presiding judge. We have no power to dispense with the statutory requisition, and accept either the signature of another judge, or the consent of counsel, in lieu of it. *Floyd v. Fountain*, 17 Ala. 700." *Southern Exp. Co. v. Black*, 54 Ala. 177, 178.

Waiver of Necessity for Signature.—

Counsel by agreement can not waive the necessity for the signature of the judge to a bill of exceptions. *Southern Exp. Co. v. Black*, 54 Ala. 177; *Pearce v. Clements*, 73 Ala. 256, 257; *Clark v. McCrary*, 80 Ala. 110.

Neither joinder in error nor consent of parties can give validity to unsigned bill of exceptions. *Kerley v. Vann*, 52 Ala. 7.

Statutory Provisions.—Under Code 1907, § 10, providing that this Code shall not affect any existing right or remedy, the old Code governs as to time and manner of signing bills of exceptions in appeals entered before the new Code became op-

erative. *Jones v. Jones*, 162 Ala. 287, 50 So. 310.

"Section 2760 of the Code of 1886 provides that when the bill of exceptions is signed by the presiding judge, it 'thereby becomes a part of the record.'" *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

To withstand a motion in the appellate court to strike a bill of exceptions it must be made to appear when it was signed, and that it was signed, as required by Code 1907, § 3019, within ninety days from the time it was presented; and this rule is not changed by Code 1907, § 3020, providing that it shall not be stricken by the court *ex mero motu*, but only on motion. *Baker v. Central, etc., R. Co.*, 165 Ala. 466, 51 So. 796.

The law in force before the adoption of the Code (Clay's Dig., p. 307, § 5) required that the bill of exceptions should be "signed and sealed" by the presiding judge; and, where the bill purports to have been signed and sealed by him, but without the addition of his seal or scroll, it can not be regarded as any part of the record. *Godden v. Le Grand*, 28 Ala. 158.

Authority to Sign.—Where an instrument purporting to be a bill of exceptions is signed without authority of law, it is no part of the record, and can not be considered. *Dothan Nat. Bank v. Wiggins*, 147 Ala. 692, 40 So. 967.

Signed after Appeal.—The signing of a bill of exceptions is merely an authentication of the record of the proceedings below, and, when properly authenticated, it becomes a part of the record on appeal, so that a bill will not be stricken because it was signed after appeal was taken. *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759.

Substituted by Certificate.—"The absence of the presiding judge's signature is not allowed to be supplemented by a certificate of the official, declaring that the record contains the bill of exceptions. *Alford v. Eubank*, 44 Ala. 276." *Pearce v. Clements*, 73 Ala. 256.

Where Incorporated in Transcript.—"In the absence of a compliance with the requirements of the statutes as to the signing or establishment of a bill of exceptions, a mere incorporation of such bill in the transcript does not constitute it a

record." *Rainey v. Ridgway*, 151 Ala. 532, 43 So. 843, 844.

A paper in the transcript, purporting to be a bill of exceptions, but not signed by the judge, can not be considered. *Rolater v. Rolater*, 52 Ala. 111.

An agreed statement of facts, incorporated into the transcript by consent of counsel, but neither signed by the presiding judge of the court below, nor established as a bill of exceptions, will not be considered by this court in lieu of a bill of exceptions. *Kirby v. Vann*, 51 Ala. 221; *Ex parte Mayfield*, 63 Ala. 203, 205; *Pearce v. Clements*, 73 Ala. 256, 257; *Clark v. McCrary*, 80 Ala. 110.

Effect of Signature.—"The bill, as signed by the judge, is the one upon which this court must act, until a new one is established in the mode pointed out by the Code. *Hale v. Goodbar*, 81 Ala. 108, 2 So. 467; *Posey v. Beale*, 69 Ala. 32." *Turner v. White*, 97 Ala. 545, 12 So. 601, 603.

Remedy Where Judge Refuses to Sign.—Code 1886, § 2762, provides that, if the judge shall fail or refuse to sign a bill of exceptions, the point of decision and the facts being truly stated, the supreme court must receive such evidence of the facts as may be deemed by it satisfactory, and proceed to hear the cause as if the bill had been signed by the court. Held, that the remedy of a person aggrieved by the refusal of the trial court to sign her bill of exceptions is by motion in the evidence as would be satisfactory to the court, and not by appeal from the refusal to sign the bill. *Turner v. White*, 97 Ala. 545, 12 So. 601.

Necessity for Seal.—A bill of exceptions, without the seal of the presiding judge, does not conform to the requirements of the statute and can not be regarded as a part of the record. *Floyd v. Fountain*, 17 Ala. 700; *Haden v. Brown*, 22 Ala. 572; *Moore v. Appleton*, 34 Ala. 147; *Rolater v. Rolater*, 52 Ala. 111, 112.

What Constitutes Seal.—A scroll around the word "Seal," opposite the judge's signature, is a sufficient seal. *Kenan v. Starke*, 6 Ala. 773.

As to time for presentation, allowance, and filing, see ante, "Time for Presentation, Allowance, and Filing," § 23.

§ 36. Amendment or Correction.**What Constitutes Material Alteration.**

—Where a bill of exceptions was entitled "Henry Thomas, by A. J. Thomas, His next Friend," the fact that the initials "A. J." were inserted in the caption after the bill was signed by the judge was not a material alteration; the bill, when signed, reciting plaintiff's testimony that he was seventeen years old and that A. J. Thomas, his next friend, was his father. *North Alabama Traction Co. v. Thomas*, 164 Ala. 191, 51 So. 418.

Power of Trial Court.—After the judge has signed the bill of exceptions, and the time allowed for signing the same has expired, it is beyond his power to modify the bill. *Louisville & N. R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

A bill of exceptions, when signed by the presiding judge becomes a part of the record, and the judge has no power to alter or add to it after the adjournment of the term. *Dudley v. Chilton County*, 66 Ala. 593; *Branch Bank v. Kinsey*, 5 Ala. 9; *Kitchen v. Moye*, 17 Ala. 394; *Posey v. Beale*, 69 Ala. 32; *Chapman v. Holding*, 54 Ala. 61; *Pearce v. Clements*, 73 Ala. 256; *Rosson v. State*, 92 Ala. 76, 9 So. 357; *Cullum v. Casey & Co.*, 1 Ala. 351, 355; *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897.

Where a bill of exceptions is defective in failing to show that it was signed and sealed in term time as required by the statute, the judge who presided at the trial has no authority in vacation to add to it so as to cure the defect, and if he does so, the act is void. *Kitchen v. Moye*, 17 Ala. 394, cited in *Pearce v. Clements*, 73 Ala. 256, 257; *Louisville, etc., R. Co. v. Malone*, 116 Ala. 600, 22 So. 897; *Dorsey v. State (Ala.)*, 39 So. 584.

Power of Appellate Court.—It is beyond the power of this court to receive affidavits which are designed to correct defects agreed to be erased from a bill of exceptions, which has been executed within the time and in the manner prescribed by the statute. *Chapman v. Holding*, 54 Ala. 61; *Pearce v. Clements*, 73 Ala. 256, 257.

By Agreement of Parties.—When once perfected, a bill of exceptions can not be modified by an amendment or addition made, without consent of parties, by the

presiding judge. *Kitchen v. Moye*, 17 Ala. 394; *Pearce v. Clements*, 73 Ala. 256.

Inserting Matters Stricken Out.—Where the judge struck from a bill of exceptions the words, "this being all the evidence in the case," mandamus will not lie to compel him to insert them, to enable the review of exceptions to the refusal of instructions, unless the insertion be necessary to show that the instructions were not abstract. *Ex parte Huckabee*, 71 Ala. 427.

Addenda to Bill.—Where the court signs addenda to the bill of exceptions, with a recital that "the court signs the foregoing bill of exceptions with the following addenda," such addenda, if they contain facts proper to be stated in the bill, are to be treated as part thereof. *Louisville & N. R. Co. v. Barker*, 96 Ala. 435, 11 So. 453.

By Parol Evidence.—Where a judge changes a bill of exceptions, whether properly or not, and, without action to establish a proper one, the one so signed is made a part of the record, it will be considered by this court as the proper one, and can not be corrected or changed by resorting to extraneous matters. *Hughes v. Albertville Mercantile Co.*, 173 Ala. 559, 56 So. 120.

Supplemented by Assignment of Error.

—A bill of exceptions can not be supplemented by assignments of error. *General Electric Co. v. Town of Ft. Deposit*, 174 Ala. 179, 56 So. 802.

§ 37. Quashing or Striking from Files.**§ 37 (1) Grounds.**

Not Signed by Judge.—Where a bill of exceptions is incorporated in the transcript by the clerk, and appears to be regular on its face, it will not be struck out on motion, supported by affidavits, on the ground that it was not signed by the presiding judge on trial. *Hollingsworth v. Chapman*, 50 Ala. 23.

Not Signed by Judge.—Where a bill of exceptions, duly signed, will not be suppressed, on motion, because it states that before the signing and sealing one of the defendant's attorneys, to whom it was submitted for examination, objected to the signing and sealing because it was not also submitted to the defendant's other attorneys, and that the judge, in over-

ruling the objection, and signing and sealing, does so without prejudice to the right of defendant's attorneys to urge such objection in the appellate court. *Ryan v. Kilpatrick*, 66 Ala. 332.

Setting Out Evidence in Extenso.—

Where a bill of exceptions contains the evidence in extenso, it will be stricken, even though the evidence be short; appellate court rule 32 (Code 1907, p. 1526) providing that the bill of exceptions shall not contain the testimony in extenso. *Irby v. Kaigler* (Ala.), 60 So. 418.

Under Code, p. 1201, § 33, providing that bills of exceptions shall not contain the testimony, or any portion thereof, in extenso, except in certain enumerated instances, and authorizing the court to strike any bill which violates this rule, where a bill, not within the exceptions enumerated, contains a complete stenographic record of everything said and done at the trial, except arguments to the jury, it should be stricken. *Louisville & N. R. Co. v. Hall*, 131 Ala. 161, 32 So. 603.

"The bill of exceptions must be stricken, on the authority of *Gassenheimer Paper Co. v. Marietta Paper Mfg. Co.*, 127 Ala. 183, 28 So. 564, on account of being in violation of rule 33 of circuit and inferior court practice. Code, p. 1201. The frame of the bill of exceptions in this case is identical with the one in the *Gassenheimer Paper Co. Case*." *Louisville, etc., R. Co. v. Hall*, 131 Ala. 161, 32 So. 603, 605.

Where a bill of exceptions contains

much of what is, in substance, a repetition of testimony, and remarks of judge and counsel, questions not answered, and rulings not excepted to, it will be struck from the files, under rule 33 (Code, p. 1201), providing that the bill shall not contain a statement of the testimony in extenso, and declaring, by subdivision 5, that the bill shall not contain a mere repetition of previous statements, though the substance of such additional testimony may be given, and that a bill may be disallowed for violation of the rule. *Southern Ry. Co. v. Jackson*, 133 Ala. 384, 31 So. 988.

§ 37 (2) Time for Motion.

A motion to strike the bill of exceptions because the order of extension for signing, made by the presiding judge in vacation, though within the time of a previous order to the same effect, was, after an appeal to the supreme court, without merit. *Louisville & N. R. Co. v. Winn*, 166 Ala. 413, 51 So. 976, citing *Capital City Ins. Co. v. Cofield*, 131 Ala. 198, 31 So. 37.

Where the agreed statement of facts was incorporated in a proposed bill of exceptions after having been materially altered, and where counsel failed to examine them, assuming that they were correctly copied, he could not have the order establishing the bill vacated at a subsequent term of court. *Rushton v. Davis*, 127 Ala. 279, 28 So. 476.

As to extension of time, see ante, "Extension of Time," § 28.

Exceptions in Contracts, etc.

As to exceptions in contracts, conveyances, etc., see the appropriate titles, such as CONTRACTS; COVENANTS; DEEDS; MORTGAGES; etc.

Exceptions in Judicial Proceedings.

As to exceptions in judicial proceedings, see the appropriate titles, such as APPEAL AND ERROR; CRIMINAL LAW; DEPOSITIONS; EXCEPTIONS, BILL OF; TRIAL; etc.

Exceptions in Statute.

See the titles FRAUDS, STATUTE OF; STATUTES; and the appropriate specific titles.

Excessive Bail.

See the title BAIL.

Excessive Damages.

See the titles CARRIERS; DAMAGES; MASTER AND SERVANT; NEW TRIAL; RAILROADS; STREET RAILROADS.

Excessive Fines.

See the titles CRIMINAL LAW; FINES.

Excessive Punishment.

See the titles CONSTITUTIONAL LAW; CRIMINAL LAW; and the specific criminal titles.

Excessive Taxation.

See the title TAXATION.

Exchange.

See the titles BANKS AND BANKING; BILLS AND NOTES. As to exchange broker, see the title BROKERS.

EXCHANGE OF PROPERTY.

Analysis.

- § 1. Nature of Elements in General.
- § 2. Exchange of Real Property.
- § 3. — Modification or Rescission.
- § 4. Exchange of Personal Property.
- § 5. — Rescission.
- § 6. — Warranties.
- § 7. — Remedies.
 - § 7 (1) Conditions Precedent.
 - § 7 (2) Evidence.
 - § 7 (3) Trial.

Cross References.

See the title DEEDS.

§ 1. Nature of Elements in General.

The distinction between sale and exchange, or bargain of barter, is that in a sale a price is attached to the article sold, which may be received in money or in a chattel at an estimated price, whereas in barter one chattel is exchanged for another, no price being attached. *Fuller v. Duren*, 36 Ala. 73; *Gunter v. Leckey*, 30 Ala. 591.

§ 2. Exchange of Real Property.

§ 3. — Modification or Rescission.

See post, "Rescission," § 5.

In an action to rescind an exchange of lands on the ground of fraudulent representations as to the value of the lots conveyed by defendant, complainant testified that defendant said the lots would be very valuable, and would come into market soon, and that he considered them worth \$2,000 each; and that they would sell for \$1,000 each at forced sale. Held that, although the lots could not have been sold for more than \$500 each, the representations afforded no ground for relief, being merely an expression of opinion, and not an affirmation of fact. *Lockwood v. Fitts*, 90 Ala. 150, 7 So. 467.

In a suit to rescind an exchange of land and to cancel the conveyance of complainant on the ground of fraudulent representations as to the value and location of lots conveyed by defendant, the testimony showed that the exchange was

made in March, and that in April complainant discovered that the lots were not as valuable as represented, nor situated where he had been led to suppose them to be. There was a mortgage on the lots, which complainant assumed in consideration of six additional lots. In May he began to negotiate with defendant for the exchange of other lands, and in July he wrote to defendant's agent, stating that he wished to exchange the lots included in the second agreement, as well as those in the first exchange, for renting property, so that he might be able to meet the interest due on the mortgage in September. In August he notified defendant that he would not execute the second agreement, and offered to rescind the exchange already consummated. Held, he had waived his right to rescind by continuing to treat the property as his own after discovery of the alleged frauds. *Lockwood v. Fitts*, 90 Ala. 150, 7 So. 467.

§ 4. Exchange of Personal Property.

§ 5. — Rescission.

See ante, "Modification or Rescission," § 3.

Where a party receiving a horse on a trade for a mule discovered that, while the other party had represented that the horse was sound, its sight was in fact defective, and he immediately offered to return the horse and rescind the contract, which was refused, the contract was at

an end, and he was entitled to recover the mule, notwithstanding he used the horse occasionally after that time. *Hayes v. Woodham*, 145 Ala. 597, 40 So. 511.

In *Barnett v. Stanton*, 2 Ala. 181, it is said in the opinion: "An offer to return the chattel within a reasonable time, on the breach of a warranty, or where fraud has been practiced on the purchaser, is equivalent in its effect upon the remedy to an offer accepted by the seller, and the contract is rescinded."

One can not rescind a trade for fraud by demanding a re-exchange, without offering to return the property he received, though he has it with him when the demand is made. *Samples v. Guyer*, 120 Ala. 611, 24 So. 942.

Where one traded for a mule, and used it after discovering that he was defrauded, he has lost the right to rescind, and is remitted to an action for damages. *Samples v. Guyer*, 120 Ala. 611, 24 So. 942.

Plaintiff contracted with defendant for the exchange of pianos. Defendant agreed to deliver his piano within a week. Subsequently he wrote to plaintiff, suggesting delay in the delivery, but offering to perform in the time specified. Plaintiff requested defendant to hold the piano for some time, and subsequently refused to accept it. Held, that plaintiff could not recover back the piano delivered to defendant pursuant to the contract. *Forbes v. Rogers*, 143 Ala. 208, 38 So. 843.

§ 6. — Warranties.

Upon discovery of defects in a house traded for, with a special warranty of soundness, there may be a recovery in detinue for the property exchanged for the house, though the defects were plain and perceptible. *Thompson v. Harvey*, 36 Ala. 519, 5 So. 825.

§ 7. — Remedies.

§ 7 (1) Conditions Precedent.

Plaintiff, having the legal title, need

not, as a condition precedent to bringing ejectment, offer to rescind a parol exchange of lands made between persons under whom he and defendant respectively hold title. *Alexander v. Wheeler*, 69 Ala. 332.

On the discovery of defects in a horse traded for, with warranty of soundness, the purchaser may, after offering to rescind the trade and return the horse, maintain detinue for the property exchanged for the horse, although no fraud is practiced, and the defects were plain and perceptible. *Thompson v. Harvey*, 36 Ala. 519, 5 So. 825.

§ 7 (2) Evidence.

Admissibility.—In detinue for a mule traded by plaintiff for a horse which proved unsound, and which plaintiff had offered to return, evidence by defendant that the mule was of little value is properly excluded. *Whitworth v. Thomas*, 33 Ala. 308, 3 So. 781.

§ 7 (3) Trial.

Instructions.—In an action of detinue by a party to a horse trader to recover back the mules traded by him because of the other party's fraudulent representations, and instruction that, unless the jury was reasonably satisfied from a preponderance of the evidence that the defendant did make any representation as to the soundness of the mules traded by him, their verdict must be for the defendant was properly refused, probably not stating the proposition intended to be asserted. *Pritchett v. Fife* (Ala.), 62 So. 1001.

Instruction that a statement by a party to a horse trader that mules were all right and sound and would authorize plaintiff, the other party, to rescind for fraud and recover his mules, and that the verdict would be for defendant, held properly refused because inconsistent. *Pritchett v. Fife* (Ala.), 62 So. 1001.

Excise.

See the titles COMMERCE; INTOXICATING LIQUORS; TAXATION.

Excitement.

As ground for continuance, see the title CRIMINAL LAW. As ground for change of venue, see the title CRIMINAL LAW. As to confessions made under excitement, see the title CRIMINAL LAW.

Exclamations.

See the titles CRIMINAL LAW; EVIDENCE.

Exclusive Acts.

See the title ALIENS.

Exclusion of Aliens.

See the title ALIENS.

Exclusions of Witnesses.

See the titles CRIMINAL LAW; TRIAL.

Exclusive Jurisdiction.

See the title COURTS.

Exclusive Privileges.

See the titles CONSTITUTIONAL LAW; FRANCHISES; MONOPOLIES. See, also, the specific titles.

Exclusive Remedies.

See the titles ACTION; EQUITY; QUO WARRANTO.

Exculpatory Statements.

See the titles CRIMINAL LAW; HOMICIDE. See, also, the title EVIDENCE.

Excursion Tickets.

See the title CARRIERS.

Excusable Homicide.

See the title HOMICIDE.

Excuse.

As to excuses for defaults, failure to perform duties, laches, delay, nonperformance of conditions, etc., see the appropriate private specific titles. As to excusing from jury duty, see the titles GRAND JURY; JURY. As to pleading excuses, see the title PLEADING.

Executed Remainders.

See the titles REMAINDERS; WILLS.

Executed Trusts.

See the title TRUSTS.

EXECUTION.

Analysis.

I. Nature and Essentials in General.

- § 1. Judgment, Decree, or Order.
- § 2. — Nature and Form.
- § 3. — Validity.
- § 4. — Rendition and Entry.
- § 5. — Transcript of Judgment of Inferior Court or Justice of the Peace Filed in Superior Court.
- § 6. Effect of Motion for New Trial or Rehearing.
- § 7. Effect of Agreement for Stay.
- § 8. Effect of Payment or Satisfaction of Judgment.
- § 9. Particular Forms of Execution.
- § 10. Existence of or Resort to Other Remedy.
- § 11. Persons Entitled to Execution.
- § 12. Persons against Whom Execution May Issue.

II. Property Subject to Execution.

- § 13. Personal Property in General.
- § 14. Real Property in General.
- § 15. Public Property and Institutions.
- § 16. Interests in Public Lands.
- § 17. Corporate Property Used for Public Purpose.
- § 18. Corporate Stock.
- § 19. Particular Estates or Interests.
- § 20. — Personal Property.
- § 21. — Real Property.
- § 22. Property Leased.
- § 23. Property Mortgaged or Otherwise Incumbered.
- § 24. — Personal Property.
- § 25. — Real Property.
- § 26. Trust Estates.
- § 27. Interests under Contracts in General.
- § 28. Interests of Heirs or Distributees.
- § 29. Interests of Devisees or Legatees.
- § 30. Money of Debtor.
- § 31. Ownership or Possession of Property.
- § 32. — In General.
- § 33. — Adverse Possession or Claim.
- § 34. — Property or Rights Conveyed or Assigned.
- § 35. — Property in Custody of Agent or Depositary.
- § 36. Property in Custody of the Law.
- § 37. Joint or Several Property.

III. Issuance, Form, and Requisites of Writ.

- § 38. Authority of Particular Courts and Officers.
- § 39. Issuance on Transcript of Judgment of Inferior Court or Justice of the Peace.
- § 40. — In General.
- § 41. Counties to Which Execution May Issue.
- § 42. — In General.
- § 43. Officer to Whom Writ May Be Directed.
- § 44. Death of Creditor before Issue of Writ.
- § 45. Death of Debtor before Issue of Writ.
- § 46. Leave of Court.
- § 47. — In General.
- § 48. Time for Issuance.
- § 49. Præcipe or Direction to Issue.
- § 50. Issuable and Record Thereof.
- § 51. Form and Requisites in General.
- § 52. Name in Which Writ Should Run.
- § 53. Direction to Particular Officer or County.
- § 54. Description of and Recitals as to Parties.
- § 55. Recital of Judgment.
- § 56. Statement of Amount.
- § 57. Conformity to Judgment.
- § 58. Command to Levy and Make Amount.
- § 59. Directions as to Property to Be Taken.
- § 60. — In General.
- § 61. Directions for Return.
- § 62. Indorsements.
- § 63. Delivery to and Receipt by Sheriff.
- § 64. Amendment.
- § 65. Renewal and Reissue.
- § 66. Alias and Pluries Writs.
- § 67. Variance.
- § 68. Defects, Objections, and Waiver.
- § 69. Presumption of Validity.

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- § 71. Creation and Existence of Lien.
- § 72. — In General.
- § 73. — As Dependent on Levy.
- § 74. Commencement of Lien.
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- § 79. Transfers of Property Pending or Subject to Execution.
- § 80. Duration of Lien.

- § 81. Death of Debtor after Issue of Writ.
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- § 154. Place of Sale.
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- § 157. Postponement.
- § 158. Sale in Parcels.
- § 159. Conduct of Sale in General.
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I. NATURE AND ESSENTIALS IN GENERAL.

As to nature and essentials in justices courts, see the title JUSTICES OF THE PEACE.

§ 1. Judgment, Decree, or Order.

As to attack on judgment by claimant of property, see post, "Attack on Judgment or Execution," § 124. As to conformity of writ to judgment, see post, "Conformity to Judgment," § 57. As to recital of judgment in writ, see post, "Recital of Judgment," § 55. As to variance between judgment and writ, see post, "Statement of Amount," § 56.

§ 2. — Nature and Form.

Form and Requisites in General.—An execution issued on a judgment, which is merely a copy of the judge's bench notes,

is void. *Brightman v. Meriwether*, 121 Ala. 602, 25 So. 994, cited in note in 55 L. R. A. 280.

Where there are several legatees and two executors, a decree in favor of a part of the legatees against one executor, and in favor of the other legatees against the other executor, will support execution in favor of the legatees. *Elliott v. Mayfield*, 3 Ala. 223.

No execution can issue on a decree of the county court rendered in favor of the "legatees" of a person named; it not appearing in the record who the legatees are. *Joseph's Adm'r v. Joseph's Legatees*, 5 Ala. 280.

By statutory provision (Code, § 3908), when an account is taken under a bill in chancery, and the amount of indebtedness between the parties ascertained by

the decree of the court, the decree has the force and effect of a judgment, and execution may at once issue on it; but, on decree for the foreclosure of mortgages, or the enforcement of equitable liens, "no execution must issue until the property ordered to sale shall have been sold, and the sale confirmed, and the balance due ascertained by the decree of the court." The statute contemplates a continuous proceeding, and a second decree after the sale, based upon the first, and ascertaining the balance due; which second decree must be invoked by the action of the complainant, and is not granted by the court *ex mero motu*. *Presley v. McLean*, 80 Ala. 309.

Judgment by Default.—The mere entry of "judgment by default" on the trial docket will not support execution. *Page v. Coleman*, 9 Port. 275.

Irregularities in Judgment.—A judgment not absolutely void can not be collaterally impeached, and, until set aside in a direct proceeding, an execution may properly issue upon it. *Barron v. Tart*, 18 Ala. 668.

Finality of Judgment.—An absolute decree in favor of a distributee against the administrator, on a partial distribution of the estate, is a final decree which will support an execution. *Thompson v. Perryman*, 45 Ala. 619.

Dormant Judgment.—An execution issued on a judgment not satisfied or barred by lapse of time but temporarily inoperative, so far as the right to issue execution is concerned, usually called a dormant judgment, is not void, but irregular and voidable; but it can not be successfully attacked collaterally. *Draper v. Nixon*, 93 Ala. 436, 8 So. 489. See *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403; *Steele v. Tutwiler*, 68 Ala. 107; *Shackelford v. Miller*, 18 Ala. 675; *Herzberg v. Hollis*, 119 Ala. 496, 24 So. 842; *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

"An execution issued on a judgment after the lapse of a year and a day from its rendition, or after the lapse of ten years from the date of the last execution, is only voidable, and can be avoided only on proceedings instituted by the defendant in execution, unless third persons have acquired rights in the mean time.

If the defendant in execution interposes no objection, others, who have acquired rights after its issue, and subject to its lien, can not attack it on the ground of irregularity, either directly or collaterally." *Leonard v. Brewer*, 86 Ala. 390, 5 So. 306, 307. See *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810, 811; *Brevard v. Jones*, 50 Ala. 221; *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403.

The fact that a dormant judgment can not be revived by *scire facias*, which is strictly a statutory proceeding after five years, will not destroy its character and force as a dormant judgment upon which execution might have issued at common law, though irregular unless the full period had expired, between the date of rendition, and the issue of execution, necessary to complete a bar by the statute of limitations. *Draper v. Nixon*, 93 Ala. 436, 8 So. 489.

§ 3. — Validity.

As to validity of judgment as affecting title acquired, see post, "Judgment or Execution," § 193 (2).

§ 4. — Rendition and Entry.

Necessity.—An execution sale of land will not be set aside because no formal judgment of *nil dicit* was entered; the record showing service on defendant, his failure to appear, a trial, and verdict and judgment thereon. *McLaren v. Anderson*, 81 Ala. 106, 8 So. 188.

Time of Entry.—Code 1896, § 1920, provides for the registration of judgments and decrees in the office of the judge of probate. Section 1921 provides that every judgment or decree, when so registered, shall be a lien on all property of the defendant in the county where registered which is subject to levy and sale under execution, that such lien shall continue from the date of registration, and that the registration shall be notice to all persons of the existence of the lien. Section 1922 provides that execution may be issued at any time within ten years from the date of registration of a judgment or decree registered within one year from the date of its rendition. This provision was continued by act Feb. 23, 1899; acts 1898-99, p. 34; act Sept. 26, 1903 (acts 1903, p. 273), provided that "upon any

judgment or decree which has been filed or registered as provided by § 1 hereof within ten years" execution may issue. Held, that under a judgment filed for registration September 18, 1899, though more than one year after rendition of judgment, execution might issue by virtue of said act of 1903. *Jefferson County Sav. Bank v. Miller*, 145 Ala. 237, 40 So. 513.

Under Code 1896, § 1921, providing that every judgment or decree, when filed and registered as in the preceding section provided, shall be a lien on all the property of defendant in the county where registered which is subject to levy and sale under execution, and act Sept. 26, 1903 (acts 1903, p. 273), providing that on any judgment or decree which has been filed or registered as provided by § 1 hereof within ten years execution may issue, the execution is always issued on the original judgment and not on the registered judgment; the effect of the statute being, not to give a new judgment, but to create a lien and to preserve to the holder of the judgment the right to have execution thereon during the life of the lien. *Jefferson County Sav. Bank v. Miller*, 145 Ala. 237, 40 So. 513.

Sufficiency of Entry.—When a judgment against several defendants, one of whom died previous to its rendition, is vacated as to the deceased defendant and continued against the others, the judgment nunc pro tunc against the survivors will be regarded as a continuation of the original judgment, so that only one execution can issue against the survivors. *Hood v. Branch Bank*, 9 Ala. 335.

Entry of an amendment of a judgment imperfectly entered nunc pro tunc, which renders the entry perfect as originally directed, imparts regularity to an execution issued on the judgment prior to the amendment, and to all proceedings thereunder. *Ware v. Kent*, 123 Ala. 427, 26 So. 208.

Where a judgment has been registered in the office of the judge of probate so as to become a lien on lands of the defendant, under Code 1896, §§ 1920, 1921, the proper method of enforcing the judgment is by execution under acts 1898-99, p. 34. *Emrich v. Gilbert Mfg. Co.*, 138 Ala. 316, 35 So. 322.

§ 5. — Transcript of Judgment of Inferior Court or Justice of the Peace Filed in Superior Court.

Acts 1871-72, p. 109, § 2, confers on a city court jurisdiction of a civil nature exercised by the circuit courts. Code 1896, § 944, confers on city courts, unless otherwise provided by law, the jurisdiction of the circuit court. Section 481 provides that appeals from justices may be taken to the circuit court, "or court of like jurisdiction." Section 1947 provides that, where levy is made on land under execution from a justice, he shall transmit the papers in the cause to the next circuit court, "or court having like jurisdiction." Section 574 declares that, when an attachment issued by a justice is levied on land, the papers after judgment against defendant must be returned to the clerk of the circuit court by the justice for an order of sale. Held that, in case of a levy on real estate under an attachment issuing from a justice, the papers must be returned to the circuit court, and the city court is without jurisdiction; the omission of the quoted words in §§ 481 and 1947 from § 574 showing an intention to deprive the city court of jurisdiction in such a case. *Moog v. Doe*, 145 Ala. 568, 40 So. 390.

§ 6. Effect of Motion for New Trial or Rehearing.

On an appeal from an order refusing to set aside a judgment and grant a new trial, it is not error to refuse to quash an execution regularly issued on the original judgment, since the appeal is not from the judgment on which the execution is issued, but from the order denying the new trial, and the appeal bond operates only to stay proceedings on the order appealed from. *Espy v. Balkum*, 45 Ala. 256.

§ 7. Effect of Agreement for Stay.

An agreement between the parties to a pending claim suit, to the effect that a judgment of condemnation should be rendered for plaintiff in execution for a sum less than the real value of the property in controversy, and that the title thereto should vest in the claimant on payment of this agreed value within a reasonable time, does not render void an execution rendered on the judgment of condemnation. *Patton v. Hamner*, 33 Ala. 307.

§ 8. Effect of Payment or Satisfaction of Judgment.

In General.—An execution issued on a satisfied judgment, but of which satisfaction no entry is made on the record, is not void but voidable only. *Henderson v. Planters', etc., Bank* (Ala.), 59 So. 493.

Where a judgment is satisfied by a payment, an execution issued thereon should be treated as also satisfied. *Henderson v. Planters' & Merchants' Bank of Ozark* (Ala.), 59 So. 493.

Specific Applications of Rule.—There being two judgments substituting for the same debt, the satisfaction of one is the satisfaction of the other also; and an execution issuing on one after the other is paid will be superseded. *Lockhart v. McElroy*, 4 Ala. 572.

Where an execution is levied on land, and defendant in execution is discharged as a certificated bankrupt, after the judgment, but previous to the levy, the execution and levy can not regularly be quashed on his motion. *Freeny v. Ware*, 9 Ala. 370, distinguishing *McDougald v. Reid*, 5 Ala. 810.

Where several judgments were recovered for the same debt against the surviving partners and the administratrix of a deceased partner, she can not, by paying the judgment against her and taking an assignment of the other, issue execution thereon in plaintiff's name, as the debt was a several charge, and the satisfaction of the judgment against either defendant is an extinguishment of the right against both. *Bartlett v. McRae*, 4 Ala. 688.

§ 9. Particular Forms of Execution.

Lands levied on by attachment, after judgment for plaintiff, may, as well as personal goods so levied on, be sold at the election of plaintiff, by either a venditioni exponas, or the ordinary writ of fieri facias. *Autry v. Walters*, 46 Ala. 476.

§ 10. Existence of or Resort to Other Remedy.

The statute providing that, when an execution on a judgment has been issued within the year and a day after its rendition and returned unsatisfied, an alias execution may be issued on the same judgment at any time within ten years,

without a scire facias, does not deprive the judgment creditor of his common law right to sue in debt on the judgment, but merely gives plaintiff the remedy by execution in addition to such right. *Kingsland v. Forest*, 18 Ala. 519.

§ 11. Persons Entitled to Execution.

The assignee of a judgment may sue out execution in the name of plaintiff. *Harrison v. Marshall*, 6 Port. 65; *Haden v. Walker*, 5 Ala. 86.

Code 1896, § 1928, provides that an assignee of a decree may have execution thereon if the assignment is indorsed on the execution docket, or the margin of the record, and is attested by the clerk, etc. Held, that an agreement entitling petitioner to one-half the proceeds of all suits instituted by him in the name of the party signing the agreement was not an assignment of a decree thereafter obtained by such assignor, within § 1928. *Reese v. Waller*, 154 Ala. 453, 45 So. 468.

Where a petition for execution on a decree which petitioner claimed by assignment showed on its face that another suit was pending by other parties involving petitioner's right to the decree, the petition was properly denied. *Reese v. Waller*, 154 Ala. 453, 45 So. 468.

§ 12. Persons against Whom Execution May Issue.

On dissolving an injunction on a judgment, it is not competent for the court to decree that execution shall issue against any person except defendant in the judgment, or his administrator. *Harris v. Carter*, 3 Stew. 233.

A writ against two defendants was served on one only, and he only appeared, and the record stated that the parties came by their attorneys, etc., and that plaintiffs recovered of defendants, etc. Held, that they only were "parties" who were parties to the issue, and, in case an execution should be taken out against the party not served, it would be superseded or quashed; that the judgment rendered must be regarded as a consequence of the verdict, intended to conform to it, and not affecting other persons than those who were parties to the issue tried; and that the substitution of the word "defendants" for defendant would be treated

as a mere clerical misprision. *Grayham v. Roberds*, 7 Ala. 719.

II. PROPERTY SUBJECT TO EXECUTION.

As to directions in writ as to property to be taken, see post, "Directions as to Property to Be Taken," § 59. As to property affected by lien or levy, see post, "Property or Interests Affected, and Extent of Lien," § 75. As affecting title of trustee in bankruptcy to assignees of bankrupt, see the title BANKRUPTCY. As to creditors' suits to reach property not subject to execution, see the title CREDITORS' SUIT. As to enforcement of personal judgment for debts secured against property conveyed as security, see the title MORTGAGES. As to property subject to execution in justice's court, see the title JUSTICES OF THE PEACE. As to leaseholds as subject to execution after assignment of crop, see the title LANDLORD AND TENANT. As to separate property of married woman for debts of husband, see the title HUSBAND AND WIFE.

§ 13. Personal Property in General.

See post, "Personal Property," § 20; "Ownership or Possession of Property," § 31.

§ 14. Real Property in General.

"In this state, 'Executions may be levied on real property to which the defendant has a legal title, or a perfect equity, having paid the purchase money, or in which he has a vested legal interest, in possession, reversion, or remainder, whether he has the entire estate, or is entitled to it in common with others.' Rev. Code, § 2871." *Foster v. Moody*, 51 Ala. 473, 477.

§ 15. Public Property and Institutions.

In General.—When judgment is rendered against a municipal corporation, execution may be ordered to issue against it. *Birmingham v. Rumsey & Co.*, 63 Ala. 352.

Property Subject to Execution.—Under an execution on a judgment against a municipal corporation, although property used for public purposes can not be seized, such as hospitals, markets, cemeteries, etc., private property belonging to the corporation, and not useful or used

for corporation purposes, may be seized and sold. *Birmingham v. Rumsey & Co.*, 63 Ala. 352.

City property used for municipal purposes does not lose its exemption from levy and sale by a temporary use for private purposes. *Murphree v. City of Mobile*, 104 Ala. 532, 16 So. 544.

Where property of a municipal corporation, exempt from execution under Code, § 2514, on account of its use for municipal purposes, is destroyed, the insurance thereon, taken out by the corporation, stands in place of the property destroyed, to be used for its restoration, and is therefore also exempt. *Ellis v. Pratt City*, 111 Ala. 629, 20 So. 649.

Where land owned by a city, and claimed by it to be exempt from execution, because used for burial purposes, has been owned by it for over twenty-five years, without any body being buried therein, and has not been dedicated or appropriated for cemetery purposes by any city ordinance, it is not exempt, under Code, § 2514, providing that property belonging to a municipal corporation, and used for municipal purposes, shall be exempt from levy and sale. *Murphree v. City of Mobile*, 104 Ala. 532, 16 So. 544.

An acre of land owned by a city, not shown to have been used for municipal purposes, and separated by a railroad from a tract which was so used, is subject to sale under execution against the city. *Murphree v. City of Mobile*, 108 Ala. 663, 18 So. 740.

§ 16. Interests in Public Lands.

Previous to the issuance of a patent, the estate of one in lands, purchased of the United States, and for which he has received a certificate of final payment, may be levied on and sold under execution, issued on a judgment at law. *Goodlet v. Smithson*, 5 Port. 245.

The mere possession and improvement of land belonging to the United States, however valuable, is not the subject of a levy under an execution. *Rhea v. Hughes*, 1 Ala. 219.

Land acquired by entry, and for which a receipt of full payment has been executed by the register, vests such title in the person to whom it is given as may

be sold under execution at law. *Faulkner v. Leith*, 15 Ala. 9.

§ 17. Corporate Property Used for Public Purpose.

Under the rule that property of a public service corporation which is essential to it in the performance of its duties acquired by law to the public may not be sold under an execution against it, a section of a railroad's roadbed, track, and right of way was not subject to levy and sale on execution against it; the creditors' remedy, in case the corporation's assets had become so depleted that a resort to such property was required, being by the appointment of a receiver, and not by execution. *Northern Alabama R. Co. v. Lowery*, 3 Ala. App. 511, 57 So. 280.

In *Gardner v. Mobile, etc., R. Co.*, 102 Ala. 635, 15 So. 271, it was held that lands owned and held in fee as the right of way of a railroad corporation was subject to levy and sale on execution at law, where the corporation has ceased all performance of its public duties and has failed to use its franchise and right of way for any purpose.

§ 18. Corporate Stock.

Shares of stock in a national bank, which are not the property of an officer or director thereof, may be levied upon and sold under execution where the sale does not interfere with the operation of the bank as a governmental agency. *Oldacre v. Butler*, 116 Ala. 652, 23 So. 3.

§ 19. Particular Estates or Interests.

§ 20. — Personal Property.

Mere authority given by one tenant in common to another to sell the joint property does not divest the former of the right to its possession, nor exempt it from levy and sale under execution against him. *Thompson v. Mawhinney*, 17 Ala. 362, cited on this point in note in 23 L. R. A. 260.

The interest of one tenant in common in lands may be sold under execution against him before the time has arrived at which a division may be had under the provisions of the instrument creating the estate. *Hill v. Jones*, 65 Ala. 214.

There can be no doubt that, in general, an estate in personal property for a limited period, is subject to levy and sale

under execution. *Abney v. Kingsland & Co.*, 10 Ala. 355, 365.

§ 21. — Real Property.

A life estate in lands may be levied on under execution by a constable. *Mendenhall v. Randon*, 3 Stew. & P. 251.

A husband conveyed property acquired by marriage to a trustee for the joint use of himself and wife for their lives, with remainder to the survivor for life, and remainder in fee to the issue of the marriage. Held, that the life estate of the husband was subject to execution and sale for his debts. *Branch Bank v. Wilkins*, 7 Ala. 589.

§ 22. Property Leased.

It seems that the leasehold interest of the lessee is held to be subject to execution. *McCreery v. Berney Nat. Bank*, 116 Ala. 224, 22 So. 577, cited on this point in note in 17 L. R. A., N. S., 842.

§ 23. Property Mortgaged or Otherwise Incumbered.

§ 24. — Personal Property.

Interest of Mortgagor in Property.—

The interest of the mortgagor of personal property in the property mortgaged may be taken and sold on execution. *McGregor v. Hall*, 3 Stew. & P. 397; *Purnell v. Hogan*, 5 Stew. & P. 192; *McDonald v. Foster*, 5 Ala. 664.

The interest of a mortgagor of personal property in the hands of the mortgagee is not, however; subject to seizure under execution against the mortgagor. *Perkins v. Mayfield*, 5 Port. 182; *Adams v. Tanner*, 5 Ala. 740, cited on this point in note in 23 L. R. A. 259, 261. See *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770.

Where a debtor mortgages property to secure indorsers, and stipulates that the mortgagees shall take possession at any time they may think proper, to indemnify them against the consequences of their indorsement, when the mortgagees have taken possession, a mere equity remains in the debtor, which is not subject to a levy and sale under a fieri facias. *Adams v. Tanner*, 5 Ala. 740.

The interest of the mortgagor, while in possession of the property before the law day has arrived, is subject to levy; but when the mortgagee becomes entitled to the possession, upon default being made,

he may claim the property and terminate the possession. *Fontaine v. Beers*, 19 Ala. 722.

When an execution is levied on a slave which is under mortgage or deed of trust executed by the defendant, the sheriff has no authority to sell a greater interest than the defendant has, viz, the right of possession until the law day of the mortgage or deed of trust and the equity of redemption. *O'Neal v. Wilson*, 21 Ala. 288.

The right of a mortgagor of a chattel before default made may be sold on execution; such default will not be presumed from the fact merely that one installment of the debt, to secure which the mortgage is made, is due. *Magee v. Carpenter*, 4 Ala. 469.

The fact that property covered by an execution lien is subject to a prior mortgage does not prevent the lienor from enforcing the lien against the balance remaining after payment of the mortgage. *Hamilton v. Phillips*, 120 Ala. 177, 24 So. 587.

When the mortgagor of personal property remains in the actual possession of the property before the law day, his entire interest therein, consisting of the usufruct of the property until the law day and the equity of redemption, may be sold under execution at law against him. *Harbinson v. Harrell*, 19 Ala. 753.

A chattel mortgagee who interposes his claim to the chattels levied on under an execution under a judgment against the mortgagor may leave the chattels in possession of the mortgagor after the law day of the mortgage, and recover possession when he chooses to do so, without creating a leviable interest in the mortgagor based on the usufruct of the property, and the mortgagee's only responsibility is that the property shall be forthcoming at the end of the suit according to his forthcoming bond. *Hartselle v. Bibb*, 167 Ala. 669, 52 So. 642.

Though Rev. Code, §§ 1783, 1784, 1786, declares corporate stock personal property, and authorizes levy thereon and sale thereof under execution, no execution can be levied on corporate stock, pledged or mortgaged by the execution defendant as security for debt, and transferred on

the corporate books; and a purchaser thereof at execution sale acquires no title. *Nabring v. Bank of Mobile*, 58 Ala. 204.

A stipulation in a trust deed to secure the payment of certain debts, providing that the debtor shall remain in possession of the property until a named day; and afterwards until the trustee should be required in writing by his cestui que trust to proceed and sell, does not extend the law day of the deed beyond the time fixed for the payment of the debt; and, if a levy is made after that time by a creditor, the trustee may protect the property by interposing a claim under the statute. *Marriott v. Givens*, 8 Ala. 694, cited in note in 30 L. R. A. 116.

Semble; where the mortgagor has such an interest in the property as may be levied on and sold, the most appropriate step for the mortgagee to take, in order to protect his rights, is to resort to chancery, that the interest of the mortgagor may be ascertained, and separated from that which he asserts. *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770.

Interest of Grantor in Property Conveyed to Secure Payment of Indebtedness.

—Where property is conveyed by a deed of trust to secure creditors, the resulting trust is with the grantor, which may be ascertained, and subjected to the claim of an execution creditor. *Dubose v. Dubose*, 7 Ala. 235.

Any execution creditor, independent of the statute right of payment, may compel creditors secured by mortgage or deed of trust, to close the trust by sale, and distribute the surplus if any will be the probable result of a sale; and, without such probability, upon indemnifying the other party against the costs of suit and sale. *Dubose v. Dubose*, 7 Ala. 235.

Under Code, § 2455, the interest of one who conveyed a slave, by bill of sale absolute on its face, as a mere security for the payment of a debt, may be sold under execution against him; and the sheriff must, of necessity, have the right to take the slave into his possession. *McConnelly v. McCaw*, 31 Ala. 447.

The possessory interest of a grantor in a deed of trust, if it is a certain, ascertained possession, for a definite period, may be sold under execution, but not a

permissive possession, which may be terminated at the pleasure of the grantee. *Hawkins v. May*, 12 Ala. 673, distinguishing *Perkins v. Mayfield*, 5 Port. 182.

When a slave has been conveyed by the owner by a deed of trust to secure certain debts, an execution creditor of the grantor has the right to pay the debts secured by the deed, and to be substituted to the rights of the beneficiaries; and in such case the trustee would be compelled to execute the trust for him. But if the sheriff assumes the responsibility of closing the trust, by selling the entire property in the slave, and declaring that the proceeds of sale will be applied first to the payment of the debts secured by the deed, and the surplus to the satisfaction of the execution, his sale does not divest the title of the trustee, but only transfers to the purchaser the interest of the defendant in execution. *O'Neal v. Wilson*, 21 Ala. 288.

§ 25. — Real Property.

Interest of Mortgagor in Property.—While the act of 1820 (Clay's Digest, 350, § 31), providing that "the equitable title or claim to land or other real estate" should "be liable to the payment of debts, by suit in chancery and not otherwise," was of force, an equity of redemption in mortgaged lands could not be sold under execution at law against the mortgagor, issued on a judgment which was rendered after the law-day of the mortgage. (Changed by § 2455 of the Code.) *Pauling v. Barron, etc., Co.*, 32 Ala. 9.

Upon foreclosure of a mortgage by a sale under the power, after the levy under execution, but before the sale thereunder, the equity of redemption is cut off, and the purchaser at a subsequent execution sale acquires nothing. *Shaw v. Lindsey*, 60 Ala. 344.

Under the express provisions of Code 1896, § 1890, an equity of redemption in land is subject to sale on execution, and the purchaser is subrogated to all the rights of the execution defendant, and subject to all his disabilities. *Carter v. Smith*, 142 Ala. 414, 38 So. 184.

An equity of redemption in lands may be sold under execution at law against the mortgagor (Code, § 3209), either before or after the law day and default, and

whether the mortgagor or mortgagee is in possession. *Gassenheimer v. Moulton*, 80 Ala. 521, 2 So. 652.

After the execution of a mortgage the legal estate passes to the mortgagee, leaving to the mortgagor the equity of redemption only. Thus, equity may be levied on and sold under execution, and the purchaser, in the absence of fraud or priorities under the registration statutes, acquires only what the defendant in execution had—a mere equity or right to revest himself with the title, on paying the debt secured—which will neither support nor defeat an action of ejectment. *Childress v. Monette*, 54 Ala. 317.

A sale on execution of the power given in the mortgage, after the mortgagor's equity of redemption has been sold under execution, cuts off the equity of redemption acquired by the purchaser as effectually as a decree of strict foreclosure would, and leaves nothing but the statutory right of redemption, which is the personal privilege of the debtor, not the subject of levy and sale under execution at law, and can not be asserted by a purchaser at execution sale before the statutory right had arisen. *Childress v. Monette*, 54 Ala. 317, cited in note in 21 L. R. A. 38.

Interest of Mortgagee in Property.—The interest of a mortgagee, although a legal title, is not subject to attachment or sale under execution before an entry for breach of condition, with a view to foreclosure. *Morris v. Barker*, 82 Ala. 272, 2 So. 335.

§ 26. Trust Estates.

The "perfect equity" in lands, which the statute declares subject to levy and sale under execution at law (Code, § 3209), is that of a purchaser who has made full payment of the purchase money, but who has not received a conveyance; the statute does not extend to the interest of a purchaser who, having paid the purchase money, takes a conveyance of the title to his wife. *Smith v. Cockrell*, 66 Ala. 64.

"The statute subjects to levy and sale and equity of redemption, a perfect equity, the defendant having paid the purchase money, a legal title, or a vested legal interest in possession, reversion, or remainder, whether it is an entire estate, or held

in common with others. Code of 1876, § 3209." *Shaw v. Lindsey*, 60 Ala. 344, 349.

"The subjection of equitable interests, or estates, to sale under legal process, was, prior to the Code, expressly prohibited by statute. Clay's Digest, 350, § 31." *Shaw v. Lindsey*, 60 Ala. 344, 350.

Under Code 1886, § 2892, subjecting a defendant's real property, to which he has a perfect equity of redemption, to levy on execution, the interest of a purchaser in an executory contract for the purchase of land, where the price has not been paid, although all accrued payments thereon have been paid, is not subject to execution. *Bank v. Kizer*, 119 Ala. 194, 24 So. 11.

An equitable interest in land can not be seized and sold on execution. *Wilson v. Beard*, 19 Ala. 629.

Since the act of 1820 (Aik. Dig., p. 173), providing that "no other than the legal title to land or other real estate shall hereafter be sold or conveyed by virtue of any execution," and that "the equitable title or claim to land or other real estate shall hereafter be liable to the payment of debts by suit in chancery, and not otherwise," an equitable title to land can not be seized and sold under execution, whether defendant is in possession or not. *Davis v. McKinney*, 5 Ala. 719.

A judgment debtor who pays out of his own effects most of the purchase money for land which is conveyed to his wife has no interest in the land which is subject to sale under execution, under Code 1886, § 2892, which provides that "executions may be levied on real property to which the defendant has a legal title or a perfect equity, having paid the purchase money, or in which he has vested legal interest in possession, reversion, or remainder." *Goodbar v. Daniel*, 88 Ala. 583, 7 So. 254.

The interest of the cestui que trust in possession of personal property may be sold under execution at law, though the legal title is outstanding in a trustee. *Clarke v. Windham*, 12 Ala. 798.

When mortgaged lands have been sold under a decree of foreclosure rendered by the chancery court, and afterwards redeemed under the statute by the mortgagor, and a conveyance taken in the name of a trustee for the use and benefit of his

wife, the mortgagor has not such an interest in the redeemed lands as can be the subject of a levy and sale under execution at law. *Wilson v. Beard*, 19 Ala. 629.

Not only a perfect, but an inchoate, legal title to lands, may be levied on and sold under a fieri facias. *Land v. Hopkins*, 7 Ala. 115.

The "perfect equity" in lands which Code 1876, § 3209, declares subject to levy and sale on execution, is not that of a purchaser who, having paid the purchase money, takes a conveyance of the title to his wife. *Smith v. Cockrell*, 66 Ala. 64.

Where the purchase money, for land, is paid by one person, and the deed is taken in the name of another, the former acquires but an equitable estate, a sale of which, under execution at law, vests no title in the purchaser. *Mitchell v. Robertson*, 15 Ala. 412.

§ 27. Interests under Contracts in General.

See the titles SALES; VENDOR AND PURCHASER.

Interest of Purchaser before Payment.

—Where chattels are sold on condition that the title shall remain in the seller until payment of the price, after the expiration of that time, the price remaining unpaid, the purchaser has no interest in the property subject to sale on execution against him. *Fields v. Williams*, 91 Ala. 502, 8 So. 808.

The only "perfect equity" which, under Code 1876, § 3209, can be levied on and sold under execution, is that of a purchaser who has paid the entire purchase money. The statute does not apply to the interest of a defendant in execution, whose lands are sold under a power in a mortgage while the execution is in the hands of the sheriff, and bought in for him by a third person, to whom he does not refund the money until after the subsequent sale under the execution. *Shaw v. Lindsey*, 60 Ala. 344.

Interest of Purchaser after Payment.—

Under the law existing in this state prior to the adoption of the Code, the equitable title of a purchaser of land who had paid the purchase money, but had not received a conveyance, could not be sold under execution at law against him. *Fawcetts v. Kimmey*, 33 Ala. 261.

Interest of Vendor under Right of Entry.—The interest of one having a bond for the conveyance of real estate is not subject to execution. *Driver v. Clarke*, 13 Ala. 192; *Collins v. Robinson*, 33 Ala. 91; *Fawcetts v. Kimmey*, 33 Ala. 261.

A bond conditioned to make title to land, on the payment of the purchase money, is an equity merely in the vendee, which can not be sold by execution at law against him. *Driver v. Clarke*, 13 Ala. 192.

The interest of a vendee of land, who holds a bond for titles and has paid the purchase money, can not be sold under execution at law, and such sale confers no title upon the purchaser. *Hogan v. Smith*, 16 Ala. 600.

A purchaser of land in possession under a bond for title, and who has paid the full amount of the purchase money, has not such an interest as can be taken and sold on execution against him; and, where his interest is attempted to be sold on execution, the purchaser can not maintain an action at law for the possession. *Elmore v. Harris*, 13 Ala. 360.

§ 28. Interests of Heirs or Distributees.

Property allotted to an administratrix as distributee is not liable to an execution running against the goods, etc., of her intestate. *Lewis v. Lewis*, Minor 95.

By the Civil Code, the undivided share of an heir in a succession may be seized and sold under attachment or execution; yet the seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burdened; and the seizure and sale under attachment at the suit of a creditor of the right and title of one of several heirs to a specific part of the property inherited by him is a nullity. *Miller v. Jones*, 29 Ala. 174.

The statute authorizing the widow to retain the possession of the dwelling house in which her husband most usually dwelt next before his death, and the plantation thereunto belonging, until her dower is assigned her, does not invest her with such a legal title therein as can be sold under execution at law. *Cook v. Webb*, 18 Ala. 810.

A regular grant of administration vests the administrator immediately with the

personal assets, and they are not subject to seizure under an execution issued on a judgment rendered against the intestate after his death, notwithstanding the administrator may have converted or fraudulently disposed of them. *Snodgrass v. Cabiness*, 15 Ala. 160.

§ 29. Interests of Devisees or Legatees.

The undivided interest of a mother in slaves bequeathed to herself and children jointly, one-third to her during her widowhood and the other two-thirds to her children, is subject to be sold under execution at law. *McIntosh v. Walker*, 17 Ala. 20.

A testator bequeathed a negro girl and her increase to his grandchildren, and provided that the negroes should remain undivided until the youngest child arrived at the age of twenty-one years, and should then be divided among those who were living. A division was made among the children before the youngest had attained his majority, and he afterwards filed a bill to have the division set aside, alleging that he had not received an equal share with the others. Held, that the negroes were exempt from execution at law against any of the legatees until the youngest child had arrived at the age of twenty-one and a division had been made pursuant to the will. *Johnson v. Culbreath*, 19 Ala. 348.

§ 30. Money of Debtor.

Money is "property" subject to levy by execution. *Exchange Nat. Bank of Montgomery v. Stewart*, 158 Ala. 218, 48 So. 487.

Money in possession of defendant in a fi. fa. may be levied on, if a levy can be made without committing a trespass. *Barnett v. Bass*, 10 Ala. 951.

§ 31. Ownership or Possession of Property.

§ 32. — In General.

In General.—"It may be laid down, generally, that a mere possessory right to lands, accompanied with actual possession, may be levied on under a fieri facias, and sold in satisfaction of the judgment. * * * This principle is not, however, without its exceptions." *Heydenfeldt v. Mitchell*, 6 Ala. 70, 71.

The possession of land under a claim

of right is *prima facie* such an interest as is subject to levy and sale, although the possession may not have continued such a length of time as to bar the right of entry. *McCaskle v. Amarine*, 12 Ala. 17.

Personal property in the possession of the execution defendant, being *prima facie* his, may, without liability to the real owner, be levied on and sold by the sheriff, in the absence of knowledge to rebut such presumption. *Pilcher v. Hickman*, 132 Ala. 574, 31 So. 469.

"In the absence of some statute which justifies the proceeding, the manual taking of goods by an officer * * * is not authorized by an execution or attachment against one who has neither the possession nor the right to the possession of the property." *Goode v. Longmire*, 35 Ala. 668, 676.

A deed purporting to convey certain slaves from a father to a third person, in trust for the "benefit" of a daughter then recently married, provided that the daughter, together with her husband, was to retain the possession of the slaves, etc., during coverture and the natural life of the daughter, and, should she die without issue, the slaves were to revert to the donor or his lawful heirs, thus, as the deed declares, conveying the legal interest to the trustees in trust, and the possessory interest to the daughter "and the heirs of her body, forever, if any; if none, according to the terms before set forth." Held that, upon the death of the wife, the possessory interest of the heirs of her body commenced, and, the husband being in possession, the slaves were subject to seizure and sale under an execution against his estate. *O'Neil v. Teague*, 8 Ala. 345.

Property Loan.—Although a slave has been lent, and continued in the possession of the borrower for more than three years, without the registration required by the statute of frauds, if the owner resumes the possession before any creditor of the borrower has acquired a lien upon it, it can not be afterwards made subject to the debts of the borrower. *Maull v. Hays*, 12 Ala. 499.

Under Clay's Dig., p. 254, § 2, relating to pretended loans of personal property, and providing that three years' uninterrupted possession by the borrower is re-

quired to make the property subject to his debts, if the lender, with a view to avoiding the effect of the statute, resumes possession before the expiration of three years, and retains it for one or two days, it cuts off the statute at that point, and the borrower's subsequent possession will date from the time when the property is restored to him. *Montgomery v. Kirksey*, 26 Ala. 172.

Property of Citizen on Execution against Municipality.—The private property of the inhabitants can not be seized under execution on a judgment rendered against a municipal corporation, which execution has been returned, "No property found." *Miller v. McWilliams*, 50 Ala. 427.

§ 33. — Adverse Possession or Claim.

The mere right of property in chattels, unaccompanied with the possession, can not be levied on and sold under a *fieri facias*, where the possession is holden bona fide, adversely to the defendant in execution. *Carlos v. Ansley*, 8 Ala. 900.

The mere right to personal property, in the adverse possession of a third person, which possession originated and is continued in good faith, is not subject to seizure under an attachment or execution; and where there is no evidence tending to prove *mala fides*, a charge to the jury, laying down the law as above stated, generally, is not erroneous because it omits to refer to the bona fides of the adverse possession. *Horton v. Smith*, 8 Ala. 73.

A debtor's land may be sold under an execution, although held by a third party in adverse possession. The doctrine of adverse possession does not apply to judicial sales. *High v. Nelms*, 14 Ala. 350.

§ 34. — Property or Rights Conveyed or Assigned.

Where a creditor of a debtor who has stock standing in his name on the books of a corporation has knowledge that the debtor transferred the same number of shares of the stock of such corporation to a bank, as collateral security, and that the shares passed to the assignee of a bank, the creditor is charged with notice that the stock held by the assignee is the stock appearing on the corporation books, especially as the transfer of certificates of

stock, instead of a transfer on the corporation books, is a customary method of transferring stock as security for debt. *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 So. 508.

D. sold land to R., and gave bond for title. Afterwards S. recovered a judgment against D., and did not proceed against D.'s interest in the land sold to R. until R. had sold to M., and D. had made title to M. Held, that D. had no interest in the land subject to sale under execution. *Downing v. Mann*, 43 Ala. 266.

Evidence considered, and held to show that a creditor levying on stock standing on the corporation books as belonging to his debtor had knowledge that a similar number of shares in the same corporation had been transferred to a bank, and had been assigned by the latter. *Selma Bridge Co. v. Harris*, 132 Ala. 179, 31 So. 508.

§ 35. — Property in Custody of Agent or Depositary.

Where it appears that the property, at the time of levy in a warehouse in the name of the principal defendant, had been wrongfully placed there by him in his own name after he had undertaken to store it for another, not a party to the proceeding, his breach of trust was of no prejudice to plaintiff. *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683.

§ 36. Property in Custody of the Law.

Property Held under Prior Writs.—Property levied on under execution, and claimed by third persons, the right of which is found against them, can not be subsequently levied on by virtue of a judgment obtained against the claimants and their sureties on their bond to redeliver. *Lindsay v. King*, 3 Port. 406.

Where a levy is made on slaves, and a bond given to try the right of one claiming them, a subsequent junior execution can not be levied on the same slaves, although they are left by the claimant with the defendant in execution. *Kemp v. Porter*, 7 Ala. 138.

Property Delivered to Claimant under Bond.—When an execution had been levied on property, and bond given to try the right thereto in conformity with the statute, a second levy under a junior execution can not be made on the same prop-

erty before the claim is disposed of. *McLemore v. Benbow*, 19 Ala. 76.

After a levy on property, and bond given to try the right, a junior execution can not be levied on the same property pending the trial. An execution issued on an elder judgment, but which has lost its lien by the lapse of a term, will be postponed to one issued on a younger judgment during such interval. *Hobson v. Kissam*, 8 Ala. 357.

§ 37. Joint or Several Property.

As to execution in actions by or against a partnership, see the title PARTNERSHIP.

"The property of a partnership may be levied on, by execution against one of the partners, and the interest of that partner sold to satisfy it. Yet the law cautiously protects the interest of the co-partners and the creditors of the firm, by restraining the vendee under execution from appropriating the property purchased to his own separate use, until the partnership accounts are adjusted, and the demands of the joint creditors either paid or provided for. It is but sheer justice that the estate of a debtor should be held liable to the payment of his debts, no matter how it may be situated, giving, however, a preference to creditors who have the highest claim upon it. It would be unjust if an individual could, by investing his estate in a partnership concern, defeat his separate creditors in the collection of their debts; and it would work quite as great injustice if the co-partner, who had acquired an interest in that estate by the connection in business, could be deprived of his lien upon it for balances due, or to pay debts. The law as we have stated it, secures the rights of all, and is established most firmly upon authority as we have already shown." *Winston v. Ewing*, 1 Ala. 129, 132.

III. ISSUANCE, FORM, AND REQUISITES OF WRIT.

As to defects as ground for vacating sale, see post, "Defects or Irregularities in Execution or Levy," § 173. As to execution against the person, see post, "Form and Requisites," § 263. As to necessity of issuance, and return of execu-

tion against property to authorize execution against the person, see post, "Previous Issue and Return of Execution against Property," § 260. As to quashing or vacating writ, see post, "Quashing or Vacating Writ," § 111. As to wrongful issuance of ground of action for damages, see post, "Wrongful Issuance of Execution," § 272. As to issuance in justices' courts, see the title JUSTICES OF THE PEACE. As to mandamus to compel issuance see the title MANDAMUS. As to writ as protection to officer, see the title SHERIFFS AND CONSTABLES.

§ 38. Authority of Particular Courts and Officers.

Code 1907, § 4079, provides that the clerk shall issue executions on all judgments in favor of the successful parties as soon after the adjournment of court as practicable, within the time prescribed by the Code, unless otherwise directed. Held, that the words "unless otherwise directed" mean unless otherwise directed by the court rendering the judgment, and that the issuance of the execution, being a ministerial act, could be delegated orally. *Henderson v. Planters', etc., Bank (Ala.)*, 59 So. 493.

Since it is the duty of the clerk to issue an alias execution on oral or written application of the party entitled thereto, such clerk is liable on his official bond for failure to issue such writ on oral application by the attorney of the party having the real interest in and control of the judgment, though no proof of such interest and control was exhibited, since such oral application was sufficient, in absence of a requirement by the clerk for a written one, and failure to demand proof of interest and authority was a recognition thereof. *Steele v. Thompson*, 62 Ala. 323.

Execution may issue from the orphans' court upon a decree of that court in favor of legatees, under the statute of 1830. *Childress v. Childress*, 3 Ala. 752.

The court of probate has power, equivalent to that of courts of law, to enforce satisfaction of its decrees for the payment of money, by the original writ of fieri facias, or execution. *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85.

The clerk of the circuit court may issue an execution on the judgment of the supreme court affirming a judgment. *Howard v. Deens*, 151 Ala. 608, 44 So. 550.

§ 39. Issuance on Transcript of Judgment of Inferior Court or Justice of the Peace.

§ 40. — In General.

An order of sale granted at the then pending term of the city court, on an execution issued by a justice of the peace in proceedings certified by him to such court, is void, because, under Code, § 3359, the proceedings should have been certified "to the next" term of the city court. *Johnson v. Dismukes*, 104 Ala. 520, 16 So. 424.

§ 41. Counties to Which Execution May Issue.

§ 42. — In General.

Where property of the judgment debtor, after lien of the property has attached, is sold, and removed to another county, an execution may be issued to such county, and the removed property levied on and sold. *Street v. Duncan*, 117 Ala. 571, 23 So. 523.

The recording of a judgment in the county where rendered, which makes it a lien on all defendant's property in such county (Code 1886, p. 635, note), gives such creditor a right to levy on property which defendant in execution had afterwards sold the claimant, who had removed it to another county. *Street v. Duncan*, 117 Ala. 571, 23 So. 523.

In a suit to subject the equitable interest of a defendant to the satisfaction of a judgment, a defendant can not raise the objection that an execution was not sent to the county of his residence, unless he shows that he had visible property in that county which was liable to its satisfaction. *Rugely v. Robinson*, 19 Ala. 404.

It seems that where the judgment debtor has a known and fixed place of residence within the state, and sufficiency of visible property in the county in which he lives to satisfy the execution which issued on the judgment, subject to its satisfaction, the execution, if the law authorizes, must be issued to the county in which the defendant resides at the time

of its issuing. But it is not necessary, in a creditors' bill, to make a specific allegation upon the subject; for, if the execution has issued to an improper county, it devolves upon the defendant in such case to show it in his defense. *Brown v. Bates*, 10 Ala. 432.

A levy under an execution issued by a justice of the peace, and sent to another county, which was not authenticated by the certificate of the probate judge or of a justice of the peace of the latter county who is acquainted with his handwriting, as provided for by Code, § 3647, is void. *Street v. McClerkin*, 77 Ala. 580.

§ 43. Officer to Whom Writ May Be Directed.

Where a judgment is obtained against one as the executor of an estate after the resignation of the trust, the judgment has no effect upon a succeeding administrator, and therefore an execution may lawfully issue to the sheriff, although he is the succeeding representative of the same estate. *Wilson v. Auld*, 8 Ala. 842.

§ 44. Death of Creditor before Issue of Writ.

In General.—An execution can not be issued on a judgment after the death of the creditor. *Stewart v. Nuckols*, 15 Ala. 225; *Graham v. Chandler*, 15 Ala. 342, see note in 61 L. R. A. 354.

If a sole plaintiff dies after judgment, the judgment thereby abates or becomes suspended, so that, until it is revived, it is ineffectual to furnish a warrant for the execution, and an execution issued thereon without revival is void. *Stewart v. Nuckols*, 15 Ala. 225, cited on this point in note in 61 L. R. A. 354.

Specific Application of the Rule.—

Where a plaintiff was dead before an execution was issued, no execution could regularly issue until the judgment was revived in the name of the personal representative by scire facias, for the reason that there was no plaintiff in *rerum natura* to whom satisfaction could be made, who was answerable for the purpose of the process of the law; and the execution so issued was quashed on motion. *Moore v. Bell*, 13 Ala. 469, cited on this point in note in 61 L. R. A. 354.

A judgment is a debt, though it was ob-

tained for a personal injury, so that the right to collect it is not affected by the death of the person injured after the judgment was obtained. *City of Anniston v. Hurt*, 140 Ala. 394, 37 So. 220.

If execution issue on a judgment after the death of plaintiff in his name, it may be superseded by defendant and quashed on motion. *Moore v. Bell*, 13 Ala. 469, cited in note in 61 L. R. A. 354.

§ 45. Death of Debtor before Issue of Writ.

As to death of debtor after execution of writ, see post, "Death of Debtor after Issue of Writ," § 81.

In General.—An execution issued on a judgment after the death of the defendant is void. *Holloway v. Johnson*, 7 Ala. 660; *Hurst v. Weathers*, 15 Ala. 417; *Beach v. Dennis*, 47 Ala. 262; *Meyer v. Hearst*, 75 Ala. 390; *Henderson v. Gandy*, 11 Ala. 431; *Moore v. Bell*, 13 Ala. 469; *Graham v. Chandler*, 15 Ala. 342; *Blount v. Traylor*, 4 Ala. 667; *Abercrombie v. Hall*, 6 Ala. 657; *Nicolson v. Burke*, 15 Ala. 353; *Reddick v. Long*, 124 Ala. 260, 27 So. 402; *Nuckols v. Mahone*, 15 Ala. 212; *Jones v. Swift*, 12 Ala. 144; *Brown v. Newman*, 66 Ala. 275; *Whitlock v. Whitlock*, 25 Ala. 543; *Collier v. Windham*, 27 Ala. 291; *Smith v. Alexander*, 80 Ala. 251. See note in 61 L. R. A. 375, et seq.

A sale of lands under execution, or other legal process, issued after the death of the defendant in the writ, is a nullity, and passes no title to the purchaser, unless, as authorized by statute (Code, § 3213), a lien was acquired and kept alive during his life, without the lapse of an entire term. *Sims v. Eslava*, 74 Ala. 594.

An alias execution can not issue after the death of the defendant in execution, without a revival of the judgment, unless to continue a lien acquired by a former execution issued in the lifetime of the defendant. *Fryer v. Dennis*, 3 Ala. 254, cited on this point in note in 61 L. R. A. 378, and distinguishing *Collingsworth v. Horn*, 4 Stew. & P. 237, cited in 61 L. R. A. 377, 378.

If an execution be issued in the lifetime of the defendant the lien may be continued after his death by an alias or

pluries. But if there be a chasm by the lapse of a term, an alias can not issue, but the judgment must be revived by scire facias against the personal representative. *Boyd v. Dennis*, 6 Ala. 55, cited on this point in note in 61 L. R. A. 378, and distinguishing *Collingsworth v. Horn*, 4 Stew. & P. 237, cited in 61 L. R. A. 378.

"If an execution be issued in the lifetime of the defendant, the lien may be continued after his death by an alias or pluries *fi. fa.*; but if there be a chasm by the lapse of a term during which there was no execution in the officer's hands, an alias can not issue, but the judgment must be revived by a scire facias against the personal representative. *Boyd v. Dennis*, 6 Ala. 55. Although there be a plurality of defendants in the judgment, the rule will be the same in respect to the one who is dead. *Jones v. Swift*, 12 Ala. 144." *Nicolson v. Burke*, 15 Ala. 353, 355.

In the event, however, of the death of a defendant, after execution has begun, it seems that no revival against the personal representative would be essential, where regular executions have preceded his death; and a lien has been kept up and continued, from the first execution to the last. For it seems also that in cases where an execution is returned to the proper term, and the clerk, within a reasonable time (consistent with his other duties) issues an alias or pluries, regularly, thereon, any lien, which may have been acquired by the original execution, is transferred from it (by such regular issues) to such alias or pluries; and is thus continued and preserved. *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

A pluries execution issued after the death of the defendant, which is regularly preceded by an original and alias without any intervening term, is not void; and therefore, if voidable, the irregularity can not be taken advantage of by a stranger. *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

So, it seems, a pluries execution issued upon a judgment obtained in the life time of a defendant, and which has been regularly preceded by alias and original—both

returned *nula bona*; is not void, because issued after the defendant's death. *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

Where, however, executions have not regularly issued, from term to term, so as to keep up the lien, acquired on an original *fi. fa.*; and rights have been obtained, by third persons, to property, in the possession of a defendant, while the first execution was in the sheriff's hands, it is competent for strangers to take advantage of the loss of the lien. *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

It seems that if no execution issues upon a judgment, until after the expiration of a year and a day, from the time rendered; or, if not sued out before the death of a defendant—in either case, an execution taken out, without a revival by scire facias, might be considered irregular. *Collingsworth v. Horn*, 4 Stew. & P. 237, cited on this point in note in 61 L. R. A. 377, 378.

A judgment rendered against a party after his death is a nullity; and an execution issued on a valid judgment, after the defendant's death, is void, unless the judgment supporting it has been revived, or it is issued in order to continue a lien already acquired by previous execution. *Meyer v. Hearst*, 75 Ala. 390.

If an execution, on a judgment, against a sole defendant, issues, after his death, it is a nullity, and a sale under it, of land, which the defendant, in his life time, had fraudulently conveyed to a third person, vests no title in the purchaser. *Hurst v. Weathers*, 15 Ala. 417.

An execution issued upon the judgment, after the defendant is dead, is an absolute nullity. It is so wholly void that a sheriff into whose hands it may come, can not be ruled for not returning it. *Henderson v. Gandy*, 11 Ala. 431. See *Holloway v. Johnson*, 7 Ala. 660.

It is a sufficient reason for quashing an execution, at the instance of a party, or privy, that it issued after the death of the plaintiff. *Nuckols v. Mahone*, 15 Ala. 212.

Section 2875 of the Revised Code authorizes a sale of the defendant's land

after his death, under an alias or pluries fieri facias, when the writ was received by the sheriff while defendant was in life, and has been regularly kept up without the lapse of an entire term. *Hendon v. White*, 52 Ala. 597, cited on this point in note in 61 L. R. A. 373.

An exception to the rule that an execution issued upon a judgment, after the defendant is dead, is an absolute nullity, obtains where an execution has issued in the life time of the deceased; then it appears if there has been no chasm, by the lapse of a term, but the lien has been regularly continued, an alias may issue after the death of the defendant in the judgment. This, however, is confined in its operation to execution issued when judgments of courts of record which are a lien on the personal property of the defendant from the time they come to the sheriffs hands. The executions issued on the judgment of the justice of the peace, his not being a court of record, have no such attributes. *Henderson v. Gandy*, 11 Ala. 431. See *Collingsworth v. Horn*, 4 Stew. & P. 237; *Collier v. Windham*, 27 Ala. 291, cited on this point in note in 61 L. R. A. 379.

The authority of a sheriff to levy on and sell lands, under execution, after the death of the defendant in the writ, is purely statutory. *Brown v. Newman*, 66 Ala. 275.

Earlier cases in the state under former statutes made a distinction as to the lien attaching to lands and that attaching to personalty by virtue of an execution issued in the life time of the debtor, but later statutes have obliterated the distinction, and authorize the levy and sale of lands, as well as goods and chattels, under an alias or pluries fi. fa. issued after the debtor's death, which is a regular continuance of execution issued to the sheriff while the debtor was living. *Hendon v. White*, 52 Ala. 597, cited on this point in 61 L. R. A. 373. See *Clark v. Kirksey*, 54 Ala. 219, cited on this point in note in 61 L. R. A. 373.

"It will be observed that the Code obliterates entirely the distinction existing under the former statutes as to the lien of judgments and executions. The lien is no longer attached to the judgment,

but to the execution. It attaches to lands, and goods, and chattels, at the same time. As to each, it is confined to the county to which the execution issues. The lien as to each is lost by the same laches, the failure to keep alive the execution from term to term. The distinction having been obliterated thus far, the Code not only does not authorize a scire facias, or other remedy by which lands descended can be subjected to the satisfaction of a judgment against the ancestor, but it declares in express terms: 'When a judgment has been rendered against the decedent, before his death, no execution can issue thereon against the personal representatives, except in the case provided for in § 2875 (2459); nor can the judgment be revived against them except by suit on the judgment.' R. C., § 2289. Section 2875, provides: 'A writ of fieri facias issued and received by the sheriff during the life of the defendant may be levied after his decease, or an alias issued and levied, if there has not been the lapse of an entire term, so as to destroy the lien originally created.' The judgment not now operating a lien, and the writ of fieri facias issuing as well against lands, as against goods and chattels, and the lien being attached to it, the section of the Code last quoted can not be construed otherwise than to authorize the levy and sale of lands, as well as goods and chattels, under an alias or pluries fi. fa., which is a regular continuance of execution, after the death of the defendant. No revivor can be had against his heirs or personal representatives, and if such sale is not authorized by this statute, the lien is lost. There is not a want of conformity of the writ to the judgment, in such case, as there was when the judgment was a lien. Then, the lands having descended, the execution would not authorize a sale, when the heir in whom the title resided was not party to the judgment. Now, the execution conforms to the judgment, and the alias or pluries is not original process, but a continuation of the original issuing in the life of the ancestor, to which the law attaches a lien." *Hendon v. White*, 52 Ala. 597, 601.

Code 1886, § 2897, provides that a writ of fieri facias, issued and received by the

sheriff during the defendant's life, may be levied after his death, or an alias may be issued and levied, if there has not been the lapse of an entire term, so as to destroy the original lien. Code Feb. 5, 1891 (Acts 1890-1891, p. 375), provides that on any judgment or decree which has been or may hereafter be legally registered execution may be issued at any time within ten years from the date of the judgment, whether execution has been previously issued thereon or not, "provided that the registration must have been made within a year from the time the judgment or decree was rendered." Notwithstanding the broad language of the statute that execution may issue at any time within ten years, the issue of the execution must be within the life time of the judgment debtor, unless it is within the exception, provided in § 2897 of the Code. *Enslen v. Wheeler*, 98 Ala. 200, 13 So. 473, cited on this point in note in 61 L. R. A. 379.

Code 1886, § 2280, provides that when a judgment has been rendered against a decedent before his death no execution can issue thereon against his personal representative, except in the case provided in § 2897, and that the judgment can be revived only by suit on the judgment. Section 2897 provides that a writ of fieri facias, issued and received by the sheriff during defendant's life, may be levied after his death, or an alias may be issued and levied, if there has not been the lapse of an entire term, so as to destroy the original lien. Section 2894 provides that such writ is a lien only from the time it is received by such officer, and continues as long as the writ is regularly issued and delivered to him without the lapse of an entire term. Act Feb. 28, 1887 (Code, p. 635), § 1, provides that a certified abstract of any judgment rendered by a court of record may be filed in the office of the probate judge and registered, and that a judgment so filed shall be a lien on the property of the defendant in such county, which is subject to execution, and such lien shall continue for ten years from registration, which is notice to all of such lien. Held, that the latter act was not in conflict with the former statutes, but provided merely an additional lien, and both stat-

utes are in force. *Enslen v. Wheeler*, 98 Ala. 200, 13 So. 473.

Specific Applications of the Rule.—An execution can not be issued against the estate of a deceased debtor, unless one has previously issued on the same judgment in his lifetime; and the fact that there is a plurality of defendants in the judgment will not change the rule in respect to one who is dead. *Jones v. Swift*, 12 Ala. 144, cited on this in note in 61 L. R. A. 371, 389.

Where defendant, against whose estate a writ of fi. fa. is issued, dies after it has been enjoined, his lands are not subject to levy and sale under an execution issued after his death, on the dissolution of the injunction; the act of 1835 "to authorize the issuing of execution in certain cases, and for other purposes," not applying to such a case. *Abercrombie v. Hall*, 6 Ala. 657, cited in note in 61 L. R. A. 373, 393.

A judgment against two defendants, one of whom is dead at the time of its rendition, is void only as against the deceased defendant; and if no motion is made to vacate it as against him, execution may properly be issued against both of the defendants, and levied on the property of the survivor. *Fabel v. Boykin*, 55 Ala. 383, cited on this point in note in 61 L. R. A. 388.

Under Rev. Code, § 2875, providing that an execution in the sheriff's hands during the life of a judgment debtor may be levied after his death, if the lien created has not been lost by lapse of time, where no execution was issued during life of judgment debtor a levy made on an execution issued after his death was invalid, and a sale thereunder passed no title. *Reddick v. Long*, 124 Ala. 260, 27 So. 402, cited on this point in note in 61 L. R. A. 380.

"Where a defendant, against whose estate a fi. fa. is sued out, dies after the judgment has been enjoined, his lands are not subject to levy and sale under an execution issued after his death, upon the dissolution of the injunction. *Abercrombie v. Hall*, 6 Ala. 657." *Nicolson v. Burke*, 15 Ala. 353, 355.

Where a creditor omits to sue out execution until after the death of his debtor, no lien attaches upon his personal estate,

in the hands of his administrator, who is bound to apply them in due course of administration, and whose claim will prevail against the levy made under an execution issued after the death of the debtor. *Blount v. Traylor*, 4 Ala. 667, cited in note in 61 L. R. A. 371.

An execution, issued after the death of the defendant in the judgment, is void; and, consequently, a sale under it is also void, and may be set aside, on motion, at the instance of the heir-at-law. *Beach v. Dennis*, 47 Ala. 262, cited on this point in note in 61 L. R. A. 373, 393.

An alias execution was declared void, where the debtor had died previous to its issue, and more than a term had elapsed since the original execution was sued out. *Whitlock v. Whitlock*, 25 Ala. 543, cited on this point in note in 61 L. R. A. 379.

Where, at the death of a judgment debtor there is no execution in the hands of the sheriff, and none is issued for several terms thereafter, a sale under an alias or pluries subsequently issued confers no title on the purchaser; and the fact that such debtor became bankrupt a few days before the return of the original execution without levy, and more than a year before his death, does not affect this principle. *Brown v. Newman*, 66 Ala. 275, cited in note in 61 L. R. A. 379.

No execution was issued until after the death of the debtor, in *Beach v. Dennis*, 47 Ala. 262, and then three were issued successively, the last of which was levied on land. Upon a motion by an heir to have the sale set aside, it was held, mainly upon the authority of *Lucas v. Price*, 4 Ala. 679, that the execution, having been issued after the death of the debtor, was void, and conferred no authority on the sheriff to sell. Cited on this point in note in 61 L. R. A. 373.

A sale of lands of a judgment debtor, made under an alias pluries execution issued after his death, in continuance of a lien created during his life, is valid. *Clark v. Kirksey*, 54 Ala. 219, cited in note in 61 L. R. A. 373.

In the above case the heirs to whom the land descends take it encumbered with the lien. If they can show that the execution has been satisfied, or that from any cause the lien is lost, or should not

be enforced, supersedeas affords them an ample remedy. The present statute only requires them to be the actors in showing cause against the lien, instead of being proceeded against by scire facias, as under the former statutes. *Clark v. Kirksey*, 54 Ala. 219.

Prior to the death of the debtor, it appeared that an execution issued and levied against his land was stayed by the order of the plaintiff. After the debtor's death, without the lapse of a term, an alias execution was issued and levied, and then, after its return, a venditioni exponas was issued commanding the sheriff to sell the land. It was insisted that the lien of the execution, issued and levied before the death of the debtor, was lost by the plaintiff's order to stay it, and also that the statute does not authorize a venditioni exponas to issue for the sale of the lands of a deceased person, but requires a lien by execution obtained in his life to be continued in no other way than by an alias fieri facias. In regard to the first contention, the court held that the lien of an execution could not be lost against the defendant therein or his personal representatives by the mere suspension of the execution. In regard to the second contention, it was held that it was within plaintiff's operation to sue out, either an alias writ, or a venditioni exponas; that the latter continues the lien of the execution which has been levied as to the property on which the levy was made, whether real or personal, and is in its nature and operation an alias execution commanding and authorizing the sale of real estate, and thus completing the execution previously begun. *Dryer v. Graham*, 58 Ala. 623, cited on this point in note in 61 L. R. A. 373.

Previous to the debtor's death an execution was issued and levied upon land. After her death, but without the lapse of a term, another execution was issued, by virtue of which the levy was renewed and the land sold. The court held that, the lien having attached during the life time of the debtor, her death did not impair it or destroy the sale, there being no lapse of time between the executions. *Caldwell v. Pollak*, 91 Ala. 353, 8 So. 546, cited on this point in note in 61 L. R. A. 379.

Although the statute declares that a

feri facias issued and received by the sheriff during the life of the defendant, may be levied after his death; or if a term has not intervened, that an alias may issue and be levied, and does not expressly authorize the issue of a *venditioni exponas*, yet the *venditioni exponas* is in the nature of an alias execution as to property upon which a levy has already been made, is within the spirit of the statute, and a proper writ to complete the execution already begun; and if issued in continuation of the lien acquired in the life of the defendant, a sale under it will pass the decedent's title. *Dryer v. Graham*, 58 Ala. 623.

The court recognizes the distinction between personal estate bound after the debtor's death by executions regularly kept up, and real estate bound by the judgment by virtue of the right of satisfaction by *elegit*, which right, as against the debtor, is destroyed by his death; so, while the execution is permitted to continue as to the personalty, the judgment does not survive as to the realty. It is stated that, upon the death of the judgment debtor intestate, the land immediately descends to his heirs, and their title can not be divested without a proceeding instituted for that purpose to which they must be made parties; and the court stated the law to be settled that an execution issuing after the death of a defendant is, as to his lands, a nullity. *Burk v. Jones*, 13 Ala. 167, cited on this point in note in 61 L. R. A. 373.

The inquiry whether, if a judgment be rendered against two, and one dies before execution is issued, an execution can be issued and levied on the land of the survivor, without a *sci. fa.*, has been decided in the affirmative. The court referred to the common law rule that if judgment was rendered against two, but one died, the plaintiff, nevertheless, might sue out execution against both for the sake of conformity with the record, but it was in law an execution against the survivor only, and his goods alone could be levied on in satisfaction of the judgment; and further pointed out that, by the act of 1812 (Clay's Digest, 205), lands are liable to be sold under the same writ by which goods are sold, therefore, plaintiff may proceed against the land of a survivor in

the same manner that he might proceed against his goods. *Martin v. Branch Bank*, 15 Ala. 587, cited on this point in note in 61 L. R. A. 391.

§ 46. Leave of Court.

§ 47. — In General.

If a sheriff returns on an execution that "defendants in this case have settled with plaintiff's attorney, as per order of same; costs and commissions paid to sheriff," a subsequent execution can not issue without authority of court. *Haden v. Walker*, 5 Ala. 86.

§ 48. Time for Issuance.

Premature Issuance.—The premature issuance of an execution is an irregularity that does not render it void. *Christian, etc., Grocery Co. v. Michael*, 121 Ala. 84, 25 So. 571. See *Draper v. Nixon*, 93 Ala. 436, 8 So. 489; *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403, 405; *Steele v. Tutwiler*, 68 Ala. 107.

Where an execution is prematurely issued on a valid judgment it is not on that account void but only irregular and voidable. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

Period after Rendition of Judgment.—See ante, "Nature and Form," § 2.

As to lien of judgment which has not become dormant not being lost or impaired by alias in issuing execution, see the title JUDGMENT.

Acts 1903, pp. 273, 274, held to apply to authorize execution on judgments, registered before its enactment, but more than a year after their rendition, contrary to Acts 1898-99, p. 34. *Compton v. Sharpe*, 174 Ala. 149, 56 So. 967.

Under Code, §§ 1920, 1922, authorizing the registration of judgments, and the issuance of execution within ten years from the date of registration, if within a year from its rendition, a creditor, whose judgment has been properly registered, may proceed within ten years by execution without regard to whether one has been previously issued within a year from the rendition of the judgment. *Howard v. Corey*, 126 Ala. 283, 28 So. 682.

Affirmed Decrees.—The circuit court clerk, on receiving a certificate of affirmation from the clerk of the supreme court, is bound to promptly issue execution on

the judgment. *Northern Alabama Ry. Co. v. Lowery*, 3 Ala. App. 511, 57 So. 260.

§ 49. Praeceptum or Direction to Issue.

An oral or verbal application to the clerk of the court in which a judgment has been rendered, to issue an alias or pluries execution for its satisfaction, is sufficient, if he does not then require a written demand. *Steele v. Thompson*, 62 Ala. 323.

§ 50. Issuable and Record Thereof.

It is no objection to an execution that it was not issued by the clerk, or a duly qualified deputy—it may be made out and subscribed with the clerk's name, by his direction, and under his supervision, or afterwards adopted by him, though the manual labor of writing may be performed by one merely appointed for that purpose. *McMahan v. Colclough*, 2 Ala. 68.

It is no objection to an execution that it was not made out by the clerk or his deputy, if it is signed and adopted by the clerk. *McMahan v. Colclough*, 2 Ala. 68.

§ 51. Form and Requisites in General.

In General.—It is not necessary that the statute form of an execution should be precisely followed, if the substance is preserved. *McMahan v. Colclough*, 2 Ala. 68.

The statute providing that a sheriff or other ministerial officer is justified in the execution of process regular on its face, whatever may be the defect in the proceeding on which it was issued (Code, 1876, § 3041), is intended only for the protection of the officer executing the process, and can not impart validity to a levy and sale made by him under the process; nor can the protection of the statute be extended to third parties who procured the issue and execution of the process. *Meyer v. Hearst*, 75 Ala. 390.

An execution gets its validity from the authority issuing it and from what is written in it, and not by virtue of the mode by which the sheets of paper upon which it is written are fastened together; and as the law does not require it to be on one sheet of paper, and if it be on two sheets does not direct how they shall be fastened together, an execution, embracing two sheets, the second containing only the bill of costs and the constable's in-

dorsements, and pinned together, was valid. *Glover v. Bass*, 162 Ala. 267, 50 So. 125.

Description or Recital as to Parties.—An execution in the name of "A. B., use of officers of court," is not void, but gives protection to the officer levying it, if issued by a court of competent jurisdiction. The words "use of officers of court" may be treated as surplusage. *McElhanev v. Flynn*, 23 Ala. 819.

A judgment was rendered against W. M. and W. F. E. and a writ of fieri facias issued thereon, against the goods, etc., of W. W. M. and W. F. E. Held, that the insertion of the initial of a middle name was not such a departure from the judgment, as to avoid the execution, and that if necessary, the judgment might be aided by the declaration, in which the defendants were described as in the execution. *McMahan v. Colclough*, 2 Ala. 68.

The omission of the words "late of your county" after the defendant's names in an execution, though contained in the statute form, can not be regarded as essential to its validity. *McMahan v. Colclough*, 2 Ala. 68.

Statement of Amount.—The statute form supposes the damages and costs, for which judgment is rendered, to be added together, and an execution to issue for the aggregate; it is, however, no objection to an execution that it issue for the amounts of each separately stated. *McMahan v. Colclough*, 2 Ala. 68.

Conformity to Judgment.—An execution must fail, or correspond in the judgment with the parties. *Thompson v. Bondurant*, 15 Ala. 346.

§ 52. Name in Which Writ Should Run.

A writ of fi. fa. does not become a record of the court until returned by the sheriff, and is as much within the control of the court for correction on a motion to quash, in case of mistake as to when the same in fact issued, as the declaration, or any other part of the cause on a question of this character. *Harrell v. Martin*, 6 Ala. 587.

§ 53. Direction to Particular Officer or County.

Where an execution was directed to the sheriff, who was the defendant in the suit,

the coroner could not legally execute it, though delivered to him. *Pope v. Stout*, 1 Stew. 375.

§ 54. Description of and Recitals as to Parties.

Where, in ejectment, plaintiff relied on a sheriff's deed on execution sale, and it appeared that the execution recited the names of plaintiffs as A. S. & Sons, conforming in such respect to the caption of the judgment upon which it was issued, the complaint in such action might be consulted for the purpose of identifying the complainants as to the judgment and execution. *Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441.

An execution which fails to state the name of the plaintiff in whose favor the execution was issued, or in whose favor the judgment, on which the execution was issued, was rendered, is void on its face. *Jordan Bros. v. Gordon* (Ala.), 62 So. 1023.

Where, in ejectment, plaintiff relied on a sheriff's deed on execution sale, and the execution recited the names of plaintiffs as A. S. & Son, conforming in such respect to the caption of the judgment, defendant's contention that the execution was void and untenable. *Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441.

When the judgment is in the name of A., as guardian of B., and after a levy and forthcoming bond, on a fi. fa. pursuing the judgment, another fi. fa. is issued on the bond, in the name of B., by his guardian, A., the last execution is irregular, because of the change of plaintiffs, and should be quashed on motion. *Smith v. Knight*, 11 Ala. 618.

In an action brought in the name of C. & Co. as plaintiffs, an execution issued in favor of C. individually upon a judgment in favor of C. & Co. is not void, where it appears that the names of the partners composing the firm were not set out in the proceeding. *Couch v. Atkinson*, 32 Ala. 633.

When one of the two joint plaintiffs dies after the rendition of the judgment, and no entry of his death is made in court, an execution should be taken out in the name of both the plaintiffs, so that it may conform to the judgment. *Stewart v. Cunningham*, 22 Ala. 626.

§ 55. Recital of Judgment.

An execution properly recites the date of the original judgment as the date of the rendition of the judgment on which it was issued, notwithstanding the subsequent amendment of that judgment nunc pro tunc. *Carter v. Smith*, 142 Ala. 414, 38 So. 184.

Where a judgment by confession was described in the execution as being rendered for "the nonperformance of a certain promise and assumption," the variance was held immaterial. *McMahan v. Colclough*, 2 Ala. 68.

§ 56. Statement of Amount.

Sufficiency of Writ.—Under Code, § 1883, providing that on every execution the clerk must state the several items composing the bill of costs, and that without such copy of the bill of costs the execution is illegal, where, after two executions have been issued and returned unsatisfied, a third is issued, on which the clerk's and sheriff's fees on the prior executions are stated in gross, and not itemized, the execution is void, and will not support a levy. *Marks v. Wood*, 133 Ala. 533, 31 So. 978.

Code, § 1883, provides that "at the foot or on some part of the execution, the clerk must state * * * the several items composing the bill of costs; and without such copy of the bill of costs the execution is illegal." Held that, as there was no law requiring any officer of the circuit court to keep an itemized account of costs accruing in cases appealed from a justice's court, an execution issued out of a circuit court in a cause appealed from a justice was not vitiated by the fact that, among the items of costs indorsed thereon, the justice's fees were shown only by a statement of their gross amount. *Griffin v. Dauphin*, 133 Ala. 543, 31 So. 849.

Under Code, § 4144, providing that, when property for which a claim bond has been executed is not delivered to the sheriff after judgment has been obtained against it, execution shall issue for the amount of the judgment, if that be less than the assessed value of the property, or for the assessed value, if that is not greater than the amount of the judgment, an execution for the assessed value of the property when it is delivered is erroneous,

and should be superseded. *Alabama G. S. R. Co. v. Queen City Electric Light Co.*, 121 Ala. 300, 25 So. 824.

An execution stating the aggregate of the witness fees, without the names of the witnesses and the fees allowed to each, or without itemizing the several fees of the clerk or sheriff, is void, since it failed to state "the several items composing the bill of costs," as required by Code 1886, § 2885. *Maxwell v. Pounds*, 116 Ala. 551, 23 So. 730.

An execution issued on a forfeited claim bond should, under Code, §§ 3215, 3290, 3291, 3344, be for the assessed value of the property replevied by the claimant, not exceeding the amount of plaintiff's judgment, damages, and costs, save when the property is replevied by a defendant, when it may be for the whole amount of the judgment and costs. *Maas v. Long*, 70 Ala. 237.

Construing in *pari materia* the several statutes relating to summary judgments and executions on forfeited replevy and claim bonds (Code, §§ 3215, 3290-91, 3344), the court holds, that when a claim is interposed by a stranger, and bond given to try the right to property on which an attachment has been levied, and the claim suit is decided against the claimant, and the bond returned forfeited, the execution against the obligors should be, as when similar proceedings are had in reference to property on which an execution has been levied, for the assessed value of the property, but not exceeding the amount of the plaintiff's judgment, together with the damages and costs; and that execution on a forfeited bond issues for the whole amount of the judgment and costs, without regard to the assessed value of the property, only when the property levied on is replevied by the defendant in execution or attachment. *Maas v. Long*, 70 Ala. 237.

Where a certified transcript of a judgment is for \$752.78, and the certified copy of the execution issued thereon is for \$752, the variance between the amount of the judgment and the amount specified in the execution is so slight as to be immaterial, and does not preclude the introduction in evidence of such certified copy of the execution. *Clements v. Pearce*, 63 Ala. 284.

§ 57. Conformity to Judgment.

An execution should be received in evidence to support a sale under it after levy, though it varies in some respects from the judgment, where it appears from the whole writ, and other facts, that it was enforced as an execution on such judgment. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

The execution docket of the clerk is admissible to identify a judgment, and to connect with it an execution issued thereon. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

§ 58. Command to Levy and Make Amount.

Code 1896, § 1372, allows thirty cents for entering any order of court, and an item of the cost bill stated upon an execution was, "Orders of court, thirty cents." Held, that it was obvious that the word "order" was intended, and the execution was not invalid on the ground that the bill of costs was not itemized as required by § 1883. *Simmons v. Sharpe*, 148 Ala. 217, 42 So. 441.

Where the order of court is that the sheriff "be commanded to sell," and by the venditioni exponas he is "commanded to cause to be made of the lands," etc., there is no variance; the legal effect of the terms employed in the order and writ being identical. *Allen v. Best*, 6 Ala. 234.

Quære will a purchaser at a sheriff's sale be affected by a variance between the venditioni exponas, and the order under which it issued, if the writ is not void. *Allen v. Best*, 6 Ala. 234.

§ 59. Directions as to Property to Be Taken.

§ 60. — In General.

Where an execution issues against A., who is described as the administrator of B., but the sheriff is required to levy upon the goods and chattels, lands, and tenements of A., the property of A. may be taken into execution. *Averett v. Thompson*, 15 Ala. 678.

§ 61. Directions for Return.

In General.—A writ of execution should be made returnable to the term of the court next succeeding its teste when issued more than fifteen days previous to the return of the next succeeding term; but

if issued when there is a less number of days, it should then be made returnable to the next succeeding term thereafter. *Harrell v. Martin, etc., Co.*, 4 Ala. 650.

An execution, made returnable at a date more distant than prescribed by the statute, may be enforced within the time at which it might properly have been made returnable. *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810, 811. See *Wofford v. Robinson*, 7 Ala. 489.

Specific Application of Rule.—An execution issued more than fifteen days before the next term thereafter should be made returnable to that term, or it will be quashed. *Harrell v. Martin*, 4 Ala. 650.

An execution issued on a decree of the orphans' court, which is not made returnable to a regular term of the county court, is void, and should be quashed on motion. *Powell v. Summers*, 17 Ala. 647.

An execution from the chancery court is required by Rev. Code, § 3478, to be made returnable on the first Monday in some month, and the day must be specified in the writ; and, if the day specified is beyond the next term of the court, this does not render the execution void. *Brevard v. Jones*, 50 Ala. 221.

An execution issuing from the orphans' court for the collection of money should be made returnable to the regular semi-annual term of the county court proper, if there are fifteen days between the commencement of the term and the teste of the writ; if not, then to the next succeeding term of the county court. *Graham v. Chandler*, 12 Ala. 829.

Such an execution, when issued, has the same attributes as an execution issued on a judgment at common law, must be executed in the same mode, and may be enforced in the same manner. *Graham v. Chandler*, 12 Ala. 829.

§ 62. Indorsements.

Construction of Statutory Provision.—Code 1896, § 1883, making executions illegal where the "clerk" fails to indorse thereon the items composing the bill of costs, does not of itself apply to executions issued by registers of chancery courts, and is not made to so apply by § 857, providing that all writs for the collection of money, or to obtain possession of land or personal property, in use in the

common-law courts, are to be adapted to the execution of decrees in chancery courts, since § 857 was adopted over thirty years before the penal effect of § 1883 was adopted, and since such a statute as § 1883 can not be extended in application by implication, or by a construction of dubious support in legislative purpose to conditions not clearly within its purviews. *Francis v. Sheats*, 153 Ala. 468, 45 So. 241.

Act 1807, § 8, which requires the sheriff to indorse upon an execution the day of its receipt, is merely directory, and his neglect to do so can not prejudice the plaintiff; the time of delivery may be proved in any other way. *Hester v. Keith*, 1 Ala. 316.

Application of Statute.—Where it is material to show that executions were in the sheriff's hands, it is admissible to prove that indorsements thereon acknowledging their receipt are in the handwriting of a sheriff who has since died. *Stewart v. Conner*, 9 Ala. 803.

Where a judgment is obtained in a suit commenced by attachment, the plaintiff may, at his election, take out a venditioni exponas for the sale of the property attached, or he may sue out an ordinary *fi. fa.* In the latter case it would be proper for the clerk to indorse on the writ a description of the property attached, and of the persons by whom it was replevied, that the sheriff might demand the property seized by the attachment, and, if not delivered, return the bond forfeited. If the property attached is not delivered, or is insufficient to satisfy the judgment, it would be the duty of the sheriff to levy on other property. *Garey v. Hines*, 8 Ala. 837.

Unauthorized indorsements made on an execution by the clerk issuing the same are surplusage, and may be stricken out on motion, but do not affect the validity of the execution. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

It is no objection to the admission of an execution under which a sale was made that the indorsement as to the date of a levy found thereon does not correspond with the sheriff's deed. *Driver v. Spence*, 1 Ala. 540.

"And in *Hester v. Keith*, 1 Ala. 316, it was held, that the act in requiring the

indorsement of the reception of an execution, must be regarded as directory, and its nonobservance by an officer in whose hands an execution is placed, can not prejudice a plaintiff. The lien attaches as soon as the execution is received, and the noting upon it the day of the receipt is only intended to evidence the fact; and it is competent to show the time of the delivery by extrinsic proof." *McMahan v. Green*, 12 Ala. 71, 73.

§ 63. Delivery to and Receipt by Sheriff.

As to proof of delivery of execution to sheriff by memorandum on execution docket and oath of clerk, see the title EVIDENCE.

§ 64. Amendment.

In General.—"If the clerk, by mistake, should teste the writ improperly or the date should be afterwards altered, the court has the power to correct it." *Harrell v. Martin, etc., Co.*, 6 Ala. 587, 588.

The courts, in virtue of their power over process issued by them, or their officers, without the aid of legislation, may amend an execution by striking therefrom the name of a person who is improperly joined as a defendant with several others, without impairing its validity as to those against whom it should have issued. *Cawthorn v. Knight*, 11 Ala. 579.

An execution is not an absolute nullity for a variance from the judgment on which it issued, but may be amended so as to conform to the judgment. *McCollum v. Hubbert*, 13 Ala. 282.

An execution issued on a void delivery bond against the defendants in the judgment and their surety on the bond, if it correctly describes the judgment, by its date, amount, and names of parties, is neither void nor voidable as to the defendants in the judgment, but may be amended by striking out the name of their surety on the bond. *DeLoach v. State Bank*, 27 Ala. 437.

A difference in the amount of damages which a first and second execution recite that plaintiff recovered is a clerical error, amendable in the court issuing the same. *Sheppard v. Melloy*, 12 Ala. 561.

Where an excessive execution is issued, and motion is made to quash the same, the record, if it shows the error, furnishes

the only proper data for its correction, and it is the duty of the court, of its own motion, to direct an amendment and overrule the motion. *Sheppard v. Melloy*, 12 Ala. 561.

Where an execution on its face is returnable at a time anterior to the term to which by the law it should have been made returnable, it may be amended. *Forward v. Marsh*, 18 Ala. 645.

The courts, in virtue of their power over process issued by them or their officers, without the aid of legislation, may amend an execution, by striking therefrom the name of a person who is improperly joined as a defendant with several others, without impairing its validity as to those against whom it should have issued. *Cawthorn v. Knight*, 11 Ala. 579.

On motion to supersede and quash an execution, the execution may be amended by striking out the name of one of the defendants so as to make it conform to the judgment upon which it was issued. *Goodman v. Walker*, 38 Ala. 142.

The irregular execution of a fi. fa. may be corrected or avoided by a seasonable application to the court from which it issued. *Hubbert v. McCollum*, 6 Ala. 221.

Operation and Effect.—The amendment of an execution by striking out the name of a person not a party to the judgment, and which name had been improperly inserted in the execution, does not affect its lien. *Andress v. Roberts*, 18 Ala. 387.

Evidence.—Evidence is admissible to show when in fact an execution issued, either by proving that the clerk made a mistake in the teste of the writ, or that it has subsequently been altered. *Harrell v. Martin, etc., Co.*, 6 Ala. 587.

§ 65. Renewal and Reissue.

As to alias and pluries writs, see post, "Alias and Pluries Writs," § 66.

§ 66. Alias and Pluries Writs.

As to issuance of alias and pluries writs of execution by justices of the peace, see the title JUSTICES OF THE PEACE.

Right to Writ.—A party may take out a second execution before the return of the first, at his own cost. *Fryer v. Dennis*, 3 Ala. 254.

Plaintiff may, by statute (*Aik. Dig.* 159), have a second writ of execution, at

his own cost and charges, if the first writ be not returned and executed. *Webb v. Bumpass*, 9 Port. 201.

The return upon an execution, that "the defendant has the receipt of the plaintiff for the debt, costs, and interest in this case," is not a legal return, and will not prevent the issuing of an alias. *McKeagg v. Collehan*, 13 Ala. 828.

Where goods levied on are removed by the defendant, or by his permission or connivance, or are delivered to him under a forthcoming bond, which he forfeits, the plaintiff may have a new fi. fa. *Leach v. Williams*, 8 Ala. 759.

The forfeiture of a claim bond does not operate as a merger or satisfaction of the original judgment, nor does it deprive the plaintiff of the right to sue out an alias or pluries execution. *Patton v. Hamner*, 33 Ala. 307.

Where a fi. fa. de bonis testatoris is returned nulla bona on a default judgment against the estate, scire facias can not issue against the executors or administrators to show cause why execution de bonis propria should not issue. *Bank of Alabama v. Hooks*, 2 Port. 271.

Where goods levied on by a fi. fa. are removed by the defendant, or by his permission or connivance, so that they can not be sold under the execution or under a venditioni exponas, the plaintiff may take out a new execution. *Webb v. Bumpass*, 9 Port. 201.

Time of Issuance.—A sale of land under a pluries execution, issued since the war on a judgment rendered during the war, is valid, and will pass the title of the defendant in execution. *Parks v. Coffey*, 52 Ala. 32.

Where an execution has been sued out within a year after rendition of judgment, and returned nulla bona, it is not irregular to issue another after a lapse of eight years. *Scull v. Godbolt*, 4 Ala. 320.

Order or Leave of Court.—Where an execution has been returned "Satisfied," the clerk can not, on the ground of mistake, issue a new execution, without the action of the court being first had thereon. *Harkins v. Clemens*, 1 Port. 30.

Form, Requisites and Validity.—A discrepancy between the first and second

executions, as to the amount of costs, furnishes no ground for quashing the latter. *Sheppard v. Melloy*, 12 Ala. 561.

"According to our practice, the judgment is not rendered for any definite sum as costs, but merely that the successful party recover of the other his costs, which are afterwards to be taxed by the clerk of the court; and upon this taxation the execution issues. This being the case, where successive executions issue upon the same judgment, the last must of course require the collection of a larger amount of costs than the first—these are increased according to the magnitude of the debt or damages required to be made, or the service performed by him to whom the execution was entrusted. So that the judgment in respect to the amount of the costs is not fixed, but changes with each renewal of the execution—opening to receive the addition. If the execution requires more costs to be collected than the defendant is liable to pay, it is not for that cause voidable in other respects. It has accordingly been held, and may be considered the settled law in this state, that when too much costs be taxed on an execution, it will not be quashed, but they will be retaxed on motion." *Sheppard v. Melloy*, 12 Ala. 561, 564.

Where a defendant in execution proceedings has no property subject to the process, and the officer returns the writ prior to the return day, when such return is made in good faith, subsequent writs and proceedings based upon it are not void, but at most voidable. *Berry v. Perry*, 81 Ala. 103, 1 So. 118.

Presumption as to Issuance of a Previous Execution.—Where land is sold under an alias execution, and no objection to its irregularity is made in the court below, it will be presumed that a previous execution was regularly issued. *Pollard v. Cocke*, 19 Ala. 188.

Evidence.—In an action by the purchaser, for property sold under a second execution, such execution may be received in evidence, although the sheriff has in his hands a venditioni exponas, directing the sale of property levied on under the first execution. *Webb v. Bumpass*, 9 Port. 201. See the title EVIDENCE.

§ 67. Variance.

Parol evidence is admissible to explain any immaterial variance between an execution and the judgment on which it was issued. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777. See the title EVIDENCE.

§ 68. Defects, Objections, and Waiver.

An execution issued upon a satisfied judgment, such satisfaction not having been entered upon the record, is voidable only, and not void. *Boren v. McGehee*, 6 Port. 432.

When there are less than fifteen days between the teste and return day of an execution, the writ is not absolutely void, but voidable only, and, until quashed or set aside, is as effectual to create or continue a lien as if it were free from irregularity. *Brown v. Hurt*, 31 Ala. 146.

Entering into bond for the forthcoming of property levied on in execution, is not a waiver of previous irregularities. *Page v. Coleman*, 9 Port. 275.

"At common law, if an execution issued on a judgment that had been paid or satisfied, or the defendant had any good legal reason why the execution should not be enforced against him, the writ of *audita querela* was the proper remedy by which he could bring his defense before the court and obtain relief. 1 Bacon's Ab. 307; 3 Black. Com. 405. This writ was the commencement of a suit by the defendant against the plaintiff in the original judgment, in which the defendant regularly declared, setting forth the grounds of his defense to the original judgment and execution. To this declaration the plaintiff in the judgment was required to plead or demur, and thus the issues were presented to the court in the same manner that issues of fact or law are made up in ordinary suits. See the form of the pleadings in *Turner v. Davis*, 2 Saunders' Rep. 365. This writ, however, has gone out of use, and in lieu of it a summary jurisdiction is exercised by the common-law courts, by granting relief on motion and staying proceedings in vacation by the order of a judge. By statute in this state, the judges have power to grant writs of supersedeas in vacation, when it shall appear that the execution has improperly issued. This is done by petition, setting forth the facts

on which the defendant relies as the grounds for superseding the execution. When the writ is issued by the order of the judge it must be considered in the nature of a suit. *Shearer v. Boyd*, 10 Ala. 279. And the parties must proceed to make up the issues and present the questions in controversy to the court by pleading, in the same manner required in a common suit. As the petition, however, states the facts on which the defendant relies, this, under our practice, is properly considered as the declaration that would have been required of the defendant in the judgment at the common law, and to this the plaintiff may plead or demur, as his defense may require, or he may see proper." *Edwards v. Lewis*, 16 Ala. 813, 815.

§ 69. Presumption of Validity.

On a trial of right of property levied on, the burden is on the plaintiff in the process to show that the execution is valid. *Brightman v. Meriwether*, 121 Ala. 602, 25 So. 994.

IV. LIEN, LEVY OR EXTENT, AND CUSTODY OF PROPERTY.

As to defects affecting title of purchaser at sale, see post, "Effect of Defects or Irregularities in Execution, Levy, or Sale," § 193. As to wrongful or excessive levy as ground of action for damages, see post, "Wrongful or Excessive Levy," § 273. As to duties of officers in general, see the titles SHERIFFS AND CONSTABLES. As to levy on exempt property, see the titles EXEMPTIONS; HOMESTEAD. As to effect of debtor's bankruptcy, see the title BANKRUPTCY. As to effect of insolvency of debtor, see the title INSOLVENCY. As to fees of officers for levy and return, see the title SHERIFFS AND CONSTABLES. As to levy and lien in justice's court, see the title JUSTICES OF THE PEACE. As to liabilities of officer for acts in connection with levy, see the title SHERIFFS AND CONSTABLES. As to mandamus to compel levy, see the title MANDAMUS. As to rights of execution creditor in foreclosure proceedings, see the title MORTGAGES. As to service or levy of distress warrant, see the title LANDLORD AND TENANT.

§ 70. Nature of Lien.

"The lien of an execution does not vest in the judgment creditor either a *jus in re*, or a *jus ad rem*. It is simply a right by law to charge the property of the judgment debtor which is subject to levy and sale, with the payment of the debt; operating as an incumbrance on it, of which all who subsequently deal with him must at their peril take notice. It is not unreasonable to compel them to take notice, as they are compelled to take notice of prior registered conveyances. An examination of the public records, in either case, will lead them to notice; and it is their own negligence, if they do not make it." *Thames & Co. v. Rembert*, 63 Ala. 561, 573.

"The lien of an execution,' says Mr. Freeman, 'does not transfer title. It does not change the right of property, and vest it at once in the plaintiff in execution, nor in the officer charged with the execution of the writ. It confers, however, the right to levy on the property to the exclusion of all transfers and liens made by the defendant subsequent to commencement of the execution lien. When the levy and sale are made, the title relates back to the inception of the lien, and thus takes precedence over all transfers and encumbrances made subsequently to such inception.' 1 *Freem. Ex'ns*, § 195; *Sawyer v. Ware*, 36 Ala. 675, 682; *Thames & Co. v. Rembert*, 63 Ala. 561, 573; *Watson v. Steele*, 78 Ala. 361." *Street v. Duncan*, 117 Ala. 571, 23 So. 523.

"In the absence of a statute, an officer levying an execution on personal property acquires a right of possession and a special property. This right of possession and special property and the duration of the lien after the return-day confer on the officer making the levy authority, notwithstanding the return-day may have passed, to sell the property. *Ryan v. Couch*, 66 Ala. 244; *Bondurant v. Buford*, 1 Ala. 359; *Freem. Ex'ns*, § 58." *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810, 811.

§ 71. Creation and Existence of Lien.

§ 72. — In General.

"The statute for the registration of judgments and making them a lien on property of defendants therein, adopted

February 28, 1887, provides, that 'every judgment or decree, so filed and registered shall be a lien upon all the property of the defendant in such county, which is subject to levy and sale under execution; and such lien shall continue for ten years from the date of such registration.' Code 1886, p. 635, note. Before this statute was enacted, a writ of *fieri facias* was a lien within the county in which it was received by the officer authorized to execute it, on the property of defendant subject to levy and sale, from the time only that the writ was received by such officer, which lien was continued as long as the writ was regularly issued and delivered to such officer, without the lapse of an entire term. Code 1886, § 2894. This section was not repealed by said act of 1887, but still of force, so that a plaintiff may acquire and keep in force his lien on the defendant's property in the county by issuing execution on his judgment and keeping it alive in the manner prescribed by said § 2894 of the Code of 1886, or he may omit this, and by recording his judgment in the manner prescribed by said act of 1887, may accomplish the same result. The record of such judgment gives the plaintiff therein the right to enforce the same by an execution issued thereon, at any time within ten years, just in the same manner and to the same extent as if executions had been regularly issued on the judgment without the lapse of a term, up to that time. The recorded judgment was intended, as we have held, to have the effect of an execution in the hands of the sheriff, 'as an instrumentality of creating and preserving a lien.'" *Street v. Duncan*, 117 Ala. 571, 23 So. 523. See *Reynolds v. Collier*, 103 Ala. 245, 15 So. 603; *Enslin v. Wheeler*, 98 Ala. 200, 13 So. 473; *Decatur, etc., Chemical Works v. Moses*, 89 Ala. 538, 7 So. 637.

By the issuance of execution on a justice's judgment, levy on lands, and return of papers to the circuit court, and application for an order of sale, no lien is created until order of sale is granted. *Dickerson v. Carroll*, 76 Ala. 377.

The delivery of an execution to a bank marshal, appointed under the act of 1843, while that act was in force, created a lien on the goods of defendant. *Andress v. Roberts*, 18 Ala. 387.

§ 73. — As Dependent on Levy.

Aik. Dig., p. 165, § 36, providing that a writ of execution shall bind the goods and chattels against which the writ is sued forth from the time it is placed in the hands of the officer, does not extend the lien to chattels in another county, in which case actual levy is necessary to create the lien. *Pond v. Griffin*, 1 Ala. 678.

An execution in the hands of the sheriff is not a lien on the ungathered crop of defendant. *Evans v. Lamar*, 21 Ala. 333, cited in note in 23 L. R. A. 261.

"An unlevied execution can create a lien only on property in the county where it is received by the officer authorized to execute it. Code, § 1892." *Jordan v. Nashville, etc., R. Co.*, 131 Ala. 219, 31 So. 566.

"While it may be conceded that an ungathered crop is regarded as the chattel of the person who owns it, and, by the common law, is subject to be levied upon and sold under execution for the payment of his debts; yet the legislature of this state has, by special enactment, exempted such property from levy and sale under execution. Clay's Dig., 210, § 46." *Evans v. Lamar*, 21 Ala. 333, 335.

§ 74. Commencement of Lien.

In General.—An execution creates a lien on the personal property of the judgment debtor within the body of the county to which it runs, from the date of its receipt by the sheriff. *Newcombe v. Leavitt*, 22 Ala. 631; *Andress v. Roberts*, 18 Ala. 387; *Walker v. Elledge*, 65 Ala. 51; *Hendon v. White*, 52 Ala. 597; *Bondurant v. Buford*, 1 Ala. 359; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85; *Alabama Gold Life Ins. Co. v. McCreary*, 65 Ala. 127; *King v. Kenan*, 38 Ala. 63. See *Hester v. Keith*, 1 Ala. 316; *Wood v. Gary*, 5 Ala. 43.

"The fieri facias is declared a lien only within the county in which it is received by the officer, on the lands and personal property of the defendant, subject to levy and sale, from the day it is received by the sheriff." *Hendon v. White*, 52 Ala. 597, 601.

An execution is a lien on the property of the defendant, from the time it is received by the sheriff, although he may not

have indorsed his receipt on it, nor entered it on his docket. *Childs v. Jones & Co.*, 60 Ala. 352.

An execution regularly renewed from term to term, and kept in the hands of the sheriff, is a lien on the personal property of the judgment debtor within the county from the time it was first placed in the hands of the sheriff. *King v. Kenan*, 38 Ala. 63.

Code, § 2456, making a judgment a lien on the real estate of the debtor only from the time of the delivery of an execution to the sheriff, applies to judgments rendered before its adoption. *Daily v. Burke*, 28 Ala. 328; *Curry v. Landers*, 35 Ala. 280. See *Iverson v. Shorter*, 9 Ala. 713; *Beck v. Burnett*, 22 Ala. 822; *Bugbee v. Howard*, 32 Ala. 713.

Fieri Facias Issued from Court of Probate.—"As to the lien, there has been no distinction, and there is no room for a distinction, between writs of fieri facias issued from the court of probate, and such writs issued from courts of law; they stand upon an equality. The lien of an execution, by which is intended a fieri facias, is operative upon, and binds all property, real or personal, which is the subject of levy and sale in obedience to its mandate; and, of consequence, it is sometimes termed a general lien, to distinguish it from liens which operate only on specific or particular property. And the lien operates and binds, not only the property subject to its mandate, which is in the possession of the defendant, or the title to which stands in his name; but it operates equally on all such property, with the title to which he has parted for the purpose of hindering, delaying, and defrauding his creditors, until there is the coming in of a bona fide purchaser, without notice, and for a valuable consideration, from the fraudulent grantee or donee having possession. The conveyance or transfer of the property, though it may be valid between the parties, is invalid—it is void—as to creditors. And creditors may disregard it entirely, and proceed to levy and sell the property under legal process; or they may proceed, in a court of equity, to remove the conveyance or transfer as an obstacle to the advantageous enforcement of their legal rights. Whichever is the remedy they elect to

pursue, it is but a remedy for the enforcement of the lien of the *fieri facias*. *Freeman on Executions*, §§ 136, 430; *Carter v. Castleberry*, 5 Ala. 277; *Dargan v. Waring*, 11 Ala. 988." *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, 88.

Lien on Growing Crops.—By the common law, which is now unaffected by statutory provisions in this state, an execution is a lien on a growing crop from the time of its delivery to the sheriff. *McKenzie v. Lampley*, 31 Ala. 526, cited on this point in note in 23 L. R. A. 258.

§ 75. Property or Interests Affected, and Extent of Lien.

Territorial Extent.—The lien of a *fi. fa.* extends only to the goods and chattels of defendant in the county to which it is issued. *Pond v. Griffin*, 1 Ala. 678.

"All writs of *fieri facias*, issuing from a court of record, are a lien on the lands and personal property of the defendant, subject to levy and sale, within the county of the sheriff to whom it is delivered for execution." *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, 88. See *Hendon v. White*, 52 Ala. 597, 601; *McMahan v. Green*, 12 Ala. 71, 73; *Spyker v. Spence*, 3 Ala. 333, 338.

The delivery of an execution to a bank marshal appointed under act 1843 created a lien on the goods of defendant coextensive with the limits of the state. *Andress v. Roberts*, 18 Ala. 387.

Real Property and Interests Therein.—Under St. 1821, prohibiting a levy on a crop until it has been gathered, no lien attaches in favor of a *fi. fa.* on a growing crop, nor does such lien attach until after the crop has been gathered. *Adams v. Tanner*, 5 Ala. 740.

§ 76. Priorities between Executions.

As to distribution of proceeds among different judgments or executions, see post, "Distribution among Different Judgments or Executions," § 231. As to satisfaction, see post, "Levy on Personal Property," § 250.

In General.—Where different creditors claim a priority of lien for their respective executions, and one of them moves against the sheriff and his sureties, so as to coerce an appropriation of the money to the satisfaction of his *fi. fa.* although the other creditor may have the prior

lien, yet the party submitting the motion is entitled to a judgment for the excess of money in the sheriff's hands. But, if the plaintiff in such case has returned the facts specially to the court, and asked its direction thereupon, he will be relieved from the payment of damages and interest. *Wood v. Gary*, 5 Ala. 43.

When personal property of the defendant in execution is brought into the county after executions of different judgment creditors have come to the sheriff's hands against such defendant, the eldest judgment creditor who has preserved his lien will have the prior right. *Wood v. Gary*, 5 Ala. 43.

An alias execution issued after the lapse of an entire term, after the original, coming in conflict with the execution of a junior judgment creditor, which had come to the sheriff's hands during such interval, will be postponed to the latter. *Hobson v. Kissam & Co.*, 8 Ala. 357. See *Wood v. Gary*, 5 Ala. 43, 50.

A. and B. were obligors on a bond given on claiming property levied on by a sheriff, and, on the property being found subject to the execution, they paid the judgment obtained against their surety, and afterwards, when the same property was again levied on under other executions, procured the issuance and levy of an execution on the judgment on which right of property had been tried, and the property was sold under all of the executions. Held, that the proceeds of the sale should be first applied to the benefit of the execution paid by A. and B. *Mills v. Williams*, 2 Stew. & P. 390.

As Affected by Date of Judgment.—When an execution is levied on the lands of defendant, and before the sale another execution issued on an older judgment comes to the hands of the sheriff, plaintiff in the senior judgment is entitled to the proceeds of the sale. *Bagby v. Reeves*, 20 Ala. 427.

As Affected by Delivery of Writ to Officer.—The lien of an execution does not depend on contract, but is given by law, and imports to the holder the right of satisfaction, in preference to one that has subsequently gone into the sheriff's hands. *Bell v. King*, 8 Port. 147.

In a contest between execution creditors, it appeared that an original alias and pluries *fi. fa.* had regularly issued on de-

defendant's judgment, the last of which was placed in the sheriff's hands before the original fi. fa. in favor of plaintiff issued. Held, that no question could arise as to the dormancy of defendant's first fi. fa., as between him and plaintiff, as his subsequent executions, which were regularly proceeded in, were entitled to priority of plaintiffs. *Leach v. Williams*, 8 Ala. 759.

As Affected by Date of Levy or Seizure.

—Where, judgments having been rendered on the same day, there is no priority of lien between them, but one judgment creditor causes execution to be issued on his judgment and a levy made thereunder, he is entitled to priority of satisfaction, though before the sale the other judgment creditor places his execution in the hands of the sheriff. *Bliss v. Watkins*, 16 Ala. 229.

Where a plaintiff neglects to sue out execution from term to term, an execution on a subsequent judgment, sued out during such neglect, will acquire a preference. *McBroom v. Rives*, 1 Stew. 72.

As Affected by Diligence or Indulgence.

—The sheriff should levy a fi. fa. on a sufficiency of defendant's property, if to be found, to satisfy it; but the mere omission of the sheriff to do his duty in this respect will not postpone an elder to a junior fi. fa. at the suit of another party. *Leach v. Williams*, 8 Ala. 759.

If a judgment creditor fail to continue his lien on defendant's property by suing out executions returnable to successive terms, he can not complain of another more vigilant creditor, who, by an attachment under circumstances warranting it, may acquire a preference. *Cary v. Gregg*, 3 Stew. 433.

The most salient feature of the various statutes relating to liens of competing executions is, that the older lien is lost, in all cases, by permitting "the lapse of an entire term" of the court without issue of the execution upon which such lien is founded and is delivered to the sheriff. *Lancaster v. Jordan*, 78 Ala. 197.

Since the adoption of Code 1852, declaring the order of liens of executions, a junior judgment creditor who has kept his judgment alive by issuing executions from term to term is entitled to priority over senior judgment creditors who have suffered an entire term to elapse without

the issue of an execution, though they may have executions in the hands of the sheriff when a sale is made under the junior judgment. *Toney v. Wilson*, 51 Ala. 499.

The neglect of plaintiff in a judgment to sue out execution from term to term, after the return of the original fi. fa., will postpone his lien to a junior judgment creditor, who has instituted a suit in equity to subject the real estate of their debtor to the satisfaction of his judgment. *Dargan v. Waring*, 11 Ala. 988.

Where an execution is placed in the hands of a sheriff with instructions not to sell, or not to sell until further orders, it is not in his hands for any effective legal purpose, and its lien is postponed to that of any subsequent execution creditor who establishes his lien while the older execution is thus kept dormant. The attempt to preserve a lien by such method is a constructive fraud on creditors and subsequent purchasers. *Alabama Gold Life Ins. Co. v. McCreary*, 65 Ala. 127, cited on this point in note in 27 L. R. A. 379.

The remark of plaintiff in a fi. fa. to the sheriff that he would do nothing that could affect his lien, nor must he (the sheriff) do anything that would cause him to lose it, but, if he failed to make the money by a sale of property, he would not rule him, will make the fi. fa. dormant and inoperative, if the sheriff failed to proceed thereon, unless plaintiff intended to assent to and approve the delay, with the view of aiding defendants or protecting their property. *Leach v. Williams*, 8 Ala. 759.

The sheriff, by order of the attorney of plaintiff, returned an execution by mistake a week too soon, and an alias was not issued until after an execution of a junior judgment creditor had been issued and levied on the property of defendant. Held, that as it did not appear that the execution was returned, or its reissuance delayed, for the purpose of favoring defendant in execution, and as a term had not elapsed between the return and the issuance of the alias, the prior execution had not lost its lien. *Johnson v. Williams*, 8 Ala. 529.

"Our decisions have settled that mere passiveness on the part of a senior judgment or execution creditor—mere delay

in the enforcement of his lien—will not impair it, and postpone him to a junior execution creditor, if at the time of sale under the junior execution, he has execution in continuance of the lien originally attaching in the hands of the sheriff. 1 Brick Dig. 899, § 140." *Burnham & Co. v. Martin*, 54 Ala. 189, 190.

Where an execution issued on a senior judgment is held up at the instance of the judgment creditor, the action is fraudulent as to junior judgment creditors, and the priority of the execution is destroyed as to executions issued upon such junior judgments and levied before a second execution is levied on the senior judgment. *Patten v. Hayter*, 15 Ala. 18.

The interference of a judgment creditor to delay the collection of a *fi. fa.* on his judgment after it comes into the hands of the sheriff, for the purpose of protecting his debtor, is fraudulent in law, and the effect, as to a junior execution, is as though no execution had issued, notwithstanding act 1807, providing that the goods of defendant shall be bound from the time the *fi. fa.* or other writ of execution shall be delivered to the sheriff "to be executed." *Wood v. Gary*, 5 Ala. 43. See *Burnham & Co. v. Martin*, 54 Ala. 189.

A writ of *fi. fa.* being returnable to the first Monday in April, the direction of the plaintiff to the sheriff on the 25th of March preceding, to return it, will not render it dormant, or impair its lien, as it respects an execution of a junior judgment creditor subsequently issued, unless such return was made when the execution might have been satisfied and with interest to favor the defendant in execution. *Wood v. Gary*, 5 Ala. 43.

If property levied on is directed by plaintiff to be left with defendant, to be forthcoming on the day of sale, this is a discharge of the lien as to junior judgments, although the property is not delivered. *Campbell v. Spence*, 4 Ala. 543.

Original and Alias Writs.—Under Code, § 3211, providing that if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before sale of the property under a junior execution, the lien of the first execution shall be preferred, if the alias is not delivered before sale under a junior execution, the

purchaser at such sale acquires a title superior to that of a purchaser at a subsequent sale under the senior execution. *Lancaster v. Jordan*, 78 Ala. 197.

Under the statute declaring the liens of executions, as between different judgment creditors, and between judgment creditors and purchasers from the defendant, "if an alias be sued out before the lapse of an entire term, and delivered to the sheriff before the sale of the property under a junior execution, the lien created by the delivery of the first execution must be preferred" (Code, § 3211); and by necessary implication, if the alias is not delivered to the sheriff before the sale under the junior execution, the lien of the junior execution must be preferred, and the purchaser at the sale under it acquires a superior title to a purchaser at a subsequent sale under the senior execution. *Lancaster v. Jordan*, 78 Ala. 197.

When land is sold under a junior execution, and is afterwards sold under a senior execution having a prior lien, the purchaser at the latter sale would, irrespective of statutory regulations, acquire the superior title; but possibly a different rule would prevail in the case of personal property. *Lancaster v. Jordan*, 78 Ala. 197.

Where the sheriff is directed by plaintiff to return a *fi. fa.* before the date on which it is returnable, an alias sued out before the intervention of an entire term will continue the lien of the first execution, and overreach an execution issued on a junior judgment before such alias, if the alias comes to the sheriff's hands before a sale under the junior execution. *Wood v. Gary*, 5 Ala. 43.

Obligors in a bond given under act 1812, on alleging claim to property levied on by a sheriff, paid the judgment obtained against their surety, on the property having been found subject to the execution. When the same property was again levied on under other executions, they procured an execution on the judgment that had issued on which the right of property was tried, and levied it on the same property. Held, that the proceeds of the sale would be applied to the benefit of the execution paid off by them. *Mills v. Williams*, 2 Stew. & P. 390.

Writs from Different Courts or Jurisdictions.—An execution from the probate

court stands on the same footing as an execution from the chancery court, and neither possesses any superior dignity or preference over the other. *Lancaster v. Jordan*, 78 Ala. 197.

The lien of the executions in the hands of the sheriff is not divested by a subsequent levy and sale by a constable of defendant's effects. *Harrison v. Marshall*, 6 Port. 65.

Whilst an execution issued from the circuit court was in the sheriff's hands, a judgment was obtained against the defendant, and his property levied on and sold by a constable, under an execution issued thereon—held, that the lien created by the delivery of the execution to the sheriff was, under the act of 1828, divested by the levy of the constable. *Jones v. Davis*, 2 Ala. 730.

§ 77. Priorities between Executions and Other Liens or Claims.

As to enforcement of claims or liens prior or superior to execution, see post, "Claims or Liens Prior or Superior to Execution," § 121. As to rights of purchasers pending execution, see post, "Transfers of Property Pending or Subject to Execution," § 79. As to title of purchaser at sale as against prior liens, see post, "Liens or Incumbrances on Property," § 187. As to priority between execution and attachment liens, see the title ATTACHMENT. As to priority between execution and judgments, see the title JUDGMENT. As to priority between execution and lien for rent, see the title LANDLORD AND TENANT. As to priority between execution and mechanics' liens, see the title MECHANICS' LIENS. As to priority between execution and laborer's lien, see the title MASTER AND SERVANT. As to priority between execution and mortgage, see the titles CHATTEL MORTGAGES; MORTGAGES. As to priority between execution and vendor's lien, see the title VENDOR AND PURCHASER. As to effect of appointment of receiver, see the title RECEIVERS. As to assignments for benefit of creditors, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS.

Incumbrances in General.—Although the interest of one tenant in common in lands may be sold under execution against

him (Code, § 3209), before the time has arrived at which a division may be had under the provisions of the instrument creating the estate, the purchaser at the sale, while acquiring the interest of the defendant in execution, takes it subject to any lawful charge or incumbrance existing upon or against it by the terms of that instrument. *Hill v. Jones*, 65 Ala. 214.

An execution purchaser of real estate takes the property subject to a lawful charge for the education of a child of a former owner existing against the property. *Hill v. Jones*, 65 Ala. 214.

Attachments.—When an alias fi. fa. issues, followed up, without the lapse of a term, by a pluries execution, under which a sale is made, the purchaser's title is superior to the lien of a creditor who attached the land in the interval elapsing between the issue of the alias fi. fa. and the sale under the pluries execution. *Parks v. Coffey*, 52 Ala. 32.

Equitable Claims.—An equitable title to land will prevail against the creditors of one having the naked legal title, as also against the purchasers of the land at a sale on execution against the holder of such legal title. *Morgan v. Morgan*, 3 Stew. 383.

An indebtedness accruing from a husband to his wife on account of her separate estate does not create a specific lien on his property, and can not, therefore, be preferred in payment to debts due by him to third persons who have acquired liens on such property by judgment and execution. *Betts v. Betts*, 18 Ala. 787.

A simple contract creditor, proceeding under the statute in a court of equity to have vacated and set aside fraudulent conveyances or transfers of property subject to execution at law, does not thereby acquire a preference over a judgment creditor who has a prior lien under an execution duly issued, and in the hands of the sheriff at the time of the filing of the bill. *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85.

A vendor's lien on land for unpaid purchase money, where he has executed a conveyance to the purchaser, reciting therein the payment of the purchase money, is a parol trust in lands arising by implication of law, within the meaning

of the statute declaring such trusts void as against purchasers and creditors without notice (Code, § 2200); and it must prevail against the claim of a creditor who, having recovered a judgment before a justice of the peace, and had his execution levied on land in default of personal property, receives notice of the lien before he obtains an order for the sale of the lands, and afterwards purchases at his own sale. *Dickerson v. Carroll*, 76 Ala. 377.

§ 78. Proceedings for Determination of Priority.

Where a creditor has caused a levy to be made on property, which after the levy is claimed by a third person, and then the same property is again levied on by another creditor as belonging to the claimant, and after this the claimant collusively dismisses his claim, these circumstances will not invest a court of equity with jurisdiction of a suit by one creditor against the other to determine which of their debtors has the right of property. *Hendricks v. Chilton*, 8 Ala. 641.

§ 79. Transfers of Property Pending or Subject to Execution.

As to right of purchaser to maintain statutory proceeding for trial of right of property, see post, "Rights of Claimants of Property," § 122. As to transfers of homestead, see the title HOMESTEAD.

Sales and Conveyances in General.—A purchaser from the claimant pending trial of the claim suit acquires only the title which the claimant had, independently of his rights under the claim bond. *Spencer v. Godwin*, 30 Ala. 355.

A purchaser for valuable consideration without notice, and before levy, takes title superior to the lien of an execution. *Thames v. Rembert's Adm'r*, 63 Ala. 561.

A claimant may sell or transfer his title to the property as if no levy was made, so long as the property remains in the custody of the law, but subject to the question of right arising from the levy. *Atwood v. Pierson*, 9 Ala. 656.

The subsequent acknowledgment of an ineffectual conveyance to a voluntary grantee will not relate back to the signing and delivery of the deed, so as to prejudice the rights of execution creditors. *Hendon v. White*, 52 Ala. 597.

An execution lien may be enforced against the property even after its removal to another county, and sale to an innocent purchaser; and, where he has removed it from the state, he is liable to the lienor for its value to the extent of the lien. *Hamilton v. Phillips*, 120 Ala. 177, 24 So. 587.

"It is immaterial whether a judgment or execution lien is suspended, in a sense, as to property removed from the county, or not. Whether so or not, it is still a potential lien, and may be effectuated as against ad interim purchasers for value, without actual notice, through an execution sent to the county to which the property has been removed. *Street v. Duncan*, 117 Ala. 571, 23 So. 523." *Hamilton v. Phillips*, 120 Ala. 177, 24 So. 587, 588.

Unrecorded Deed.—Though a deed executed by defendant in execution to the claimant is admissible on the trial of the right of property against plaintiff in execution, even if it was not recorded within the time prescribed by law, yet the effect of such deed will depend on the fact whether it was recorded before plaintiff's lien attached, or whether he had notice of its existence. *Wallis v. Rhea*, 10 Ala. 451.

The lien of plaintiffs in execution is not affected by a sale of the property made by agreement between the mortgagor and the mortgagee after the levy, and before the law day. In such case plaintiffs would be entitled to recover the value of the hire of the property from the time of the sale until the law day, and to have an account taken of the value of the property on the law day. *Harbinson v. Harrell*, 19 Ala. 753.

The levy of an execution on a slave pending the trial of the right of property under a former levy against the same defendant is not void as against the purchaser from the claimant pending the trial of the claim suit. *Spencer v. Godwin*, 30 Ala. 355.

Under a verbal contract for the sale of an article to be manufactured by the seller, if the contract is within the statute of frauds, the title does not pass to the buyer until delivery; and, if a valid execution against the seller is in the

sheriff's hands in the interval between the manufacture and delivery of the article, the execution lien is superior to the buyer's title. *Sawyer v. Ware*, 36 Ala. 675.

Mortgages and Deeds of Trust.—Where the plaintiff, on valuable consideration, causes his execution in the hands of the sheriff to be held up for a specified time, he will be postponed to the lien of a mortgage attaching in the interval of such suspension. *Burnham & Co. v. Martin*, 54 Ala. 189, cited on this point in note in 27 L. R. A. 380.

Plaintiffs in execution are entitled to precedence over a stranger to whom, after the levy, the mortgagor has given an order on the mortgagee, which has been accepted by the latter, to be paid out of the surplus fund, after satisfying the mortgage debt. *Harbinson v. Harrell*, 19 Ala. 753.

A direction by plaintiff to the sheriff not to levy several executions successively issued will not render a subsequent execution, on which no such direction had been given, dormant, as against creditors of defendant claiming under a trust deed made after the last execution came to the sheriff's hands. *Branch Bank v. Robinson*, 5 Ala. 623.

Chattel Mortgages.—The lien of an execution which has been levied on personal property is lost, as against an intermediate mortgage, by an order to a sheriff to postpone the sale until after the return term of the execution, and to let the property remain in the possession of defendant without requiring bond. *Albertson v. Goldsby*, 28 Ala. 711.

Effect of Delay in Enforcing Execution Lien.—The discharge of a levy on account of plaintiff's failure to give a bond of indemnity when required by the sheriff destroys the lien on the property, and thus gives effect, as against a subsequent levy, to a deed executed by defendant while the execution was in the sheriff's hands, but before it was levied. *Cotten v. Thompson*, 25 Ala. 671.

Validity of Execution or Levy.—An instrument in form a deed, without subscribing witness or certificate of acknowledgment, given in consideration of the release of dower, creates an equita-

ble title, and will not be set aside in favor of the vendor therein, whose claim of title is founded on subsequent execution sales to which the vendee was not a party. *Caperton v. Hall*, 83 Ala. 171, 3 So. 234.

§ 80. Duration of Lien.

Delivery of Property.—Though goods be levied on by a subsequent execution, and delivered to a third person, who has interposed a claim and given bond, yet it will be competent to levy on the same by a *fieri facias*, the lien of which was first commenced, and still continues. But if the older execution is first levied and proceedings instituted to try the claim, a junior execution can not be levied on the same property. *Langdon & Co. v. Brumby*, 7 Ala. 53.

If the sheriff demand a bond of indemnity from plaintiff in execution, which is not given, he may deliver the property levied on to the person from whose possession he took it; but if he does not do so, but retains it, the lien of the execution continues. *Pickard v. Peters*, 3 Ala. 493.

Where, upon the refusal of the plaintiff in the senior execution to indemnify the sheriff, on his demand, the plaintiff in a junior execution gives the necessary bond, the levy of the senior execution is discharged, and the lien transferred to the younger execution. *Pickard v. Peters*, 3 Ala. 493.

Effect of Return or Expiration of Writ.—The lien of an execution is lost by the lapse of an entire term between the return of one execution and the issuance of another. *Walker v. Elledge*, 65 Ala. 51; *Hendon v. White*, 52 Ala. 597, 601; *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, 88.

The return of a sheriff on a writ of *fi. fa.* that "the property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that he has parted with the possession of it, and unless he returns the property to defendant in execution, or delivers it to the party claiming it, the lien of the execution continues. *Branch Bank v. McCollum*, 20 Ala. 280.

Necessity for, and Effect of, Alias or Other Writ.—Judgments do not operate as liens under our statutes; it requires execution in the hands of the sheriff to create a lien on either real or personal property, which lien will be lost if an entire term of the court—from one session to another—is permitted to elapse. A new execution in the hand of the sheriff, not a revivor of the last lien, is required to create a new lien of such character. *Gamble v. Fowler*, 58 Ala. 576.

A statute enacts that "the lien acquired by any execution issuing from certain courts in Mobile shall not be lost if alias executions issue to the sheriff without interval of more than ninety days." Held, that where an original execution was returned on the 14th of April, and an alias issued on the 14th of the next July, the lien was not lost; the court presuming that the alias issued precisely at the instant at which the 14th day of July commenced. *Lang v. Phillips*, 27 Ala. 311.

Where an original *fi. fa.* is returned unsatisfied, in order that its lien be preserved plaintiff must sue out an alias to the next term, and continue to renew the same from term to term; and, in event an alias is not sued out to each succeeding term, the lien created by the first writ is canceled. *Cary v. Gregg*, 3 Stew. 433.

While, under the statute, six months may be permitted to elapse between the issue and return of an execution from the probate court, a new execution must be issued before the lapse of the regular monthly term next succeeding the return term, or the lien of the execution will be lost. *Carlisle v. May*, 75 Ala. 502, cited on this point in note in 61 L. R. A. 379.

Where an execution issued from the probate court, returnable on the second Monday in December, 1882, was in the hands of the sheriff at the time of the death of the defendant in execution, in September, 1882, but no other execution was issued until 21st April, 1883, four entire terms of the probate court having been thus allowed to elapse without the issue of an execution, this operated a loss of the lien. *Carlisle v. May*, 75 Ala. 502.

Code, § 2894, provides that the lien of

a *fi. fa.* shall continue so long as the writ is regularly issued and delivered to the proper officer "without the lapse of an entire term." Held that, "an entire term" having elapsed before the execution of a mortgage, the lien of the execution was lost, and the issue of an alias execution after the execution of the mortgage will not restore the lien, so as to give priority over the mortgage. *Collier v. Wood*, 85 Ala. 91, 4 So. 840.

Where plaintiff suffers a term to elapse between the return of his first execution and the issuance and delivery to the sheriff of an alias, the lien of the first is lost, and a junior execution issued and delivered to the sheriff before the alias is sued out acquires a superior lien. *Branch Bank v. Broughton*, 15 Ala. 127.

The lien created by an execution is lost where an entire term of court elapses without placing an alias execution in the hands of the sheriff. *Gamble v. Fowler*, 58 Ala. 576.

Trial of Right of Property.—Pending a trial of the right of property in slaves levied on under *fi. fa.*, whether such trial be by action of detinue, or by claim suit under act 1812, the lien of plaintiff in execution continues, and its operation only is suspended. *Branch Bank v. McCollum*, 20 Ala. 280.

§ 81. Death of Debtor after Issue of Writ.

As to death of debtor before issuance of writ, see ante, "Rendition and Entry," § 4.

In General.—The death of defendant does not destroy the lien of an execution on his property so long as successive executions are issued without the lapse of an entire term. *Childs v. Jones*, 60 Ala. 352, cited on this point in note in 61 L. R. A. 379.

The word "defendant," in Code, § 2897, providing that an execution issued and received by the sheriff during the lifetime of the defendant may be levied after his death, includes the plaintiff in the judgment, where execution is issued against him under Code, § 2891, for the costs created by him in obtaining his judgment. *Hullett v. Hood*, 109 Ala. 345, 19 So. 419, cited on this point in note in 61 L. R. A. 381.

Though at common law an execution issued after the debtor's death is void, under Rev. Code, § 2875, if the sheriff receives an execution during the debtor's life, and levies it on his lands, they may be sold under an alias execution issued after the debtor's death without the lapse of an entire term, unless his estate has been declared insolvent. *Hurt v. Nave's Adm'r*, 49 Ala. 459, cited on this point in note in 61 L. R. A. 379.

Where, during the lifetime of a judgment debtor, an execution is received by the sheriff, the land may be sold under levy after the debtor's death, if the lien of the execution is preserved by the issue of alias executions, as provided by Code 1876, §§ 3213, 2633. *Keel v. Larkin*, 72 Ala. 493, cited in note in 61 L. R. A. 379.

Specific Applications of Rule.—Real estate levied on during the life of the judgment debtor may be sold under the levy after his death, without first making his representatives parties to the judgment. *Strange v. Graham*, 56 Ala. 614.

Under Rev. Code, § 2875, which allows an execution received by the sheriff during defendant's lifetime to be levied after his death, lands may be sold after defendant's death under a levy made in his lifetime and personal notice thereof given to him. *Jones v. Ray*, 50 Ala. 599, cited on this point in note in 61 L. R. A. 382, 384.

A coroner is not bound to notice the insolvency of a debtor's estate against which he has an execution; nor does the death of a debtor, whose estate is reported insolvent, destroy the lien of an execution when it has once attached upon his property. *Caperton v. Martin*, 5 Ala. 217, cited on this point in note in 61 L. R. A. 384.

Where an original *fi. fa.* issues in the lifetime of defendant, but is returned unsatisfied after his death, an alias or pluries afterwards issuing can not be levied on the lands of which defendant died seised. *Lucas v. Price*, 4 Ala. 679, cited in note in 61 L. R. A. 373.

"By the death of the defendant his lands descend to his heirs, or vest as he may devise by will, and the mandate of an execution which directs the sheriff to

make of them the amount of a judgment, must be wholly inoperative and void. In fact such a writ could never be executed in consequence of the death of the defendant, which has cast his estate upon other proprietors. And such is the law in respect to personal property, where an execution has not issued against the defendant in the judgment, while living; and it is only the lien of a *fi. fa.* regularly issued that legalizes an alias or pluries which bears teste after the defendant's death." *Lucas v. Price*, 4 Ala. 679, 681.

§ 82. Authority to Levy.

Where an execution comes to the hands of a sheriff after the expiration of his term of office, he has no more authority to levy it than any other private individual. *Andress v. Broughton*, 21 Ala. 200.

A levy and sale by one constable for another, which are recognized and returned by the other, are not void. The purchaser's title under such sale and return is valid. *Pruit v. Lowry*, 1 Port. 101.

The coroner has no authority to levy an execution directed to the sheriff; all process to be served or executed by him being required by Clay's Dig., p. 336, § 133, to be directed "to any coroner of the state of Alabama." *Gresham v. Leverett*, 10 Ala. 384.

An agreement between the parties to a pending claim suit to the effect that a judgment of condemnation should be rendered for plaintiff in execution for a sum less than the real value of the property in controversy, and that the title thereto should vest in claimant on payment of this agreed value within a reasonable time, does not affect the authority of the sheriff to levy on and sell the property under an execution afterwards issued on the judgment of condemnation, notwithstanding a tender of the agreed value by claimant. *Patton v. Hamner*, 33 Ala. 307.

"An execution placed in the hands of a sheriff, with instructions to levy, or with no instructions, is an authority and command to him to proceed to make the money, by levying upon and selling defendant's property, if necessary." Ala-

bama Gold Life Ins. Co. v. McCreary, 65 Ala. 127, 128.

§ 83. Powers of Officer in Making Levy.

A party injured by the improper execution of a fieri facias, may obtain redress, on motions, to the court from which the writ issued. *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. 679.

"It is well settled at common law, that courts of judicature possess a controlling power over the acts of their officers, which it is their duty to exercise in advancement of justice. Thus, if a sheriff is guilty of an irregularity in his proceedings upon an execution, to the prejudice of either party, or a third person, the court will either set aside, or correct the act complained of. As, for example, if a sheriff, in executing a writ of habere facias possessionem, deliver to the plaintiff the possession of other or more land than he has recovered, the court, on motion, will so modify the act, that complete justice be done." *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. 679, 687.

§ 84. Time for Levy.

The sheriff is bound to execute an execution with diligence, under Code 1907, § 4098. *Northern Alabama Ry. Co. v. Lowery*, 3 Ala. App. 511, 57 So. 260.

§ 85. Mode and Sufficiency of Levy.

§ 86. — In General.

The provision of Code, § 2830, requiring plaintiff in execution to give a bond before levy, is confined to cases where the levy proposed to be made is on property to which a claim of exemption has been filed and recorded under Code, §§ 2828, 2829. Such bond can not be supplied after levy. *Ex parte Redd*, 73 Ala. 548.

"It is the duty of the sheriff, in executing the powers attached to his office, so to provide, that the property levied on by him, will probably be sufficient to satisfy the executions which he levies; but he is not bound, nor, indeed, will he be justified in making an excessive levy. What will constitute either an excessive, or insufficient levy, must necessarily, to some extent, depend upon the estimated value of property by individuals." *Powell v. Governor*, 9 Ala. 36, 39.

§ 87. — Personal Property in General.

To make a valid levy on personal property, the sheriff must have the property within his power and control, or at least within his view, unless defendant acknowledges a levy by executing a delivery bond. *Cawthorn v. McCraw*, 9 Ala. 519.

"To constitute a levy on personal property, the officer must assume dominion over it. He must not only have a view of the property, but he must assert his title to it, by such acts as would render him chargeable as a trespasser, but for the protection of the process." *Goode v. Longmire*, 35 Ala. 668, 673.

"To constitute a valid levy on personal property, the property must be so described as that it can be claimed and taken possession of, and it must be brought under the dominion of the levying officer. 'One hundred bales of cotton, more or less,' would seem to be too indefinite in the absence of a more exact description." *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, 291.

A declaration by the sheriff that he levied an execution in favor of the plaintiff, on certain slaves who were present, in the possession of a trustee, for the purpose of being sold under a deed of trust; without attempting to take them into his possession, or otherwise control them, does not amount to such a divestiture of the authority of the trustee to sell the slaves, as will affect the title acquired by a purchaser under him. *Cobb v. Cage*, 7 Ala. 619.

A levy on slaves, when they are not present nor under the control of the sheriff, does not make his subsequent sale void. *Andrews v. Keith*, 34 Ala. 722.

A mere declaration by a sheriff that he levies an execution on slaves then present, with no effort to take them into possession, is inoperative. *Cobb v. Cage*, 7 Ala. 619.

§ 88. — Particular Interests in Personal Property.

In levying on a partner's interest, the officer should take possession of the entire property, though he can sell only the undivided interest. *Andrews v. Keith*, 34 Ala. 722.

§ 89. — Exhaustion of Personalty before Levy on Realty.

A sheriff is not bound to levy on personal property when a sufficient levy can be made, and is made, on land. *Powell v. Governor*, 9 Ala. 36.

§ 90. — Real Property and Interest Therein.

A judgment creditor of the mortgagor may levy on the equity of redemption only, or on the land generally, not designating the interest of the mortgagor. *Gassenheimer v. Moulton*, 80 Ala. 521, 2 So. 652.

§ 91. Successive Levies under Same Writ.

After execution has been levied on property, and bond given to try the right therein, a second levy will, on motion, be set aside, even before the return of the execution. *McLemore v. Benbow*, 19 Ala. 76.

A sheriff having executions in his hands, made a levy on land, and went out of office, without making sale of it. The execution on which the levy was made coming to the hands of his successor after his qualification, he struck the name of his predecessor out of the levies, and inserted his own, altering the date to correspond with his reception of the execution, and sold under this levy. Held, that the sale was not affected by the previous levy of his predecessor. *McCollum v. Hubbert*, 13 Ala. 282.

When the sheriff makes a levy on land which he afterwards ascertains to be incumbered by a mortgage, it is his duty to make a further levy, unless it is reasonable to expect that the land so incumbered will bring a sum sufficient to satisfy the execution in his hands. *Governor v. Powell*, 9 Ala. 83.

§ 92. Notice of Levy.

The failure of a sheriff to give personal notice of a levy on lands to defendant in execution, as required by Code 1876 § 3195, does not vitiate the sale, and defendant can not on that account be admitted to redeem by a court of equity. *Love v. Powell*, 5 Ala. 58; *White v. Farley*, 81 Ala. 563, 8 So. 215.

§ 93. Indorsement or Entry of Levy.

As to effect of evidence in claim case, see post, "Weight and Sufficiency," § 135 (3).

§ 94. — In General.

Where an execution has been lost, and the indorsement of the levy thereon does not appear of record, the contents of the indorsement may be shown by parol evidence. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

A sheriff who levies an execution should within a reasonable time thereafter indorse on the process a memorandum of the property seized, or, where it consists of so many different articles that they can not be thus conveniently indorsed on the execution, he should make an inventory and file it with the process; and he will be liable for any loss resulting from his failure so to do. *Toulmin v. Lesesne*, 2 Ala. 359.

§ 95. — Description of Property.

As to effect of insufficient description on sale, see post, "Levy or Sale," § 193 (3). As to description in deeds, see post, "Description of Property," § 219. As to description of property in return, see post, "Description of Property," § 239.

Where goods levied on are in a house leased to the defendant, the sheriff is not liable for rent to the landlord until the possession has been demanded; the sheriff merely retaining the key and using the house for the safe keeping of the goods, and the lease continuing during the whole time of the sheriff's occupancy. *Whidden v. Toulmin*, 6 Ala. 104.

§ 96. Amount of Property Taken, and Excessive Levy.

In determining the amount of property to be levied on to satisfy an execution, the officer is left to exercise his own judgment; but it is his duty to take property sufficient to satisfy the execution, allowing for reasonable and probable depreciation of the property at a forced sale, though he should not make the levy so unreasonable and excessive as to bear on its face the appearance of oppression and unnecessary rigor. *Levens v. State*, 3 Ala. App. 45, 57 So. 497.

§ 97. Irregularities and Objections as to Levy, and Waiver.

As affecting title of purchaser, see post, "Levy or Sale," § 193 (3). As to ground for vacating sale, see post, "Defects or Irregularities in Execution or Levy," § 173.

Code, § 4141, provides that when an execution is levied on personality to which one not a party claims title, such person may try the right of property by making affidavit that he holds title to the property claimed, and executing a bond to have the property forthcoming to satisfy any judgment of plaintiff, etc. Held, that the affidavit and claim bond of a claimant estop him to deny a proper levy. *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683.

Where property of a municipal corporation, exempt from execution under Code, § 2514, on account of its use for municipal purposes, is destroyed, the mere fact that it is re-erected by the municipality without the use of the insurance money does not show a waiver on its part of the exemption of such money. *Ellis v. Pratt City*, 111 Ala. 629, 20 So. 649.

Where property of a municipal corporation, exempt from execution under Code, § 2514, on account of its use for municipal purposes, is destroyed, the burden is on the creditor of the municipality, seeking to subject the exempt insurance money to the payment of his claim, to show that the municipality had abandoned its exemption. *Ellis v. Pratt City*, 111 Ala. 629, 20 So. 649.

§ 98. Operation and Effect of Levy in General.

One levying an execution on goods in possession of his judgment debtor acquires no more interest in the goods than the debtor had, as he is not a bona fide purchaser. *Jones v. Chenault*, 124 Ala. 610, 27 So. 515.

The levy or lien of an execution does not change the title of defendant in execution into a mere right of action, but he may transfer or sell the property in the same manner as if no levy or lien existed, though in the hands of his assignee it will continue subject to the levy

or lien. *Atwood v. Pierson*, 9 Ala. 656.

The levy of an execution on real estate does not divest the title of defendant, and if the execution is returned without a sale, and defendant die before any further proceedings are had thereon, the title descends to the heirs at law. *Fry v. Branch Bank*, 16 Ala. 282, cited on this point in note in 61 L. R. A. 382.

It was later provided, however, by statute (Revised Code, § 2875), that "A writ of fieri facias, issued and received by the sheriff during the life of the defendant, may be levied after his decease, or an alias issued and levied, where there has not been the lapse of an entire term, so as to destroy the lien originally created." *Jones v. Ray*, 50 Ala. 599, cited on this point in note in 61 L. R. A. 382. See, ante, "Death of Debtor after Issue of Writ," § 81.

The delivery of a fieri facias to the sheriff, creates a lien upon the personal estate of the defendant, in favor of the plaintiff, yet the property of the debtor is not divested, until the process has been actually levied. But when the sheriff has duly seized goods, he then acquires a special property in them, and is answerable to the plaintiff to the extent of their value, and the defendant is discharged from the judgment pro tanto. *Bondurant v. Buford*, 1 Ala. 359.

§ 99. Waiver, Release, or Abandonment, and Discharge or Extinguishment of Levy or Lien.

§ 99 (1) In General.

As to effect of giving forthcoming bond, see post, "In General," § 105. As to postponement of sale, see post, "Postponement," § 157. As to liability of officer for releasing levy, see the title SHERIFFS AND CONSTABLES.

Rule in General.—When the lien once attaches, it can not be lost without some act with which the plaintiff is chargeable or neglect which the law makes prejudicial to his rights. *Spyker v. Spence*, 8 Ala. 333; *Street v. Duncan*, 117 Ala. 571, 23 So. 523. See *Wood v. Gary*, 5 Ala. 43.

"The lien, so long as the creditor keeps it alive by the regular issue and delivery of executions to the sheriff, can not be defeated or impaired by the activity of

creditors acquiring a junior lien; nor is it lost by mere passiveness—by mere neglect to force a levy and sale; there must be culpable laches, or fraud upon the part of the creditor, to work its loss." *Mathews v. Mobile Mut. Ins. Co.*, 75 Ala. 85, 88. See *Wood v. Gary*, 5 Ala. 43; *Johnson v. Williams*, 8 Ala. 529; *Turner v. Lawrence*, 11 Ala. 427; *De Vendell v. Hamilton*, 27 Ala. 156.

"While mere passiveness—mere acquiescence in the delay of the sheriff, will not destroy the lien, if the creditor does any positive act inconsistent with the pursuit of the execution to satisfaction of the judgment, the lien is lost. This is especially true, when, for the benefit of the defendant, on a consideration deemed valuable, the execution is suspended by the authority of the creditor. 1 Brick. Dig. 900, § 148." *Burnham & Co. v. Martin*, 54 Ala. 189, 190.

Abandonment or Release.—Where executions have been regularly issued on a judgment, without the lapse of an entire term, the continuity of the lien is not broken by the fact that an execution issued on the judgment, which was so irregular, informal and imperfect that it would have been quashed on motion, was returned by the order of the plaintiff, and, on the same day, another execution, curing the defects of the first, was issued. *Clark v. Spencer*, 75 Ala. 49.

By Acts of Officer.—The levy of an execution on personal property, and the taking a forthcoming bond by the sheriff, does not affect the lien of the judgment, on the land of the defendants, though the bond be forfeited. Nor is the lien of the judgment affected, by the omission of the sheriff to return the forthcoming bond forfeited, or by his failure to return the execution. *Branch Bank v. Curry*, 13 Ala. 304.

The clerk of a court issuing an execution, and the sheriff receiving it, can not vacate the same by substituting an exact copy in its stead, and thus impair any lien attached under the original. *Hester v. Keith*, 1 Ala. 316.

Postponement or Delay of Sale.—As against an execution defendant and his heirs or personal representatives, the execution is not lost or suspended by plain-

tiff's direction to the sheriff to hold it up, as they are not prejudiced thereby. *Keel v. Larkin*, 72 Ala. 493, cited on this point in note in 27 L. R. A. 380.

As against defendant in execution or his personal representative or heirs, the mere suspension of the execution will not affect the lien. *Dryer v. Graham*, 58 Ala. 623.

The lien of an execution may be lost as against junior creditors, mortgagees, or vendees occupying rights during the time of the execution may be stayed by order of the plaintiff. *Dryer v. Graham*, 58 Ala. 623.

Return of Writ without Sale.—The return on an execution, "No property found," by order of plaintiff or attorney, after levy on land, destroys the lien of the writ, as in favor of purchasers for value and junior execution creditors. *Carlisle v. Godwin*, 68 Ala. 137.

Trial of Right of Property.—A proceeding to try the right of property does not destroy the lien of the *ieri facias*. At most it is only in abeyance during the pendency of the proceeding, and is revived, and may be coerced, as soon as the claim is determined to be indefensible. *Doremus v. Walker*, 8 Ala. 194.

"The interposition of a claim under the statute (Code 1886, § 3004) by one setting up a claim thereto, to try the right of the property levied on, does not impair or destroy the lien of the execution. 'It only suspends the right of sale pending the litigation. If the claim is successfully maintained, the lien is destroyed. If it fails, the claimant and his sureties must restore the property to the levying officer, or pay its assessed value.'" *Street v. Duncan*, 117 Ala. 571, 23 So. 523. See *Sandlin v. Anderson*, 82 Ala. 330, 3 So. 28; *Munter v. Leinkauff*, 78 Ala. 546, 548.

The lien of an execution acquired at the time of its issuance is not lost by being suspended in its operation on particular property by proceedings to try the right to the property as provided by act 1812. *Mills v. Williams*, 2 Stew. & P. 390.

Although, when property is levied on under an execution, and bond is given to try the right, it is in the custody of the

law, and not subject to the levy of other executions, which have not a superior lien, this does not affect the lien of those executions that have been regularly renewed on the surplus that remains from the sale of the property after discharging the older execution. In such a case, the lien is suspended, and not lost. *Branch Bank v. Broughton*, 15 Ala. 127.

Subsequent Bankruptcy of Defendant.—

The lien of an execution in the hands of the sheriff is not in the absence of fraud or collusion, destroyed or displaced by the subsequent bankruptcy of the defendant. *Chadwick v. Carson*, 78 Ala. 116.

Purchasers for a Valuable Consideration.—Code 1876, § 3211, declaring the lien of an execution lost as "between judgment creditors and purchasers from defendant for valuable consideration," is not confined to purchasers without notice. *Carlisle v. Godwin*, 68 Ala. 137.

Fraudulent Purchasers at Sale.—Although a fraudulent purchase by the guardian at a sale under execution in favor of his ward is void as against the creditors of defendant in execution, a court of equity would uphold the pre-existing lien of the execution in favor of the ward, and direct a resale of the property, and satisfaction to be made, before execution creditors whose liens subsequently attached would be entitled to the proceeds. *Cawthorn v. McCraw*, 9 Ala. 519.

Refusal to Give Bond.—Where the levy of an execution is discharged in consequence of the refusal of plaintiff to give a required bond of indemnity, its lien is suspended, and must yield to the title of a bona fide purchaser from defendant acquired before a bond of indemnity is executed or the execution relieved. *Otey v. Moore*, 17 Ala. 280.

Contest over Claim of Exemption.—

Code 1876, § 2835, providing that the lien of execution shall not be destroyed or impaired by the pendency of a contest over a claim for exemption, nor by its termination in favor of plaintiff, does not apply to a termination by the death of claimant. *Sims v. Eslava*, 74 Ala. 594, cited in note in 61 L. R. A. 379.

Lapse of Time and Death of Defendant.

—The lapse of a term destroys the lien of an execution in the hands of the sheriff at the death of defendant and prevents

the issue of a subsequent alias. *Whitfield v. Clark*, 48 Ala. 555.

Injunction Proceedings.—In *Barnes v. Baker*, Minor 373, it was intimated with strong descent that the lien of execution is destroyed by an injunction. The point was not necessary to the decision of the case.

§ 99 (2) Failure to Maintain Possession.

Delivery of Property to Wife of Defendant.—Where personal property has been levied on by a duly authorized officer, the levy is not invalidated, as between the parties, by delivering it to the wife of defendant to keep until the day of sale, and defendant is bound to restore the property at that day, if in his possession. *McCullough v. McClintock*, 88 Ala. 567, 7 So. 149.

Removal of Property beyond Jurisdiction.—Where, after execution levy on goods, the constable, by direction of plaintiff's attorney, allows the judgment debtor to remove the goods to another precinct, and he there sells them for full value to a bona fide purchaser, the latter acquires the title of the defendant unaffected by any claim of the plaintiff in the execution. *Chaney v. Buford Lumber Co.*, 132 Ala. 315, 31 So. 369.

If executions are regularly issued from term to term, the lien created by placing the execution in the officer's hands is not lost, but suspended merely, by the removal of the property from one county to another within the state. *Newcombe v. Leavitt*, 22 Ala. 631. See *Street v. Duncan*, 117 Ala. 571, 23 So. 523.

A fi. fa. operates as a lien on the goods of defendant within the county to which it issues. The lien is suspended by their removal to another county, and to revive it a new fi. fa. must be issued to the latter county. *Hill v. Slaughter*, 7 Ala. 632.

Where the lien of a fieri facias is suspended, by the removal of property from the county to which it issues to another; in order to revive it, the plaintiff should cause a fieri facias to be issued to the latter county; the transfer of the execution from the sheriff of the former to the sheriff of the latter, with a notice of the lien, can not have the effect to continue or revive it. *Hill v. Slaughter*, 7 Ala. 632.

When personal property, to which a

lien has attached by the delivery of an execution to the sheriff, is removed to another state, where it is acquired and held by a bona fide purchaser until the statute of limitations of that state has barred its recovery, and then is brought back by him to this state, his title is perfect against execution creditor, although he has had executions regularly issued from term to term. *Newcombe v. Leavitt*, 22 Ala. 631.

"Certainly, the removal of the property to another county, without the consent or connivance of the plaintiff, will not impair it. The lien, it is true, does not divest the property of the debtor; he may (certainly until a levy has been made), pass the legal title to a third person, by a sale, subject however to be defeated by a subsequent levy, and sale, under the same, or another execution issued upon an operative judgment, regularly continued and connected therewith. *Addison v. Crow*, 5 Dana, 273; *Clagget v. Foree*, 1 Danna, 428; *Collingsworth v. Horn*, 4 Stew. & P. 237; *Lucas v. Price*, 4 Ala. 679; *Hill v. Slaughter*, 7 Ala. 632." *Spyker v. Spence*, 8 Ala. 333, 338.

Where a lien has attached on personal property, by the delivery of a *fi. fa.* to the sheriff, which, during the continuance of the lien, is removed by defendant in execution to another state and sold, it may be levied on and sold by an alias execution, if brought back again to the state. *McMahan v. Green*, 12 Ala. 71.

Quære, would not the foreign purchaser acquire a good title by a purchase at a judicial sale, or would not the remedy be lost, if the property had remained long enough in the foreign country, for the statute of limitations to bar an action for its recovery. *McMahan v. Green*, 12 Ala. 71.

§ 100. Restoration of Levy or Lien.

Where a term is permitted to lapse between the terms in which an original and an alias execution are returnable, the issuance of a *ca. sa.* in the intervening term will not continue the lien created by the original execution. *Cary v. Gregg*, 3 Stew. 433.

§ 101. Rights of Officer as to Property Taken.

A sheriff who has duly seized goods under legal process has a special property

therein, and should provide for their safe keeping. *Whitsett v. Womack*, 8 Ala. 466.

§ 102. Custody and Care of Property.

Where an execution issues against a member of a partnership, the sheriff may seize all the goods belonging to the firm, and take them into his actual custody, to prevent their being wasted or carried away. *Moore v. Sample*, 3 Ala. 319.

Where an officer has seized property under execution, and the statutory bond for its safe keeping is not offered, he may provide some other custody therefor, and either retain possession himself or commit it to a bailee. *Whitsett v. Womack*, 8 Ala. 466.

§ 103. Delivery of Property to Bailee or Receiptor.

It seems that if a sheriff declares a levy on property within his power or control, and commits its custody to a third person as his agent, the levy would be good, though he would be liable for the consequences if the custodian abuses his trust; the officer having parted with the thing otherwise than as the law requires. *Easley v. Walker*, 10 Ala. 671.

If a bailee of property, seized under execution and committed to him by the officer making the levy, execute a bond for its safe keeping, it will be obligatory, though plaintiff is not bound to accept it in lieu of the officer's responsibility. *Whitsett v. Womack*, 8 Ala. 466.

Parties who entered into a bond as the bailees of property that had been levied on by a deputy sheriff can not, to avoid liability, object that the deputy transcended his powers, where the sheriff himself, instead of objecting, affirms the act. *Whitsett v. Womack*, 8 Ala. 466.

§ 104. Delivery of Property on Forthcoming or Delivery Bond.

As to liability of sheriff or constable for taking out insufficient security, see the title SHERIFFS AND CONSTABLES.

§ 105. — In General.

One of several defendants in an execution may replevy property levied on, although his codefendants do not unite with him in executing the forthcoming bond. *Sheppard v. Melloy*, 12 Ala. 561.

Quære, whether after a forfeiture, the other defendants could replevy, when their property was levied on, upon an execution on the forfeited bond. *Sheppard v. Melloy*, 12 Ala. 561.

Where personal property is levied on by attachment, and a replevy bond executed, conditioned to have the same forthcoming to abide such judgment as may be rendered in the cause, the property can not be levied on by an execution, the lien of which is not paramount, until it is discharged from all liability to satisfy the attachment on the judgment therein. *Rives v. Wilborne*, 6 Ala. 45.

§ 106. — Requisites and Sufficiency of Bonds.

§ 106 (1) In General.

Sufficiency in General.—Though a forthcoming bond be not good as a statutory bond, it may be good at common law. *Sugg v. Burgess*, 2 Stew. 509; *Butler v. O'Brien*, 5 Ala. 316.

Although a replevy bond may be defective as a statutory requirement, it may nevertheless be a good common law obligation, and support an action for its breach. *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917.

A bond given by the claimant of property levied on by attachment, payable to the sheriff, instead of the plaintiff, and the condition of which is not as extensive as the statute requires, is good as a common law bond; a surety in such bond is consequently an incompetent witness for the claimant. *Butler v. O'Brien*, 5 Ala. 316.

A forthcoming bond taken by the sheriff, payable to others besides plaintiff in execution, is not a statutory bond, within Code 1896, § 1916, providing that where personalty is levied on by the sheriff, if defendant executes a bond with sufficient surety, the sheriff must restore the property to defendant. *Burns v. George*, 154 Ala. 626, 45 So. 421.

Conditions as Redelivery of Property.—When a levy is made in the county of Clarke, and a forthcoming bond taken to deliver the property in Mobile, no execution can issue upon it, though returned forfeited, as it is not good as a statute bond, though it may be valid as a bond at common law. *Branch Bank v. Darlington*, 14 Ala. 192.

Recital of Execution or Judgment, and Variance.—A forthcoming bond, describing a fi. fa. as issuing against the goods of one defendant to make the sum of \$2,743, when in fact it issued against the goods of four persons to make the sum of \$2,492.50, should be quashed. *Lunsford v. Richardson*, 5 Ala. 618.

The forthcoming bond described a fieri facias as having issued against the goods, etc., of J. L., requiring to be made for debt, damages and costs \$2,743; the fi. fa. issued against the goods, etc., of J. L., W. H. C., L. J. M. and A. J. S., requiring to be made the sum of \$2492.50. Held, that the bond did not conform to the execution, and that the same should be quashed. *Lunsford v. Richardson*, 5 Ala. 618.

A judgment against A. and B. will not sustain a forthcoming bond which recites a judgment against A., and an execution issued upon such a bond will be quashed. *Moffitt v. Mobile Branch Bank*, 7 Ala. 593.

A bond reciting the issuing of an execution against A., when in point of fact it issued against A. and others, is good as a common law bond, although the amount for which the execution issued is not recited therein; and the obligor is estopped from denying the levy recited, as well as the property of the defendant in the goods. *Meredith v. Richardson*, 10 Ala. 828.

Where the goods of a party have been seized and sold under an execution issued from the clerk's office, on a bond, defective as a statutory forthcoming bond, the act of issuing the execution, is not the act of the plaintiff, but of the clerk; and trespass will not lie against the former therefor. *Meredith v. Richardson*, 10 Ala. 828.

A judgment was rendered against A. in favor of C., upon which execution issued against A., which being levied on a slave, he gave a forthcoming bond for its delivery, with B. as his surety. The judgment was described in the bond as having been rendered against A. and B., and was returned forfeited, and an execution was issued thereon against A. and B. Held, that the discrepancy between the bond and the execution was so great that no execution could issue upon it, and that a sale of land made under it would be

set aside. *Nicolson v. Burke*, 15 Ala. 353.

The requirement of the statute in regard to delivery bonds, that a delivery bond shall be taken in double the amount of the execution, and that it shall be stated that the property shall be delivered at "12 o'clock, noon," are directory, and not mandatory; hence a delivery bond which describes an execution for a certain number of dollars and cents with sufficient accuracy and certainty to designate what execution it was designed to suspend will not be quashed, though the recitals descriptive of the execution describe the amount of the execution to be for the number of dollars, but omit the cents in the description of the execution. *Anderson v. Rhea*, 7 Ala. 104.

A forthcoming bond must describe the execution which is thereby superseded with sufficient certainty to enable the court to determine what execution it was intended to supersede, but a small and unimportant variance will be disregarded. *Anderson v. Rhea*, 7 Ala. 104.

A variance between the property described in the bond as having been levied on, and the indorsement of the levy on the execution, can not be taken advantage of by the defendant. *Anderson v. Rhea*, 7 Ala. 104.

Defects, Objections and Waiver.—

Where a sheriff's return showed that he had levied on seventy-five head of hogs and the delivery bond was for twenty-five hogs, the surety on the bond can not take advantage of the variance, since he was not bound beyond the undertaking of the bond. *Anderson v. Rhea*, 7 Ala. 104.

Amendment.—A forthcoming bond payable to, "Jacob A. Toberney," conditioned to pay the sheriff the amount of an execution in his hands in favor of Jacob A. Flournoy, or to deliver to him certain property on which it has been levied, is not amendable without the consent of the obligors. *Flournoy v. Mims*, 17 Ala. 36.

M. and others as his securities executed a forthcoming bond payable to Jacob A. Toberney, conditioned to pay to the sheriff the amount of an execution in his hands in favor of Jacob A. Flournoy, or to deliver to him certain property on which it had been levied: Held, first, that parol evidence is inadmissible to show that the name inserted in the penal part of the

bond was intended for that of the plaintiff in execution. *Flournoy v. Mims*, 17 Ala. 36.

§ 106 (2) Operation and Effect.

In General.—Where a mode is provided by statute for the safe keeping of property taken under execution, and an appropriate bond is taken, the officer is relieved from the obligation to keep it. *Whitsett v. Womack*, 8 Ala. 466.

Extinguishment of Judgment or Execution.—Taking a forthcoming bond is not a satisfaction of the execution; and, if the condition is broken, the plaintiff may sue out a new execution on the judgment against the defendants to the same and the sureties on the bond. *Hopkins v. Land*, 4 Ala. 427.

By statute, a plaintiff is authorized to sue out more executions than one, but at his own cost; whenever therefore a forthcoming bond is forfeited and it is necessary to run executions to different counties, he may sue out one execution against the defendants to the judgment, and another against them and the sureties to the bond. *Hopkins v. Land*, 4 Ala. 427.

In general, it is irregular to sue out a second execution when a sufficient levy has been made which remains undisposed of, in consequence of a forthcoming bond; but such a bond is not a satisfaction of the judgment, and if the condition is broken, the plaintiff may sue out a new execution on the judgment, or against the defendants to the same and the sureties on the bond. *Quære*, how far the lien of the judgment or first execution is continued or destroyed. *Hopkins v. Land*, 4 Ala. 427.

The lien of an execution which has once attached is not dissolved, as between the creditor and the debtor and his representatives, by the taking and forfeiture of a forthcoming bond; but the execution issued thereon against principal and surety continues the lien of the first execution, although issued after the death of the principal. *Caperton v. Martin*, 5 Ala. 217.

Estoppel or Waiver of Objections to Execution or Levy.—Though a levy on "one hundred bales of cotton, more or less," may be invalid for indefiniteness, the invalidity is cured by giving a forthcoming bond for "one hundred bales of

cotton." *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290.

Where a levy has been made, and a forthcoming bond executed, for "one thousand bushels of corn and one hundred bales of cotton," parol proof of a contemporaneous agreement between the obligors and the sheriff that certain cotton already ginned and ready for shipment should be reserved from levy, and that the levy was actually upon the estimated amount of cotton and corn then ungathered, is inadmissible. *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290.

Persons who have executed a forthcoming bond for a definite quantity of chattels are estopped from asserting that the levy was in part fictitious, and that there existed in fact a less quantity of the chattels upon which a levy could be made. *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, cited on this point in note in 4 L. R. A., N. S., 1021.

"When a replevin or forthcoming bond is executed, reciting a levy on specified property, and binding the bondsmen to have it forthcoming on the day of sale, proof will not be received that there was no such property. It is no defense, in such case that the levy was fictitious." *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, 292.

§ 107. — Liabilities on Bonds.

In General.—It is not ground for the relief in equity of the principal or sureties in a forthcoming bond that the property specified therein was not owned by the principal, or that he had only a qualified interest therein. *Jemison v. Cozens*, 3 Ala. 636.

Accrual or Release by Breach or Fulfillment of Condition.—Personal property, upon which there were three chattel mortgages, was seized on execution under a judgment in favor of a fourth creditor, and a forthcoming bond was given therefor. One of the mortgages, on default, brought a bill for foreclosure and the appointment of a receiver to preserve the property from sale under the execution. Held that, where the receiver acquired possession of only a part of the property described in the forthcoming bond, the obligors will be discharged only to the extent of the property so acquired,

and will remain liable for the remainder. *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290.

Where personal property, upon which there are three chattel mortgages, is seized on execution under a judgment in favor of a fourth creditor, and a forthcoming bond is given therefor, one of the mortgagees, although invested with power of sale, can, upon default, maintain a bill for foreclosure, and the appointment of a receiver to preserve the property from sale under the execution. After the property, or a part thereof, has been seized by the receiver, the debtor and his sureties on the forthcoming bond may maintain a cross bill against the execution creditor, to enjoin the enforcement of their liability on such bond, and to be discharged therefrom, although they may have a remedy at law. *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, cited in note in 31 L. R. A. 63.

"When property levied on has been restored to the defendant, on the execution by him of a forthcoming bond with sureties, if such property is afterwards taken from them, under a paramount title or lien, or under valid judicial proceedings, this excuses them from the delivery of the property, and discharges the obligation of the bond, so far as to render invalid, a return of forfeiture by the levying officer. The law will not punish the failure to do that, which itself has rendered impossible to be performed. *Cole v. Connolly*, 16 Ala. 271; *Glover v. Taylor & Co.*, 41 Ala. 124; *Cordaman v. Malone*, 63 Ala. 556." *Bolling v. Vandiver*, 91 Ala. 375, 8 So. 290, 291.

The emancipation of a slave after a levy and the institution of proceedings to try the right of property does not preclude the right of action on the forthcoming bond previously given to obtain a discharge of the slave from the levy. *Mad-den v. Hooper*, 42 Ala. 397.

Rights and Remedies of Sureties.—A forthcoming bond being returned forfeited has the effect of a judgment; but one whose name appears thereon as surety may go into equity to restrain execution thereon, on the allegation that the signature of his name to the bond was unauthorized by him, and a forgery. *Brooks v. Harrison*, 2 Ala. 209.

A surety in a forthcoming bond will not be relieved, in equity, where such bond is returned forfeited, because the levy of the sheriff, on which the bond was based, was fictitious; there being no such property in existence as his return showed a levy upon. *Mead v. Figh*, 4 Ala. 279, cited on this point in notes in 4 L. R. A., N. S., 1020, 32 L. R. A., N. S., 404.

Discharge of Surety.—The sureties on a forthcoming bond are discharged from their obligation, and excused from delivering the property, by its seizure, while in the hands of the principal in the bond, under a writ of detinue issued at the instance of a third person claiming the property as his own. *Watson v. Simmons*, 91 Ala. 567, 8 So. 347.

§ 108. — Actions on Bonds.

Defenses.—In an action on a bond conditioned for the forthcoming of a slave on the day of sale on execution, a plea that the slave died before the commencement of the suit is bad. *Burgess v. Sugg*, 2 Stew. & P. 341.

A plea, to an action, autrefois acquit, must show that the judgment of acquittal was had upon the merits, or that an issue was determined, which brought the merits of the suit before the court trying the cause. *Burgess v. Sugg*, 2 Stew. & P. 341.

Summary Remedies.—An execution upon a forfeited forthcoming bond may include defendants to the judgment, as well as the obligors in the bond; and if the execution does not, on its face or by the indorsement of the clerk, show who were the obligors in the bond, it may be amended by the judgment and forthcoming bond. *Sheppard v. Melloy*, 12 Ala. 561.

It is not indispensable to the regularity of an execution issued on a forthcoming bond that it should affirm on its face that the bond was forfeited. *Sheppard v. Melloy*, 12 Ala. 561.

It is not ground for restraining the levy of an execution issued on a forfeited forthcoming bond on the property of the surety therein that the property originally levied on, and after execution issued upon the bond delivered to the sheriff by the surety to be levied upon, has been released by the fiat of the chancellor on a bill by the wife of the principal in the

bond on proper security. *Jemison v. Cozens*, 3 Ala. 636.

When property is levied on as belonging to the principal, and is claimed by another, the plaintiff may lawfully proceed to have satisfaction, by causing another levy to be made on the property of the surety, and this right is declared by statute. *Jemison v. Cozens*, 3 Ala. 636.

Appeal.—Although by statute, an execution may issue upon a delivery bond, which is returned "forfeited," yet a writ of error will not lie for the purpose of revising the bond; if too defective to sustain an execution, the defendant may obtain a supersedeas, or if the defect be not available at law, in a proper case, he may go into equity. *Taylor v. Powers*, 3 Ala. 285. See 2 Cent. Dig., Appeal and Error, §§ 25, 786.

§ 109. Delivery of Property to Creditor in Satisfaction.

In a controversy between a purchaser at an execution sale made on the original judgment after its affirmance in the supreme court on a writ of error, superseded by bond and surety, and one claiming by a conveyance from defendant in execution, executed pending the cause in the supreme court, the title of the latter will prevail; the effect of the bond and security given to supersede the execution being to discharge the lien of the judgment. *Brock v. Youngue*, 7 Ala. 64.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

As to proceedings of justices courts, see the title JUSTICES OF THE PEACE.

§ 110. Stay of Execution.

As to damages and costs on quashing or setting aside, see post, "Damages and Costs on Quashing or Setting Aside," § 119.

In General—Parties.—The president of a bank, the charter of which does not confer the power, either expressly or incidentally, is unauthorized, without permission of the directors, to whom is intrusted the management of its concerns, to stay the collection of an execution of one of its debtors; and, if the sheriff

omits to levy an execution in consequence of an order from him, it will not become dormant, so as to lose its lien. *Spyker v. Spence*, 8 Ala. 333.

Grounds.—An execution issued for an amount largely in excess of the liability of the obligors on a claim bond should be superseded. *Alabama G. S. R. Co. v. Queen City Electric Light Co.*, 121 Ala. 300, 25 So. 824.

Where a probate court, at the instance of a surety, granted a supersedeas to stay an execution which it had issued against the principal, the ground of relief must rest either on facts occurring subsequent to the decree, or on antecedent facts which show fraud in its rendition, or want of jurisdiction of the court apparent on the record, or denial of fact of suretyship. *Gravett v. Malone*, 54 Ala. 19.

Where a surety denied the fact of suretyship, and that it existed when the decree was rendered against his principal, and averred that the decree was obtained by fraud, the probate court had authority to grant a supersedeas to stay an execution which it had issued against the principal. *Gravett v. Malone*, 54 Ala. 19.

An execution will not be stayed for reasons arising prior to the judgment and which would have constituted a defense to the action in which the judgment was rendered. *Marshall v. Caudler*, 21 Ala. 490.

Where an execution is unauthorized by the judgment, a supersedeas is the proper remedy. *Crenshaw v. Hardy*, 3 Ala. 653.

The ground for granting a supersedeas to suspend or arrest an execution must appear of record. *Holloway v. Washington*, 3 Ala. 668.

A pending garnishment for the same debt may be suggested to the court, which will thereupon suspend further proceedings till the garnishment suit is determined; and, if the suggestion is not made till judgment is rendered, the court will direct a stay of the execution. *Crawford v. Slade*, 9 Ala. 887.

Pendency of an appeal by the plaintiff from a decree dissolving a garnishment does not require another court, in which the defendant is suing the garnishee, to stay execution against him for his protection against double satisfaction. Payment of the judgment will protect the

garnishee from further liability, though the order or decree dissolving the garnishment be afterwards reversed. *Montgomery Gaslight Co. v. Merrick*, 61 Ala. 534.

§ 111. Quashing or Vacating Writ.

§ 112. — In General.

Power of Court.—Every court has power to watch over the execution of its judgments, and, where its process has been irregularly or fraudulently executed, to quash it. *Rhodes v. Smith*, 66 Ala. 174.

Every court has the inherent power, exercised for the advancement of justice, to quash an execution issued by its ministerial officer irregularly and improvidently; as where a bond is improperly returned forfeited, and a summary execution is thereupon issued against the obligors. *Rhodes v. Smith*, 66 Ala. 174.

§ 113. — Grounds.

Attack on Judgment.—The fact that more costs are taxed against the person against whom an execution is issued than are properly due from him is not a ground for quashing the execution. The error can be corrected on motion to retax. *Anonymous*, 2 Stew. 228.

On a motion to quash an execution, it is not admissible to prove a mistake in the judgment as to the name of one of the parties, by whom it was confessed, so as to make it support the execution; but such mistakes can only be corrected, if at all, by a direct proceeding for that purpose. *Shorter v. Mims*, 18 Ala. 655.

Where a default judgment is void, an execution issued thereon may be superseded and quashed on petition of the judgment debtor. *City of Columbia v. J. W. Kelley & Co.*, 172 Ala. 336, 55 So. 526.

Where judgment for plaintiff in detinue was affirmed, and defendant failed to deliver the property, he can not complain that execution as issued against the sureties on his appeal bond; they not complaining, and his liability being fixed by the judgment. *Howard v. Deens*, 151 Ala. 608, 44 So. 550.

Though acts 1898-99, p. 34, providing that execution may be issued upon any judgment filed and registered as provided, so as to constitute a lien within one year from the date of its rendition at any time

within ten years from the filing, acts 1903, pp. 273, 274, which omitted to prescribe any time for the filing and registration of the decree, would apply to authorize execution on a judgment, registered before its enactment, but more than one year after its rendition. *Compton v. Sharpe*, 174 Ala. 149, 56 So. 967.

Errors and Informalities in Execution.—Where an execution was unauthorized by the judgment, the court, if in session, will entertain a motion to quash. *Crenshaw v. Hardy*, 3 Ala. 653.

"Although a wrong name is introduced upon the face of the execution, this should not vitiate the process, as to the parties against whom it should and does properly issue. It would be erroneous to quash it for such defect. *Sheppard v. Melloy*, 12 Ala. 561; *Thompson v. Bondurant*, 15 Ala. 346." *DeLoach v. State Bank*, 27 Ala. 437, 444. See ante, "Amendment," § 64.

Discharge of Bankrupt Subsequent to Judgment.—An execution against a bankrupt may be quashed where he received his discharge in bankruptcy subsequent to the entry of the judgment on which the execution was issued. *Ewing v. Peck*, 17 Ala. 339.

Motion to Quash.—Where an execution is superseded upon the petition of the defendant, it is competent to submit a motion to quash it, not only upon the ground disclosed in the petition, but upon any other that will avail. *Roundtree v. Weaver*, 8 Ala. 314.

§ 114. — Proceedings and Determination.

Application.—A petition for a supersedeas in vacation may be considered a motion to quash the execution, even if a supersedeas has improvidently issued. *Oswitchee Co. v. Hope*, 5 Ala. 629.

Where an execution is superseded upon a petition filed in vacation, it is not necessary for the defendant in execution to move the court to quash it; the petition itself, is a motion to that effect, and may be so considered even where a supersedeas has improvidently issued. *Oswitchee Co. v. Hope & Co.*, 5 Ala. 629.

As a general rule, courts have the power at any time to quash executions irregularly issued; yet they require motions for that purpose, in ordinary cases, to be

made and prosecuted with diligence, especially when founded on a mere irregularity, and treat any considerable delay as a waiver. *Henderson v. Henderson*, 66 Ala. 556.

A petition for a supersedeas which alleges that the judgment "is satisfied" on which the execution issued which the party seeks to quash is sufficient in law on demurrer. *Rice v. Dillahunt*, 20 Ala. 399.

Where an execution and levy regular in appearance were quashed on the ground, as stated in the motion, "of irregularity, the same having been issued, contrary to law, to an improper officer, and the return having been made by an officer legally incompetent to act in the premises," it was held, in error, that a judgment for these reasons, without any affirmation upon the record of fact on which they rested, could not be sustained. *Wilson v. Auld*, 7 Ala. 302.

The judgment entry recited, that the defendant's attorney moved to quash the execution and return "on the ground of irregularity, the same having been issued contrary to law, to an improper officer, and the return having been made by an officer legally incompetent to act in the premises; being seen and heard by the court, the same is granted, and the execution and return accordingly quashed." Held, that the reasons stated in the motion to quash are conclusions of law, without any affirmation of fact on which they rest; and the execution appearing upon its face to be regular, and there being nothing upon the record to show that it was addressed to, or executed by an improper officer, the judgment by which it was quashed can not be sustained. *Wilson v. Auld*, 7 Ala. 302.

A petition praying that an execution be quashed must be accompanied with a copy of the execution, or else it must state an accurate description of it; otherwise, the petition is bad for uncertainty. *Summerhill v. Trapp*, 48 Ala. 363.

No petition for a supersedeas is necessary, previous to a motion to quash an execution in the same court from which it issued; but the motion may be submitted ore tenus, in term time. *Phillips v. Brazeal*, 14 Ala. 746.

Time for Proceeding.—An execution may be quashed after its return. *Isaacs v. Judge of Jefferson County*, 5 Stew. & P. 402; *Page v. Coleman*, 9 Port. 275.

The power of courts to quash irregular executions is not limited to periods prior to their return; but such executions may be quashed after their return, especially if they still have virtue. *Isaacs v. Judge of County Court*, 5 Stew. & P. 402.

Where a motion to quash an execution on a decree of the probate court was made after the lapse of eight regular terms from the term to which it was made returnable, held, that the motion came too late to be granted. *Henderson v. Henderson*, 66 Ala. 556.

An execution on a decree of the probate court being made returnable to the September term, 1877, and a motion to quash it being made at the June term, 1878, after the lapse of eight regular terms of the court; held, on general principles, as well as by analogy to the rule of practice in the circuit court (Rule No. 13, Code, 160), that the laches was fatal to relief. *Henderson v. Henderson*, 66 Ala. 556.

Where the administrator of an estate is advised of a levy made in March on property belonging to the estate, and a motion is not made to quash it till the month of October following, he is guilty of laches fatal to relief, unless good excuse is shown for the delay. *Berry v. Perry*, 81 Ala. 103, 1 So. 118.

Act Feb. 18, 1891 (Sess. acts, pp. 1092-1103), creating the city court of Gadsden, provides that, ten days after the rendition of final judgments by said court, they shall be "as completely beyond the control of the court as if the term of the court at which such judgments are rendered had ended." Held, that an execution issued by the clerk without any order of the court on the return of a replevin bond forfeited could be quashed after ten days, as the execution was a mere office judgment, and the judgment in the case was not thereby interfered with or changed. *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917.

"The replevin bond given in this case is clearly not a statutory bond, upon which a summary execution could issue, when the sheriff returned the bond for-

feited. The execution was therefore irregular, and subject to be quashed on a proper motion." *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917.

Hearing, Determination, and Relief in General.—"A motion to quash an execution, it would seem, could never involve interference with or change of the judgment of the court. The inquiry on such motion must needs be whether or not, under the judgment rendered and the attendant facts, the process of execution and its enforcement are justified under the law. Such motion may be acted on at any time when the court is in session, without any regard to the term of the court at which the judgment was rendered. The court, in such action, simply supervises the action of its ministerial officers, so as to prevent misuse or abuse of its process. 3 Brick. Dig., p. 454, §§ 92, 93." *Harrison v. Hamner*, 99 Ala. 603, 12 So. 917.

A motion by a judgment debtor to recall an execution, on the ground that the judgment had been satisfied before the issuance of the execution, invokes the jurisdiction of the court conferred by Code 1907, § 3256, to secure parties against any abuse of execution, as regulated by § 4141, and the movant is entitled to relief whenever the party obtaining the execution has no right to enforce the judgment. *Smith, etc., Co. v. Dean*, 166 Ala. 116, 52 So. 335.

Presumptions and Proof.—On a motion to quash an execution on the ground that the judgment has become dormant because the execution was not issued thereon within one year after its rendition, the presumption is that a prior execution was issued within such time. *McDaniel v. Johnston*, 110 Ala. 526, 19 So. 35.

Where a judgment creditor and his attorney, resisting a motion to recall an execution on the ground that the judgment had been satisfied by the assignee thereof before the issuance of the execution, relied on the fact that they used the execution for the collection of the fees of the attorney for his services in procuring the judgment, the burden of showing, not only that the attorney had a lien, but the amount due to him as a fee, rested on them, and, where there was a failure of such proof, the court properly

found in favor of the movant. *Smith, etc., Co. v. Dean*, 166 Ala. 116, 52 So. 335.

Order.—A writ of error can not be brought on a judgment of the court refusing to quash an execution sued out in the plaintiff's name after his death, but the remedy is by application for a writ of mandamus. *Moore v. Bell*, 13 Ala. 469.

A judgment for a judgment debtor moving for an order recalling an execution on the judgment, on the ground that the judgment had been satisfied by the owner before the issuance of the execution, does not destroy the original judgment, or determine anything more than the issues litigated on the motion. *Smith, etc., Co. v. Dean*, 52 So. 335, 166 Ala. 116.

Effect of Quashing.—A judgment quashing an execution on the ground of the defendant's discharge in bankruptcy, although the court refuses to order satisfaction or discharge of the original judgment to be entered, of a perpetual stay of execution, relates back to the original judgment; and its effect, so far as respects the rights of the parties to that judgment, is to vacate all process issued for its satisfaction. *Ewing v. Peck*, 26 Ala. 413.

§ 115. Injunction.

§ 116. — Grounds.

§ 116 (1) In General.

Payment or Tender of Amount Due.—Where an execution issued against principal and security, and part of the money was made by the sheriff by levy and sale of the principal's effects, but he returned it "No money made," and an alias issued against the security for the whole debt, the sheriff having absconded, the security was entitled to relief in equity, and the court had jurisdiction to enjoin for the amount made by the sale. *Fryer v. Austill*, 2 Stew. 119.

Quare, can a common law court, in such case, afford relief. *Fryer v. Austill*, 2 Stew. 119.

Agreement between Parties.—Where a decree dissolving an injunction restraining the enforcement of an execution, issued by the probate court on a decree rendered by it against an administrator is certified to such court, and an execution is issued by it against the sureties on the

injunction bond, the enforcement of such execution will not be enjoined, because, by agreement between the administrator and the judgment creditor, the amount due the latter was turned over to certain persons to indemnify them against liability on a bond executed by the judgment creditor. *Knabe v. Rice*, 106 Ala. 516, 17 So. 666.

Conditions Precedent to Injunction.

Code, § 3522, requiring a bond on a suit to enjoin proceedings after judgment, conditioned on payment of such judgment in case the injunction is dissolved, when construed with §§ 3521, 3528, 3529, and 3531, relating to the same subject matter, applies only in case the relief is sought by a defendant in the judgment; and a bond with such condition is not necessary in a suit by members of a firm as individuals to restrain levy on individual property under a judgment against the firm, since they are strangers to such judgment. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575, overruling *McCalley v. Wilburn*, 77 Ala. 549.

An injunction against a levy on individual property of members of a firm under a judgment and execution against the firm does not "stay proceedings after judgment," within Code, § 3522, providing that no injunction shall issue for such purpose unless petitioner gives a bond for payment of the amount of the judgment, with interest and damages, in case the writ is dissolved. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

A bond in a suit by partners to restrain levy on their individual property under a judgment and execution against the firm should be executed under Code, § 3524, providing for bonds in cases other than injunctions against judgments (§§ 3522, 3523), and requiring a condition for payment, in case of dissolution, merely of damages and costs. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

When an injunction is sued out by the heirs of a decedent, to enjoin proceedings under an execution issued on a judgment against the administrator, which has been levied on their lands; the injunction bond being payable and conditioned as required by the statute, and duly certified by the register on the dissolution of the injunction (Code, §§ 3870-76); execution may be thereon issued

against the obligors, for the amount of the judgment, with interest and damages; and they can not supersede it because the judgment is held void as against the decedent's estate. *McCalley v. Wilburn & Co.*, 77 Ala. 549, overruled in *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

Where judgment has been rendered against a claimant in attachment, the claim bond forfeited, and execution issued against claimant and his sureties, a surety seeking to enjoin such execution must give the bond required by Code, § 3522, conditioned to pay the judgment enjoined, and such damages and costs as may be adjudged against him. *Ex parte Fecheimer*, 103 Ala. 154, 15 So. 647.

§ 116 (2) Existence and Adequacy of Other Remedy and Irreparable Injury.

Adequacy of Remedy at Law.—When complainants in a bill to enjoin the sale of lands under execution against the party from whom they derived title would be compelled, in ejectment brought under the sheriff's deed, to offer evidence outside of their deed to prevent a recovery, the bill contains equity, since there is no adequate remedy at law. *Eufaula Nat. Bank v. Pruett*, 128 Ala. 470, 30 So. 731.

One claiming property attached as that of another can not maintain a bill to have the sale on the judgment in the attachment suit enjoined, and to have it adjudged that the sale of the property to claimant was not in fraud of creditors; remedy by the claim suit instituted by her being adequate. *Troy Fertilizer Co. v. Prestwood*, 116 Ala. 119, 22 So. 262.

The refusal of a United States marshal, seizing slaves on execution, to accept a claim bond under the state statute, does not give a court of equity jurisdiction to proceed against him by injunction; claimant having an adequate remedy at law by an action of detinue. *Bissell v. Lindsay*, 9 Ala. 162.

Where personal property is improperly levied on, the party claiming it can not enjoin the creditor from proceeding at law, on the ground that another person has interposed a claim to it by mistake. The true owner has an adequate remedy at law by suit or interposing a claim un-

der the statute of Alabama. *Marriott v. Givens*, 8 Ala. 694.

Equity will not enjoin proceedings on an execution issued against the surety on a claim bond on the ground that such execution is irregular in form, and for an amount exceeding the penalty of such bond, since the surety has an adequate remedy at law. *Triest v. Enslen*, 106 Ala. 180, 17 So. 356, cited on this point in notes in 30 L. R. A. 136, 137, 31 L. R. A. 60, 32 L. R. A. 326.

§ 116 (3) Claim of Property by Third Person, and Cloud on Title.

Levy on Property Claimed by Third Person.—The sale of land under an execution issued on a judgment against the vendor would constitute a cloud on the purchaser's title; and hence, there being no adequate remedy at law, it would be enjoined. *Martin v. Hewitt*, 44 Ala. 418.

An injunction against an execution sale will issue at the instance of a bona fide purchaser for value of land subject to the lien of a judgment, where the purchase, though made after rendition of the judgment, took place before the delivery of the execution to the sheriff for levy. *Martin v. Hewitt*, 44 Ala. 418, cited in note in 30 L. R. A. 108.

A party bearing the same name with one of several defendants in a judgment may resist the levy on and sale of his property under a fieri facias by suit in equity, upon the allegation that he is not a party to the note on which the action was founded and that he was not served with process. *Givens v. Tidmore*, 8 Ala. 745.

D. sold land to R., and gave bond for title. Afterwards S. recovered a judgment against D., and did not proceed against D.'s interest in the land sold to R. until R. had sold to M., and D. had made title to M. Held, that M., by bill in chancery, might enjoin S. from attempting to sell the lands as the property of D. *Downing v. Mann*, 43 Ala. 266, cited in note in 30 L. R. A. 108.

Where execution creditors of a vendor of land levy on the land in the possession of the vendee, injunction will not lie at the instance of the vendee, as he has an adequate remedy at law, by a trial of the right under statute, or by an action for

the trespass. *Gunn v. Harrison*, 7 Ala. 585.

It is not ground for such interference that there is personal property in the hands of the vendor which, under his contract, should have been delivered to the vendee, which the creditors might have levied on. *Gunn v. Harrison*, 7 Ala. 585.

Levy on Property of Husband or Wife of Debtor.—Equity will not enjoin the sale of a slave on an execution sued out by a creditor against a husband, because the slave was part of the separate estate of the wife, created by deed, and has been conveyed by her to her children. *Flanagan v. State Bank*, 32 Ala. 508.

Where the separate estate of a wife is levied on for the debt of her husband, an injunction may be obtained to stay the sale in default of any other remedy. *Calhoun v. Cozens*, 3 Ala. 498.

Slaves being levied on as the property of the husband, the wife filed a bill to enjoin the sale, claiming the same as her separate property by the will of her father; or, if not entitled to the separate estate, then claiming an exclusive interest in the slaves to be in herself and her son by a former marriage, by the laws of Louisiana, where she was domiciled at the time of her last marriage and in possession of the slaves; or, if both these grounds failed, then claiming to hold by the permission of the administrator of her first husband, and as dative tutrix of her son, appointed in Louisiana, the property never having been distributed. Held, that the bill was not demurrable for want of equity. *Lewen v. Stone*, 3 Ala. 435.

Protection of Rights of Other Creditors.—While the question of property is pending between the plaintiff in execution and a claimant of property levied on under it, an injunction will be granted to stay proceedings on other executions issued upon the same judgment and levied upon the same property. *Huntington v. Bell*, 2 Port. 51, cited in note in 30 L. R. A. 116.

Equity will enjoin a sale of land under a judgment and execution to which it is not subject, at the suit of a mortgagee or trustee in a deed of trust. *Whitfield v. Clark*, 48 Ala. 555.

A trustee in a deed, who is also the

principal beneficiary, may come into equity, on behalf of himself and the other beneficiaries of the deed, to prevent a sale of the property under executions and attachments at law, to foreclose the deed, and to settle the conflicting liens. Such a bill is properly filed, not only as preventing a multiplicity of suits, and removing a cloud upon the title to the property, but also on the well settled ground that a mortgagee, although he has power of sale, may foreclose in equity. *Alabama Life Ins. & Trust Co. v. Pettway*, 24 Ala. 544.

§ 117. — Actions to Restrain Executions.

§ 117 (1) Pleading and Evidence.

A bill brought by the devisees of certain lands to enjoin a sale of them upon execution issued on a judgment recovered upon a bond given by their testator's administrator, under Ala. Code 1876, § 2432, to extend a debt due from said testator's estate, is demurrable, if it does not state what averments said administrator's application to the probate court, for authority to give said bond, contained. *Wilburn v. McCalley*, 63 Ala. 436.

In a suit to set aside an execution sale of certain land which complainant claimed to own, having received a conveyance thereof from M., who had also conveyed the land to defendant, complainant's original bill alleged that M. sold the land to him, and on or about March 20, 1903, executed to him a quitclaim deed. The deed from M. to defendant, including the certificate of acknowledgment, bore date March 17, 1903, and by amendment complainant alleged that defendant had M. date his deed prior to and before the date of the quitclaim to complainant as alleged in the bill. Held, that the amendment did not allege that the deed to defendant was falsely antedated. *Harton v. Enslin* (Ala.), 62 So. 696.

It is not sufficient, to authorize a court of chancery to restrain an execution, to allege that a payment has been made on account of the debt and not credited on the execution. It must be also charged that the plaintiff refused to make the credit, or that he is attempting to enforce a payment a second time. *Abercrombie*

v. Knox, 3 Ala. 728, cited in note in 30 L. R. A. 567.

On a bill to enjoin an execution against particular property, the allegation that a prior execution in favor of another plaintiff against a part of the same defendants had been enjoined is not ground for equitable relief; it not appearing but that the ground for the prior injunction had reference to the judgment or process itself, and not to the property. *Dunn v. Bank of Mobile*, 2 Ala. 152.

§ 117 (2) Damages and Costs on Dissolving Injunction.

The obligors in a bond on injunction sued out by heirs to enjoin proceedings under an execution issued on a judgment against the administrator, and levied upon their lands, can not supersede an execution issued on the bond for the amount of the judgment, with interest and damages, because the judgment against the estate is held void. *McCalley v. Wilburn*, 77 Ala. 549.

A bond in a suit by partners to restrain levy on their individual property under a judgment and execution against the firm is not within Code, § 3529, providing that on dissolution of an injunction against proceedings "on a judgment" the injunction bond has the force of a judgment on which execution may issue. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

That a bill by partners to enjoin levy on their individual property under a judgment against the firm was drawn under mistaken belief of counsel that the judgment was collectible out of the individual property of the partners is not ground for granting relief to a surety on the bond erroneously executed under Code, § 3522, with condition for payment of the judgment, who voluntarily paid the same on demand. *Halsey v. Murray*, 112 Ala. 185, 20 So. 575.

§ 118. Voluntary Withdrawal or Countermand.

If a plaintiff in an execution, after it has been levied on property of the defendant, instructs the sheriff to stay further proceedings thereon, this in law is constructively fraudulent as against junior judgment creditors, whatever the motive may have been which induced the in-

struction, and its lien will be postponed in favor of other executions that have issued and been delivered to the sheriff before the plaintiff sues out an alias. *Branch Bank v. Broughton*, 15 Ala. 127, cited on this point in note in 27 L. R. A. 379.

§ 119. Damages and Costs on Quashing or Setting Aside.

As to stay in general, see ante, "Stay of Execution," § 110.

Under Code Ala. 1876, § 5032, the sheriff is entitled to receive as a fee, "for levying fieri facias, when sale is stayed after levy by any restraining order, one per cent. on the amount of the judgment, to be paid by the party obtaining the order, to be taxed for his benefit, if successful, against the adverse party, on the termination of the suit." Plaintiff recovered judgment, and levied execution. An appeal with supersedeas was taken by defendant, and the judgment reversed. On a new trial plaintiff recovered judgment for a less sum. Held, that he could not tax one per cent. of the first judgment as costs under the statute, because he did not come within its terms. He did not pay the fees, nor did he obtain the stay, and the costs were taxed, not against the "adverse" party, but against the party who did obtain the stay. *Tennessee & C. R. Co. v. East Alabama Ry. Co.*, 81 Ala. 94, 1 So. 214.

When a petition for a supersedeas to stay execution is allowed, it is the commencement of a suit, and on its determination costs are due to the successful party. *Shearer v. Boyd*, 10 Ala. 279.

VI. CLAIMS BY THIRD PERSONS.

As to right to injunction, see ante, "Claim of Property by Third Person, and Cloud on Title," § 116 (3). As to claim by third persons against execution on foreclosure judgment, see the title MORTGAGES. As to claims in justices courts, see the title JUSTICES OF THE PEACE. As to restraining threatened claim, see the title INJUNCTION. As to right of fraudulent grantee as to property levied on by grantor's creditors, see the title FRAUDULENT CONVEYANCES.

§ 120. Intervention in General.

"A claim suit is a collateral issue, and when resorted to, it takes the place of the action of trespass against the levying officer, who, under process against one, seizes goods alleged to be the property of another. It is highly beneficial and conservative, inasmuch as it determines the controverted ownership of property in a single suit, between the real parties in adverse interest. Still, the proceeding being statutory, it can not be extended beyond the terms the statute prescribed. The provision allowing the claimant, who has made the proper affidavit, and given the proper bond, to become the bailee or custodian of the property pending the litigation, is itself highly conservative, as tending to cut down the expense of the suit, but he takes possession provisionally, and not as owner. The property is in the law's keeping, and he must preserve it for the law's final arbitrament. Preservation and inexpensive safe custody are the limit of his authority and duty. If he be cast in the suit, and fail to restore the property to the levying officer within thirty days, the law declares the result. Code, § 3344." *Munter v. Leinkauff*, 78 Ala. 546, 548.

"It is certainly indisputable that a trial of the right of property, under our statute, is an action or suit, in which the plaintiff in execution is deemed the actor, and the claimant the defendant. *Jacott v. Hobson*, 11 Ala. 434; *Planters', etc., Bank v. Borland*, 5 Ala. 531." *McAdams v. Beard*, 34 Ala. 478, 480.

"The trial of the right of property, under our statute, is a proceeding altogether sui generis. There is no precedent for it known to us in the English law. Hence, there is much disputation in this case as to the precise point at which the action commences. This court has incidentally observed in argument, without having the question before it, that the execution was the leading process of the action. *Planters', etc., Bank v. Borland*, 5 Ala. 531. This remark was certainly wrong. The issue of the execution can not be the commencement of a suit. It is not its aim or purpose to inaugurate a suit. In the execution

of its mandate, the sheriff may do that which will become the predicate of a suit in detinue, trover, or trespass, or of a trial of the right of property; but it is not the commencement of any of those actions. It is not known, when the execution issues, that there will be any claim to property levied on; and until the levy, the thing is not done which is the cause of the action. If, therefore, a suit exists from the issue of the execution, we have the absurdity of a suit without a defendant, and in advance of the cause which produces the suit." *McAdams v. Beard*, 34 Ala. 478, 481.

"The statutory trial of the right to property, levied on by legal process has, from its origin, been regarded as merely a cumulative remedy, not superseding the ordinary common law actions of trespass, trover, or detinue. It can be maintained only where, at common law, these actions could have been maintained, and hence, in accordance with the rules applicable to these actions, the claimant must have a legal title to support it, or actual possession, which is but evidence of such title, and must recover upon the strength of his own title. *Lehman, etc., Co. v. Warren*, 53 Ala. 535." *Columbus Iron Works Co. v. Renfro Bros.*, 71 Ala. 577, 579.

The commencement of a statutory claim suit is not the issue of the execution, nor its levy, but the making of the affidavit and the giving of the bond by the claimant. *McAdams v. Beard*, 34 Ala. 478.

The pendency of a proceeding to try the right of property to goods taken on execution can not prevent a third person from maintaining an action at law to recover the goods of the claimant. *Oden v. Stubblefield*, 2 Ala. 684.

§ 121. Claims or Liens Prior or Superior to Execution.

An equitable title will support a claim by third persons under the statute on the trial of the right of property levied on. *E. Strickland & Co. v. Lesesne & Ladd*, 160 Ala. 213, 49 So. 233.

The mortgagee of personal property, with a power to take possession of and sell the same upon the mortgagor's de-

fault, may interpose a claim under the statute to try the right when it is levied on by execution. *Anderson v. Hooks*, 9 Ala. 704. See *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770.

"A court of law can not, consistently with its powers, compel a plaintiff in execution to accept the value of the mortgaged property after satisfying the lien of the mortgagee instead of offering it for sale. If the mortgagor have a legal interest, the thing itself may be sold, and this will not prejudice the mortgagee, who may assert his rights in the same manner as if no sale had taken place. See further, *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770." *McDonald v. Foster*, 5 Ala. 664, 665.

A claimant of property, levied on, under execution, can not, in a proceeding to try the right thereto, interpose a mortgage of the property levied on, executed to himself, from the defendant in execution. *Purnell v. Hogan*, 5 Stew. & P. 192.

§ 122. Rights of Claimants of Property.

§ 123. — In General.

Right or Title of Claimant.—Code 1896, § 4141, with reference to personal property levied on, provides that where a stranger claims to own the title, legal or equitable, or a lien paramount to the interest of the defendant in the writ, such person may try the right to such property before sale on making affidavit and giving bond, and § 2634 declares, with reference to detinue, that a defendant not claiming title may require the adverse claimant to defend by making affidavit, etc. Held that, under § 4141, a claimant of property levied on, who claims to own title to the property, "legal or equitable," or a paramount lien thereon, was entitled to try the right of property before sale, but that an equitable title or paramount lien to the title of the defendant was not available in a proceeding under § 2634. *Howard v. Deens*, 39 So. 346, 143 Ala. 423.

A mortgagee of an unplanted crop does not acquire the legal title to the crop when it comes into existence, and therefore he can not maintain a statutory claim suit against an execution creditor

of the mortgagor who levied on the crop as soon as it came into existence. *Columbus Iron Works Co. v. Renfro Bros.*, 71 Ala. 577.

A mortgagee's equitable title to crops mortgaged before they were planted is converted into a legal one by delivery of the crop by the mortgagor to a railroad company for transportation to the mortgagee, so as to enable him to maintain a statutory claim suit against an execution creditor of the mortgagor, levying on the crops after their delivery to the carriers. *Columbus Iron Works Co. v. Renfro Bros.*, 71 Ala. 577.

Where execution was levied against a mortgagor's interest in property, and the latter discharged the mortgage lien by paying the indebtedness before trial of the claim suit, the assertion of claim by the mortgagee could not prevent the condemnation of the property. *Fontaine v. Beers*, 19 Ala. 722.

A mortgagee of unplanted crops and a landlord having a rent lien on the crops when grown have such equities that either may maintain a statutory claim suit for the crops, under Code, § 3040, allowing any person having an equitable title to property levied on to maintain a claim suit for its possession, when held by another under levy of an execution. *Ballard v. Mayfield*, 107 Ala. 396, 18 So. 29.

A cestui que trust of personal property can not interpose a claim under the statute to try the right of property. *King v. Hill*, 20 Ala. 133.

In a statutory action to try the right of property in certain oxen taken under execution against claimant's husband, it appeared that the oxen were the offspring of a cow which the husband testified he had bought on credit, and that claimant paid for her. He also testified that he turned the cow over to his wife in payment of a debt, and it appeared that, many years before, claimant had owned two cows, her separate property, which her husband sold with her consent, and used the money, promising to repay it to her. Held that claimant's right was only equitable, and the jury were properly charged to find for the execution plaintiff. *Bush v. Henry*, 85 Ala. 605, 5 So. 321.

A mortgage of an unplanted crop does not convey a legal title, on which the mortgagee may maintain a statutory claim suit, unless there has been an actual delivery of the crop after it has been gathered. *Wetzler v. Kelly*, 83 Ala. 440, 3 So. 747.

Under Code, § 3004, providing that the "right of trial to property shall include any person who holds a lien upon, or equitable title to, such property," a mortgagee of an unplanted crop, as soon as the crop comes into existence, may try his right to it at law, as though he had the legal title. *Patapsco Guano Co. v. Ballard*, 107 Ala. 710, 19 So. 777.

Code, pt. 3, tit. 2, c. 2, § 2587, provides that, when execution is levied on personal property claimed by one not a party to the suit, he is entitled to try the right thereto before sale by making affidavit that he has a just claim thereto, and also executing a bond, etc.; and § 2595 of the same chapter provides that, "when personal property mortgaged to another is levied on by execution, the mortgagee or his assignee may try the right of property as herein provided." Held that, when an execution from a court of record is levied on personal property mortgaged to another, the mortgagee or his assignee may, by virtue of the latter section, try the right of property as provided in such chapter before the law day of the mortgage has arrived; it being clear that under the former section either is authorized to try the right of property whenever such execution is levied on such property after the law day of the mortgage. *Floyd v. Morrow*, 26 Ala. 353.

After the institution of a claim to slaves levied on, a transfer by a claimant of his title to a third person is valid, and passes his right of property, clogged, however, by all the consequences of the levy and claim, and the title is not turned into a mere right of action. *Jackson v. Gewin*, 9 Ala. 114.

One who has a just interest in property levied on, derived from the owner, though he has not a legal title thereto, may try the right to the property, where the property did not belong to the exe-

cution defendant. *McKeithen v. Pratt*, 53 Ala. 116.

In a claim suit under the statute, if the claimant has even an undivided interest in the property, as where it belongs to him and a third person, he may interpose his title and thereby defeat the execution. *Cotten v. Thompson*, 21 Ala. 574.

If a purchaser from an insolvent debtor intentionally mingles the goods with his own to prevent levy of execution thereon, he can claim no exemption, save upon furnishing evidence to separate the goods. *Lehman v. Kelly*, 68 Ala. 192.

Where the claimant derives title from the defendant in execution to property which, but for the contract between them, would be subject to execution, it seems that the claimant must have the legal title to entitle him to try the right of property. This rule, however, has been altered as to mortgagees by statute. *McKeithen v. Pratt & Co.*, 53 Ala. 116.

When property is seized under process against the husband, which the wife claims under sale or gift by conveyance from him to her, neither she in her own name, nor in the name of the husband as trustee, can defend on such title in a trial at law of the right of property. *Bush v. Henry*, 85 Ala. 605, 5 So. 321.

Right to Interpose Title of Third Person.—The general rule is that a claimant on a trial of the right of property can not show title in a stranger, for the purpose of defeating the execution. *Frow v. Downman*, 11 Ala. 880; *Foster v. Smith*, 16 Ala. 192; *Pollak & Co. v. Graves*, 72 Ala. 347; *Thomas v. Degrafenreid*, 17 Ala. 602; *Jones v. Franklin*, 81 Ala. 161, 1 So. 199; *McGrew v. Hart*, 1 Port. 175; *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683; *Bennett v. McKee*, 144 Ala. 601, 38 So. 129.

On the trial of a statutory claim suit, the claimant must recover, if at all, on the strength of his own title; and it being shown that, at the time of the levy, the property was in the possession of the defendant in the writ, the claimant can only repel the presumption of ownership, arising from such possession, by showing title in himself, or by connect-

ing himself with the outstanding title of a third person. *Pollak & Co. v. Graves*, 72 Ala. 347.

A claimant, on the trial of the right of property, is not permitted to prove title in a third person, with whom, at the time the evidence is offered, he has neither shown, nor proposed to show, any privity. *Thomas v. Degraffenreid*, 17 Ala. 602.

In a trial of right of property, the claimant must recover on the strength of his own title, nor can he show, to support his claim, a title paramount to that of defendant in a third person, a stranger to the proceeding. *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683.

A claimant of property levied on at the instance of a judgment creditor can not defeat the levy by showing title in a third person, unless he shows that he has acquired such third person's right to the property. *Bennett v. McKee*, 144 Ala. 601, 38 So. 129.

The claimant of goods levied on as the property of another can not litigate the question whether the levy is right as to the execution defendant. Only the question of his own right to the property can be raised in the claim suit. *Crosby v. Hutchinson*, 53 Ala. 5.

A claimant of property levied upon under execution, while in the possession of the defendant in execution, is not permitted to show an outstanding title in a stranger, between whom and himself there is no privity, for the purpose of defeating the plaintiff's execution. He must show a legal title in himself, such as would support detinue for the property. *Jones v. Franklin*, 81 Ala. 161, 1 So. 199.

Where, a claimant possesses an undivided interest in the property levied upon; as where such property belongs jointly to the claimant and an infant, or to some third person not a party to the suit; this case would form an exception to the general rule, and authorize the interposition of the circumstance of the title, to show that the defendant in execution had none. *McGrew v. Hart*, 1 Port. 175.

Estoppel to Assert or Deny Claim.—Where a claimant of fifteen bales of a

quantity of cotton levied on secretly removed the same, without force, and substituted fifteen other bales, after erasing their marks and substituting those of the bales removed, and then claimed the substituted bales, if the sheriff elects to receive those substituted for those originally levied on, the claimant is concluded by his own act from denying that it was the cotton levied on, and the question between the parties will be as if no substitution had been made. *Smith v. Locke*, 4 Ala. 288.

Where an execution against two defendants was levied on the goods of one of them, which were claimed by another person, the fact that, in forming the issue on a trial of the right to the goods, plaintiff alleged that they were the property of "defendants," will not preclude him from subjecting them to the execution as the property of the defendant against whom the execution was levied. *Ramey v. W. O. Peoples Grocery Co.*, 108 Ala. 476, 18 So. 805.

§ 124. — Attack on Judgment or Execution.

In General.—The claimant of property levied on, can not object to any irregularity in the judgment or execution. *Fryer v. Dennis*, 2 Ala. 144; *Branch Bank v. Ford*, 13 Ala. 431, 433; *Henderson v. Bank*, 11 Ala. 855, cited on this point in note in 4 L. R. A., N. S., 1021.

"The rule is so well established, that a claimant of property can not be permitted, to question the propriety of the judgment, or the regularity of the execution, that it is unnecessary to refer to the numerous decisions in support of it. A claimant shall not be permitted even to show the satisfaction of the judgment. But I understand this rule to be limited to this extent, that the claimant shall not sustain his claim by showing such defects or irregularities." *Branch Bank v. Ford*, 13 Ala. 431, 433.

On the trial of a statutory claim suit, the claimant can not take advantage of defects or irregularities in the process which do not render it void. *Sandlin v. Anderson, etc., Co.*, 76 Ala. 403.

In a statutory claim suit, the claimant may show that the attachment, execu-

tion, or other process is void on its face. *Joseph Bradford & Son v. Bassett*, 151 Ala. 520, 44 So. 59; *Joseph Bradford & Son v. Harris*, 151 Ala. 669, 44 So. 60.

Plaintiff in "a trial of the right of property," under Code 1907, § 6039 et seq., must, to make a prima facie case, present the process under which the levy on the property was made, and if it is void on its face he can not recover. *Jordan Bros. v. Gordon* (Ala.), 62 So. 1023.

Judgment or Decree.—A claimant of property levied on can not avail himself of a defect in the judgment or decree upon which is has been issued. *Perkins v. Mayfield*, 5 Port. 182.

The claimant of property levied on under an execution can not impeach the judgment on which the execution was issued on the ground of fraud in the obtaining of it. *Hooper v. Pair*, 3 Port. 401.

Evidence which merely shows that the judgment is voidable at the election of the defendant, or that the plaintiff has an additional remedy, can not be adduced by the claimant, on a trial of the right of property. He can not, therefore, show that the defendant in execution was a surety merely; that a judgment was first obtained against the principal debtor, who had ample property to satisfy it; and that the sheriff failed to return the executions, etc. *Taylor v. Branch Bank*, 14 Ala. 633.

On the trial of the right of property under the statute, the plaintiff can not be required to produce the judgment on which his execution issued, nor can the claimant be allowed to show the same to be an insufficient warrant for an execution. *Huff v. Cox*, 2 Ala. 310.

Execution.—In a trial of the right of property, the parties can not be allowed nor required to go behind the execution to support nor to invalidate it. *Huff v. Cox*, 2 Ala. 310.

On a trial of the right of property under the statute, the claimant can not inquire into the regularity of an execution which is voidable, and which has not been quashed or set aside; otherwise, as to an execution absolutely void, or which has been quashed or set aside for irregularity. *Brown v. Hurt*, 31 Ala. 146. See

Blount v. Traylor, 4 Ala. 667; *Harrell v. Floyd*, 3 Ala. 16; *Huff v. Cox*, 2 Ala. 310; *Fryer v. Dennis*, 2 Ala. 144; *Bettis v. Taylor*, 8 Port. 564.

A claimant is estopped by his bond, from denying that a levy was made. *Henderson v. Bank*, 11 Ala. 855, cited on this point in note in 4 L. R. A., N. S., 1021.

Where a claimant in a claim suit makes affidavit and gives bond as required by Code 1896, § 4141, giving a stranger to the writ the right to have the property levied on delivered to him upon indemnifying the plaintiff, the claimant is estopped by his bond from inquiring into the validity of the levy, unless the process is void on its face. *Bradford & Son v. Bassett*, 151 Ala. 520, 44 So. 59; *Bradford & Son v. Harris*, 151 Ala. 669, 44 So. 60.

An irregularity in the issuance of an execution is a matter of which a statutory claimant of the property levied on can not complain. *Christian & Craft Grocery Co. v. Michael*, 121 Ala. 84, 25 So. 571.

A claimant of property can not show payment of the execution levied on the property claimed. *Stone v. Stone*, 1 Ala. 582.

The sheriff levied on twenty-five bales of cotton in a warehouse, as the property of J. against whom he had an execution. S. setting up a claim to fifteen bales of the cotton, procured fifteen other bales of cotton, and having obliterated the marks and brands, marked them to resemble the cotton levied on and substituted them secretly and without force, for fifteen bales of cotton levied on, which he removed, and on the day of the sale claimed the cotton and forbade the sale. Held—First, that if the sheriff elected to receive the substituted cotton for that originally levied on, S. was concluded by his own action from denying that it was not the cotton levied on. Second, that on a suit by S. against the sheriff for the fifteen bales of cotton, the only question was whether the property in the fifteen bales levied on was in S. or in the defendant in execution when the execution came into the sheriff's hands. Third, when the sheriff levies on

property which does not belong to the defendant in execution, the true owner may retake possession if he can do so without committing a trespass. *Smith v. Locke*, 4 Ala. 288.

§ 125. Time for Interposing Claim.

Judgment on a claim to personal property upon which execution has been levied, tried at the same term of a city court as that in which the execution issued, is void for want of jurisdiction, since the statute provides that, when execution issued from a city court is levied on personal property, the affidavit and bond of a claimant thereto must be returned to the next term of such court. *Johnson v. Johnson*, 108 Ala. 124, 19 So. 306.

Where property is deeded in trust to indemnify sureties, and is sold under execution against the grantor, the sureties can not interpose a claim thereto for the first time on appeal. *Hawkins v. May*, 12 Ala. 673.

§ 126. Notice or Demand by Claimant, and Affidavit of Claim.

Necessity.—An affidavit of ownership by the claimant is essential to the institution of a statutory claim suit. *Graham v. Hughes*, 77 Ala. 590.

An affidavit of ownership by the claimant is the initial step in a statutory claim suit, without which the claimant has no standing in court, and his claim is properly dismissed. *Graham v. Hughes*, 77 Ala. 590.

Form and Sufficiency.—As Code, § 4141, relating to affidavits by claimants of property levied on under execution, does not in terms require them to be signed by the party making them, an affidavit not signed, but properly certified by the officer before whom it was made, was sufficient. *Albritton v. Williams*, 132 Ala. 647, 32 So. 636.

Under Code, § 4145, providing that when the claim of a party claiming title to, or a paramount lien upon, property which has been levied on, is based on a mortgage or lien, the claimant must state in his affidavit the nature of the right which he claims, a chattel mortgagee can not recover the mortgaged property, as

against a levy thereon, where he fails to state in his affidavit the nature of his claim, especially if the law day of the mortgage has not arrived. *Ivey v. Coston*, 134 Ala. 259, 32 So. 664.

Under Code 1896, § 4145, providing that, when a claim to property levied on by execution or attachment is based on a mortgage or lien, the claimant must state in his affidavit the nature of the right which he claims, a failure of the affidavit to so state is fatal to the claim. *Bennett v. McKee*, 144 Ala. 601, 38 So. 129.

Where the affidavit of the claimant of property levied on by execution, describes the execution, the property levied on, and when, and asserts that the right thereto is in the claimant, this is a sufficient compliance with the statute, although the affidavit is dated on the day the sheriff's indorsement shows the execution was placed in his hands, and four days before the same was levied. *Rives v. Wilborne*, 6 Ala. 45.

Where the affidavit of a claimant bore date four days before the date of the levy, but the execution and property were described with sufficient certainty, a mistake in the date of the affidavit or levy was presumed, and the affidavit held sufficient. *Rives v. Wilborne*, 6 Ala. 45.

Defects, Objections and Waiver.—When the affidavit is made by an agent of the claimant, in which, whether through accident or design, the Christian name of the plaintiff in execution is incorrectly stated, the claimant can not take advantage of the error by declining to join in an issue with the plaintiff in execution, when the error is apparent from an inspection of the bond, the execution, and the indorsement thereon, which for this purpose may be regarded as parts of one transaction; but the court may compel him to join in an issue, or suffer the consequences of a default. *Gayle v. Bancroft*, 22 Ala. 316.

§ 127. Security by Claimant for Possession.

As to effect of bond as waiver of irregularities in levy, see ante, "Irregularities and Objections as to Levy, and Waiver," § 97. As to liabilities on bond,

see post, "Liabilities on Bonds and Undertakings," § 145. As to validity as a common law obligation of void statutory bond of claimant, see the title BONDS. As to sale of property where execution defendant is insane, see the title INSANE PERSONS.

Construction.—A claim bond, required by the statute, is intended to furnish an additional security for the creditor, and can not be so construed as to work an injury to him. *Patton v. Hamner*, 33 Ala. 307. See *Bradford v. Dawson*, 2 Ala. 203.

A bond executed [before the act of 1828] by the claimant of property levied on under execution, and embracing a trial of the right of property, both to real and personal estate, is void as a statutory bond. *King's Adm'r v. Walton*, 3 Port. 289.

"The sheriff had no right to take a bond for the trial of the right to real estate; and it would be great injustice to the security in this bond, to subject him to the payment of this whole debt, when only a part of the condition upon which he stipulated to become liable, has been forfeited." *King v. Walton*, 3 Port. 289, 290.

Parties to Bonds.—Since the enactment of the act of 1828, Digest 169, 5 and 55, the bond, which the claimant of property levied on by execution, is required to give before a trial of the right of property is had, should be made payable to the plaintiff in execution. *Bradford v. Dawson*, 2 Ala. 203.

If property taken in execution be claimed by M. and S., the bond of S. alone, with security, is sufficient to authorize the trial of the right of property under the statutes. *Marrs v. Gantt*, Minor 406.

The statute requires that "the person claiming such property, or his attorney, shall give bond to the sheriff with security," conditioned, etc. It can not well be doubted but that one person may enter the claim to property for himself and other joint claimants, and that the bond of such person, with sufficient security, complies with the statute, and is all the indemnity to which the adverse party is

entitled. *Marrs & Co. v. Gantt*, Minor 406.

In claims interposed under the statute to property which is levied on as belonging to the defendant in execution, the bond required to be given may be executed by those claiming the beneficial interest in the property, and not necessarily by him who is invested merely with the legal title. *Graham v. Lockhart*, 8 Ala. 9.

Defects and Objections.—If the bond given by a claimant of property taken on execution is defective, the claim should not be dismissed, if the claimant will execute a sufficient bond. *Bradford v. Dawson*, 2 Ala. 203.

A motion to quash a bond given for the trial of the right of property, made by some of the obligors, is addressed to the discretion of the court, and its refusal to quash is not revisable on error. *Gayle v. Bancroft*, 22 Ala. 648.

Lien and Custody of Property Pending Claim.—A surety in a claim bond, in which the principal is trustee for a feme covert, has no equitable right to prevent the feme covert from removing the property covered by the condition of the bond out of the state, previous to a forfeiture of the condition. *Hughes v. Garrett*, 8 Ala. 483.

Forfeiture of Bond.—The doctrine that, on the forfeiture of a claim bond, the original judgment is merged or satisfied, or in any way impaired in its force or efficiency, does not obtain in this state. *Patton v. Hamner*, 33 Ala. 307.

§ 128. Actions by Claimant for Recovery of Possession.

As to payment as a condition for precedent, see ante, "Notice or Demand by Claimant, and Affidavit of Claim," § 126.

Where in detinue against a constable for a horse there was evidence that the horse in fact belonged to the execution debtor, and that plaintiff merely held it to defraud such person's creditors, it was error to exclude the execution against such third person, for if the horse belonged to such third person defendant had a right to retain it under the execution. *Pruett v. Gunn*, 158 Ala. 123, 48 So. 492.

§ 129. Proceedings for Establishment and Determination of Claims.

§ 130. — Nature and Form of Remedy.

Where the claimant derives title to the slave in controversy under a purchase from the defendant in execution, their declarations respecting the contract, whether made before or after its consummation, but not constituting a part of the *res gestæ*, are not competent evidence for the claimant. *McAdams v. Beard*, 34 Ala. 478.

Although a mortgagee of personal property, with the power to take possession of and sell the same upon the mortgagor's default, may interpose a claim under the statute to try the right when it is levied on by execution, yet he may waive his legal right, and resort at once to a court of equity, where all interests may be adjusted, and justice more completely administered. *Anderson v. Hooks*, 9 Ala. 704.

When property levied on by attachment is claimed after a vend. ex. has come to the sheriff's hands, the suit is equivalent in all respects to one founded on a *fi. fa.*; the statute (Dig. 57, § 11), which authorizes the interposition of a claim when the levy is by virtue of an attachment, directing that the same proceedings shall be had as when the levy is under a *fi. fa.* *Yarborough v. Moss*, 9 Ala. 382.

Code 1886, § 3006, provides that, where a person not a party to the execution makes claims to property on which an execution out of the chancery court is levied, the sheriff shall return a copy of the execution, with his return of the interposition of a claim, and the claim bond and affidavit, to the circuit court of the county, wherein the trial of the right of property shall be had. This Code took effect December 25, 1887, and § 10 declares that "this Code shall not affect any existing right, remedy, or defense," but that "as to all such cases the laws in force at the adoption of this Code shall continue in force." When the Code took effect there was pending a claim to property seized on execution out of the chancery court. Held, that this claim was to be returned and determined in the

chancery court, as provided by Code 1876, § 3342. *Ex parte Oehmig*, 91 Ala. 558, 8 So. 820.

§ 131. — Jurisdiction.

The circuit court has jurisdiction of all claims to property levied on, whether the execution issued from that court or another. *Cullum v. Smith*, 6 Ala. 625.

§ 132. — Parties.

When one voluntarily, with the leave of court and the consent of a plaintiff in execution, substitutes himself in the place of another as a claimant to the property levied on, he can not afterwards be allowed to object that all this was irregular, and that he was not legally a party. *Bettis v. Taylor*, 8 Port. 564.

One of two cosureties, who are indemnified by a deed of trust of certain property, may interpose for the benefit of both a claim under the statute to such property when levied on. *Hawkins v. May*, 12 Ala. 673.

A trial of right of property may be prosecuted in the name of an infant, by a *prochein ami*, who may execute the bond, and, if necessary, make the affidavit required by the statute. *Strode v. Clark*, 12 Ala. 621.

An execution was issued by a justice at the suit of C. against the goods and chattels of A., and levied on a slave, which A. made oath was the property of W., and held by the affiant as his agent. A trial of the right of property was had between plaintiff and A. as agent, and the slave condemned to satisfy the execution. Held that, if W. was the owner of the slave, the claim of property and all subsequent proceedings should have been in his name, instead of the name of A. as agent. *Alford v. Colson*, 8 Ala. 550.

If a plaintiff in execution dies, pending a trial of the right of property under the statute, the proceeding may be revived in the name of his personal representative. *Gayle v. Bancroft*, 22 Ala. 316.

§ 133. — Pleading.

It is not necessary for a claimant of property levied on to allege his ownership, in order to raise an issue, but merely to deny that the property is liable to the

execution. *Branch Bank v. Parker*, 5 Ala. 731.

In a claim to property levied on, where the deed under which the claimant makes title, is set out in his plea, and the replication is, that if any such deed exists, it is not valid in law; such a replication, in a claim cause, does not admit the execution of or dispense with proof of the deed. *Desha, etc., Co. v. Scales*, 6 Ala. 356.

Under the statute for the trial of the right of property levied upon, a plea which alleges that the same property has been levied on at the suit of another execution creditor, a claim interposed, and bond given to try the right, will not be entertained, even if the proof of such facts would avail before a jury. *Langdon v. Brumby*, 7 Ala. 53.

Where a claimant of property seized on execution, in whose name a suit to try rights of property has been carried on for several years, was in fact ignorant of the suit, and for that reason entitled to come in and disclaim, his disclaimer must be accompanied by a showing as to his want of knowledge and of the want of authority of those who appeared in his name. *Gayle v. Bancroft*, 22 Ala. 316.

§ 134. — Issues and Questions Considered.

As to issue for trial of right of property constituting a suit at law within rule of chancery practice, see the title ELECTION OF REMEDIES.

In a statutory claim suit, the only issue for the jury to try is whether the property claimed is the property of the defendant in the execution and is liable to its satisfaction. *Joseph Bradford & Son v. Bassett*, 151 Ala. 520, 44 So. 59; *Joseph Bradford & Son v. Harris*, 151 Ala. 669, 44 So. 60.

The only proper issue upon the trial of the right of property under the statute is an affirmation on the part of the plaintiff that the property invested is subject to his execution, and a denial of that fact by the claimant. *Langdon & Co. v. Brumby*, 7 Ala. 53. See *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770; *Phelan v. Fancher*, 5 Ala. 449.

Either party in a claim suit has the

right, before trial, to require that the issue be made up; but, if they go to trial without doing so, the want of an issue can not be assigned in the supreme court as error. *Windham v. Clarke*, 16 Ala. 659.

Upon a trial of the right of property, the fact that an execution from the federal court had five years before been levied on the same property, and bond given to try the right, raises no question until it is shown that the trial is still pending, although the levy of such execution was first made. *Hobson v. Kissam*, 8 Ala. 357.

On the trial of the right of property upon a claim interposed under the statute, the court have a discretion in directing the form of the issue; but it would seem, that the only proper issue in such cases is an affirmation on the part of the plaintiff, that the property levied on is subject to his execution, and a denial of that fact by the claimant. *Planters', etc., Bank v. Willis & Co.*, 5 Ala. 770.

On the trial of an issue, whether certain property levied on by an execution in favor of P. M. B. v. J. H. W. it is not material whether J. H. W. was principal, or security in the note, on which the judgment is founded, he being equally liable to the plaintiff in the execution, whether he was one or the other, and evidence to prove his securityship may be rejected. *Planters', etc., Bank v. Borland*, 5 Ala. 531.

§ 135. — Evidence.

As to effect of assignment for creditors, see the title ASSIGNMENTS FOR BENEFIT OF CREDITORS.

§ 135 (1) Presumptions and Burden of Proof.

Where, in proceedings on a claim of third persons to property levied on, the creditors make out a prima facie case by showing judgment, execution, and levy on property in possession of defendant, it is incumbent on the claimants to show a better claim or title. *E. Strickland & Co. v. Lesesne & Ladd*, 160 Ala. 213, 49 So. 233.

On a trial of the right of property claimant must recover on the strength of his own title. When the plaintiff

shows a prima facie case, the burden is cast on the claimant to establish a legal title in himself, such title as would enable him to maintain trespass, trover or detinue. *Parker v. Wimberly*, 78 Ala. 64.

In a trial of the right of property, the plaintiff in execution need not produce the judgment, on which the execution issued—nor can the claimant be allowed to litigate its regularity or justice; or show that the defendant in execution was dead when it issued. *Bettis v. Taylor*, 8 Port. 564.

In a trial of right of property, the burden is on plaintiff to make out a prima facie case that the property levied on is that of defendant in execution, which burden is discharged when he shows that the defendant was in possession of the property at the time of the levy. The burden then shifts to claimant to overcome this prima facie presumption, and to prove ownership in himself. *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683.

In a proceeding under the statute to try the right of property, the general issue, after the onus is shifted, puts the claimant upon proof of his right to interpose the claim. *Foster v. Smith*, 16 Ala. 192.

In a statutory action for trial of right of property, claimed by a third person, the burden of proof is primarily on the plaintiff in execution or attachment. When, however, he makes a prima facie case of property in the defendant, the burden then shifts, and the claimant must prove a paramount title in himself. *Bush v. Henry*, 85 Ala. 605, 5 So. 321.

Where in a statutory action to try the right of property, the burden of proof is shifted from the plaintiff to the claimant to prove a paramount title in himself, in order to avail, the title must be legal, not equitable. *Bush v. Henry*, 85 Ala. 605, 5 So. 321.

In an issue framed under the statute, between the plaintiff in execution or attachment and the claimant of property, the bonus of proof on the plaintiff to make out a prima facie case that the property levied on is the property of the defendant in execution, is discharged sufficiently when it is shown by the plaintiff that the defendant in execution was

in possession of the property at the time of the levy; such decision being affirmative evidence of title. *Jones v. Franklin*, 81 Ala. 161, 1 So. 199.

Where a third party claims, by a prior purchase, goods sold under execution, the plaintiff in execution made out a prima facie case when he proved the existence of his debt, and that the defendant in execution was in possession of the property in controversy. The onus was then devolved on the claimant to establish a valid title in himself, as against the plaintiff. *Appel v. Crane*, 83 Ala. 312, 3 So. 863.

Under the decisions, the rule is well settled that in an issue framed under the statute between the plaintiff in execution or attachment and the claimant of the property, the bonus of proof is, in the first instance, on the plaintiff to make out a prima facie case that the property levied on is the property of the defendant in execution; he being required by statute to assume the affirmative of this issue. *Jones v. Franklin*, 81 Ala. 161, 1 So. 199.

On a statutory trial of the right of property, that the property when levied on was in a house on the premises of the execution defendant is prima facie evidence of his possession and ownership, and casts upon the claimant the burden of showing title to the property. *Bennett v. McKee*, 144 Ala. 601, 38 So. 129.

One levying an execution under a judgment in his favor on property in the debtor's possession is presumed to be entitled to the property, in the absence of evidence to the contrary. *Christian & Craft Grocery Co. v. Michael*, 121 Ala. 84, 25 So. 571.

Where a third party claims by prior purchase goods sold under execution, plaintiffs having proved the existence of their debt, and the possession of the property by defendant, the burden is on claimant to prove a purchase for a good and valuable consideration, before plaintiff's levy. *Appel v. Crane*, 83 Ala. 312, 3 So. 863.

In a trial of the right of property between a plaintiff in execution and a third person, it does not devolve on the former to produce the judgment on which

the execution issued. *Hardy v. Gascoignes*, 6 Port. 447; *Bettis v. Taylor*, 8 Port. 564.

A claimant who asserts a title to the property in dispute by a purchase under execution against a third person must prove that such person had a title to the property which could be sold by the execution against him, but is not required to prove that there was a judgment authorizing such a sale. *Brashear v. Williams*, 10 Ala. 630.

If the purchaser of goods from an insolvent debtor intentionally intermingles them with his own goods, and refuses to furnish to the sheriff, seeking to levy an execution on them as the property of the seller, the information necessary to distinguish and separate them, he can not claim any advantage from the confusion of goods; and having interposed a statutory claim to the goods levied on, the duty is cast on him to furnish the evidence necessary to separate his own goods from the others. *Lehman, etc., Co. v. Kelly & Bro.*, 68 Ala. 192.

§ 135 (2) Admissibility.

Evidence Admissible.—As the plaintiff in execution succeeds only to the rights of the defendant, any declaration of the claimant, which would be admissible evidence for himself in a suit between him and the defendant, is also admissible for him on the trial of the claim suit. *Allen v. Smith*, 22 Ala. 416.

On a trial of the right of property in slaves, the claimant derived title under a bill of sale from the defendant in execution, which the plaintiff attacked for fraud; and it was shown that the slaves had remained in the claimant's possession for about four years from the date of the bill of sale. Held, that the plaintiff might prove that the defendant in execution was decreed a bankrupt at the expiration of that time, and that the slaves were found in his possession a few months afterwards. *Snodgrass v. Branch Bank*, 25 Ala. 161.

On a trial of the right of property under the statute, the declaration of the person in whose possession the property was found, made at the time the attachment was levied on it, that it was brought to

his house by the defendant in attachment, is admissible evidence against the claimant. *Derrett v. Alexander*, 25 Ala. 265.

On trial of the right of property between plaintiff in execution against the mortgagor, and the mortgagee as claimant, it is error to exclude the claimant's mortgage from the jury, if it is not void on its face. *Floyd v. Morrow*, 26 Ala. 533.

The attachment and venditioni exponas are evidence of the indebtedness of the defendant and of the levy. *Yarborough v. Moss*, 9 Ala. 382.

Where a slave, sold on execution by a constable, is afterwards levied on by another creditor, and claimed by the purchaser, a return, amended by the constable during the trial of the claim, may be read in evidence. *Savage v. Forward*, 7 Ala. 463.

The sheriff's return on an execution is admissible evidence against a claimant, on a trial of the right of property, for the purpose of showing its levy on the slave in controversy. *Thomas v. Henderson*, 27 Ala. 523.

On trial of right of property levied on under execution plaintiff was entitled to show when the debt on which his judgment was founded originated, though the proof tends to show fraud in the conveyance under which plaintiff held, and which conveyance plaintiff had asserted he would not attack for fraud. *Taylor v. Branch Bank*, 14 Ala. 633.

A coroner sold property under execution, and conveyed it to one A., who at his instance became the purchaser, and afterwards conveyed the property to him, which he subsequently leased and hired to the defendant in execution. Held, that upon a trial of the right, the same property being levied on as belonging to the defendant in execution, it was competent for the coroner, who was claimant, to adduce these facts in evidence to prove property in himself and rebut the presumption of fraud. *Creagh v. Savage*, 14 Ala. 454.

Where, after the introduction of proof, in a trial of the right of property to a slave, tending to show possession by the defendant in execution for three years without demand made and pursued by

due course of law, the question at issue is whether such possession continued up to the time when the lien of the execution attached, the defendant having before that time left the state, it is admissible to prove that the rent of a house occupied by the slave was, without authority, paid by a third person out of the funds of the defendant, and that he, when informed of it, ratified the act. *Knox v. Fair*, 17 Ala. 503.

On trial of a claim for property seized under execution, proof of the ostensible insolvency of defendant in execution, with evidence of his ability to purchase property, notwithstanding his insolvency, was admissible to show a motive for taking the title to the property purchased by him in the claimant's name. *Knox v. Fair*, 17 Ala. 503.

On a trial of the right of property levied on by execution, a forthcoming bond executed by the execution defendant, under which he retained the property in dispute, is admissible in evidence as one of the file of papers, showing a part of the proceedings in the cause, and also to show possession by him, which is *prima facie* evidence of his ownership. *Sandlin v. Anderson*, 76 Ala. 403.

Where, on trial of right of property, the claimant describes the property as belonging to him as mortgagee in a mortgage conveying the interest of the mortgagor in crops grown on his land by a tenant, the mortgage is not invalid for insufficient description, as the property in suit may be identified by parol evidence as having been raised on the land by a tenant of the mortgagor during the mortgage period, and delivered to the mortgagor for rent. *Ballard v. Mayfield*, 107 Ala. 396, 18 So. 29.

Aik. Dig., p. 170, authorizing execution to be forwarded to other counties, and making it necessary, in order that the copy of execution and return may be evidence in itself, in a trial of the right of property, that a copy of the execution and return should be deposited in the clerk's office to which it is sent, is merely affirmative, and does not exclude other modes of proving a copy of execution; hence an examined or sworn copy is ad-

missible in evidence. *Bettis v. Taylor*, 8 Port. 564.

In a claim suit under the statute, where the plaintiff in execution attacks the bona fides of the deed executed to the claimant by the defendant in execution as having been made with the intention of hindering and delaying the grantor's creditors, evidence that the grantor executed another deed on the same day to the same grantee, who was his son and a minor, that the circumstances of the grantor were embarrassed at the time, and that the two deeds conveyed all his property in the state, is relevant to the issue, and its weight the jury must determine. *Benning v. Nelson*, 23 Ala. 801.

A claimant in the trial of the right of property, who derives his right from a deed of trust in which he is a trustee, must rely on the title thus derived, and will not be permitted to prove that, independent of the deed of trust and long before it was created, his *cestui que trust* was the owner of the property conveyed by the deed, by gift from the donor. *Dent v. Smith*, 15 Ala. 286.

As the plaintiff in execution, if successful upon the trial of the right of property, is entitled to a return of the specific thing which was delivered to the claimant, or its assessed value, it is allowable for him to offer evidence to the jury to show what was its value at the time of the trial. *Borland v. Mayo*, 8 Ala. 104; *Thomas v. De Graffenreid*, 27 Ala. 651.

Where a wife interposes a claim to goods that had been levied on under an execution against her husband while they were in his possession, a conversation between them prior to the levy relating to the fact of ownership, or of his agency in controlling them, is admissible as *res gestæ*. *Jones v. Chenault*, 124 Ala. 610, 27 So. 515.

A bond for the forthcoming of a slave levied on under execution, executed by the claimant and another person, is admissible in evidence for the plaintiff, in a trial of the right of property to the slave levied on. *Madden v. Hooper*, 42 Ala. 397.

The declarations of the defendant in execution to the sheriff, when the latter

was about to levy an execution on another slave as the property of his son, "that he might go contented without her, that he would never get a negro there on his son's account, and that every negro there belonged to himself," when it is shown that the slave in controversy was then in his possession, are admissible evidence as part of the *res gestæ*, being explanatory of his possession. *Thomas v. Henderson*, 27 Ala. 523.

Where, in a trial of the right of property, the plaintiff proves possession in the defendant, the declarations of the latter, contemporaneous with and explanatory of such possession, are admissible evidence for the claimant. *Thomas v. Degraffenreid*, 17 Ala. 602. See the title EVIDENCE.

A wife interposing a claim to goods that had been levied on under an execution against her husband may show the source from which she obtained money to pay for them. *Jones v. Chenault*, 124 Ala. 610, 27 So. 515.

Slaves had been bid off at the sale by the debtor, and a note given for the purchase price by him, together with claimant and a surety. On their subsequent seizure under execution against the debtor, claimant asserted that subsequent to the sale he had agreed with the debtor and former owner to assume the debt and ownership of the slaves. Held, that proof that claimant requested the surety to include him in the deed of trust, which the surety was about to take from the debtor to secure the payment of the note, was admissible against the claimant. *Allen v. Smith*, 22 Ala. 416.

On a trial of the right of property to a slave levied on, there was no error in admitting evidence of the value of the slave levied on at the time of the levy. The law, Revised Code, § 3018 (2589), does not lay down an inflexible rule that the value of the property at the time of trial shall be assessed. It requires only that the value at that time shall be assessed as far as practicable. The quality of property in the slave having been destroyed before the trial by emancipation, it was obviously impracticable to assess any value as of that time, because there was then no value. That being the case,

it was competent for the plaintiff to prove the value at the time of the levy. *Madden v. Hooper*, 42 Ala. 397. See *Borland v. Mayo*, 8 Ala. 104, 105.

The declarations of the defendant in execution, in whose possession the property levied on is found, when made at the time of the levy, are competent evidence to show the nature or character of his possession; and, when the record does not show what his declarations were, the appellate court will not presume that any injury was done to the claimant by allowing a witness to be asked, and to answer, what the defendant said at the time of the levy as to his possession. *Gayle v. Bancroft*, 22 Ala. 316.

The execution is competent evidence for the plaintiff on the trial of the claim suit; and the admission of the affidavit and bond is not an error for which the judgment will be reversed, although the affidavit was made by an agent, and the claimant is not one of the obligors in the bond. *Gayle v. Bancroft*, 22 Ala. 316.

Where a levy is made in a county different from that from which the execution issued, and a trial of the right of property is demanded, the copy of the execution returned by the sheriff to the county of the trial has the same effect as if it was an original execution, without any certificate that it is a copy. *Henderson v. Bank of Montgomery*, 11 Ala. 855.

Clay's Dig., p. 213, § 63, provides that when property is levied on by virtue of an execution from another county, and a claim is interposed to try the right, the sheriff shall return the original to the county whence it came, with his return thereon, and make out a copy of the same and his return thereon, and return the copy to the court of the county in which the levy was made, and the copy of such execution shall be sufficient for the court to proceed on and try the right of the property levied on. Held, that where a sheriff under said act returns the copy of an execution with the levy returned on the original, but the venue is changed, the copy so made by the sheriff may be certified by the clerk, and will have the same effect as in the county from which

the venue was changed. *Garrett v. Rhea*, 9 Ala. 134.

When the question was as to the possession of the claimant and the defendant in execution when the levy was made, the property being in the hands of the sheriff under previous levies upon other executions, the fact of such levies may be proved, without producing the executions. *Yarborough v. Moss*, 9 Ala. 382.

Inadmissible Evidence.—Where the affidavit of claimant described the property claimed as "one black and white pided but headed ox named 'Brandy,'" a mortgage held by him on property described as "one red spotted ox named 'Brandy,'" was properly excluded as evidence of his title, as the description in the mortgage was certain and definite, and varied from the description of the property claimed. *Johnson v. Whitfield*, 124 Ala. 508, 27 So. 406.

The right of an execution creditor, as against a claimant to property levied on, being dependent on whether title thereto was in the execution debtor at the time of the levy, evidence that such creditor did not know, when furnishing the goods to the debtor for which the judgment on which the execution issued was rendered, that the claimant was asserting any title to the property levied on, is immaterial. *Baker v. Drake*, 148 Ala. 513, 41 So. 845.

The issue being whether the claimant had sold the property absolutely to the defendant in execution, or had made a conditional sale, retaining the legal title until the purchase money was paid, evidence as to the financial credit and standing of the defendant at the time of the sale, the amount of property then owned by him, etc., is not relevant or admissible for any purpose. *Langworthy v. Goodall, etc., Co.*, 76 Ala. 325.

The fact that the claimant made sales of similar property to other persons, without retaining the legal title in himself until the purchase money was paid, is not relevant to the question whether the legal title was retained in the particular sale to the defendant; but, a printed form of contract being used, with blank names and dates to be filled in writing, and the particular contract in controversy

being lost, the court is "not prepared to say" that its printed contents might not be proved by other contracts in the same form, being in the nature of duplicate originals. *Langworthy v. Goodall, etc., Co.*, 76 Ala. 325.

Declarations of the defendant in execution showing a fraudulent intent on his part, are not admissible evidence against the claimant, unless he or some one through whom he claims was connected with the fraud. *Newcombe v. Leavitt*, 22 Ala. 631. See the title EVIDENCE.

The defendant in execution made a sale and conveyance of his entire estate to the claimant, and the former made certain statements to his creditor to induce him to accept the claimant for his debtor. Held, that as these statements were no part of the *res gestæ*, viz: the sale and conveyance, the creditor to whom they were made could not be allowed to narrate them as evidence. *Borland v. Mayo*, 8 Ala. 104.

Evidence of declarations made by a defendant in execution, which are not part of the *res gestæ*, are not admissible upon the trial of the right of property against the claimant, who deduces a title from the defendant. The defendant in execution is himself a competent witness. *Borland v. Mayo*, 8 Ala. 104.

On the trial of the right of property, the consideration of the cause of action on which the judgment was recovered is not a matter in issue, yet if evidence to this point has been admitted, at the instance of the plaintiff in execution, a judgment in his favor will not, for that reason, be reversed; unless it appear that the claimant was prejudiced by its admission. *Borland v. Mayo*, 8 Ala. 104.

In the case of a claim to property levied on, evidence that the defendant in execution was surety only on the note which was the cause of action is not material. *Planters' & Merchants' Bank v. Borland*, 5 Ala. 531.

Claimants to property sought to be sold under execution must recover on their own title, and can not set up an outstanding title with which they do not connect themselves; and hence, on the trial of the right to such property, it was not error to exclude a deed of assign-

ment thereof to a stranger, offered in evidence by claimants, before evidence was introduced to connect claimants with the title so passed. *Lightman Bros. & Goldstein v. Epstein*, 164 Ala. 660, 51 So. 164.

On trial of a claim suit under the statute, the record of the plaintiff's judgment against the defendant in execution is irrelevant and inadmissible. *Taliaferro v. Lane*, 23 Ala. 369.

Where the mortgagor of personal property has such an interest therein as may be sold under an execution for the payment of his debts, the mortgagee can not on the trial of the right of property, upon a claim interposed by him under the statute, introduce proof to show what was the value of the mortgagor's interest, and that it was less than the value of the property in question. *McDonald v. Foster*, 5 Ala. 664.

§ 135 (3) Weight and Sufficiency.

Claimant claimed a bale of cotton levied on under an execution against her husband, the bale being at time of levy in a warehouse, and the warehouse receipt having been issued to the husband. A witness for claimant testified the cotton was raised by claimant on land rented from witness, that he had purchased several bales of her, to be delivered in the future, and that the bale in suit was delivered to him from claimant by her husband, when witness told him to put it in a warehouse for him, or sell it. The husband testified that the witness, to whom he delivered the cotton at his wife's direction, told him to sell it for him, or store it. Held, that claimant could not recover, as the evidence showed the bale the property of the witness. *Eldridge v. Grice*, 132 Ala. 667, 32 So. 683.

A judgment debtor occupied a store, for the rent of which he gave rent notes signed by him alone. He published advertisements in his own name, and had a sign in front of the store, with his name. On a claim by his wife for the goods after they had been levied on, their undisputed testimony was that he had purchased the goods for her, with money obtained from her father's estate, and

that he was running the store as her agent. Held sufficient to sustain a judgment for the wife. *Jones v. Chenault*, 124 Ala. 610, 27 So. 515.

An execution was levied on certain furniture claimed by the wife of the judgment debtor. Prior to the recovery of the judgment, either the husband or the wife and two other persons had bought out a furniture stock, and later the whole stock was sold to the husband or the wife. The retiring partners testified that they sold out to the husband, but the bills of sale were made to him as the agent of his wife. The wife had \$500 in the bank, which she had deposited to the credit of the partnership, and which was used in its business. Held, that the furniture belonged to the wife, and was not subject to execution for the debt of the husband. *City Furniture Co. v. Simmons*, 111 Ala. 438, 20 So. 347.

On trial of right of property between a wife and an execution creditor of her husband there was evidence that the husband sold the property to the wife in consideration of the payment by her of a debt which he owed; that the debtor accepted her as his creditor; that she paid the debt; that the debt paid was a fair value for the property. Held, that a verdict for possession of the property by the wife was proper. *Larkin v. Baty*, 111 Ala. 303, 18 So. 666.

Where the claimant of property on which an execution was levied showed that he purchased the property at a sale on an execution issued upon a judgment obtained by him against the debtor by confession, this was not sufficient to support his claim against the subsequent execution creditor, as such a judgment is no evidence of a debt. *Hooper v. Pair*, 3 Port. 401.

§ 136. — Questions for Jury.

Where a claimant makes title to a slave through a deed, it should, if proved, be left to the jury, and that the title of the other party may have been complete by adverse, or other possession, or because the deed itself is inoperative, by the omission to record it. These are matters of instruction to the jury, not of ex-

clusion from it. *Carter v. Mannings*, 7 Ala. 851.

Where claimant's case depended on the horse levied on by plaintiff being the one claimants sold defendant, or one obtained by defendant in exchanging it with another, and there is no direct evidence that it was such a horse, but, at most, that is a matter of inference to be drawn or not, as the evidence, if believed, might impress the jury, verdict should not be directed for claimants, but the case should be left to the jury. *Cole v. Propst*, 119 Ala. 99, 24 So. 884.

Where a third party claims property levied on by a sheriff under execution, and on the trial of an action to determine the ownership of the property the court refuses to admit the execution in evidence because it is void, a verdict should be directed for the claimant. *Marks v. Wood*, 133 Ala. 533, 31 So. 978.

Whether cotton placed by a tenant in a house on his landlord's premises for his landlord's assignee of the rent was in the possession of the assignee, so that a buyer thereof from him could hold the same as against an execution creditor of the landlord, held, under the evidence, a question for the jury. *Bennett v. McKee*, 144 Ala. 601, 38 So. 129.

Where the evidence is conflicting as to the identity of certain oxen involved in a statutory action for the trial of the right of property, a charge directing the jury to find for the claimant ought not to be given. *Tait v. Murphy*, 80 Ala. 440, 2 So. 317.

On a trial of the right of property, proof that one through whom the claimant has shown or proposes to show he derives title, some years before the rendition of the plaintiff's judgment, asserted a claim to the property in the presence of the defendant in execution, and that he did not dispute it, is proper to be left to the consideration of the jury. *Thomas v. Degraffenreid*, 17 Ala. 602.

Under Code, §§ 3004-3012, providing for the claim by a third person of personal property taken in execution, and delivery thereof to him on the execution of a bond, though the amount claimed, as fixed by the affidavit and bond, is conclusive, the value of the goods must be

found by the jury. *Wollner v. Lehman, Durr & Co.*, 85 Ala. 274, 4 So. 643.

§ 137. — Instructions.

In a suit to try the right of property between an execution creditor and claimant, the jury should not be charged that the creditor could have paid claimant's demand, and reimbursed himself from the proceeds of the sale, as permitted by Code Ala. 1886, § 3017. The charge was foreign to any inquiry the jury was authorized to make, could only tend to confuse them. *Nelson v. Warren*, 93 Ala. 408, 8 So. 413.

In a suit to try a right of property between an execution creditor and the claimant, the court was requested to instruct the jury that if they believed the testimony of the claimant as set forth in the showing, then the verdict would be for the claimant; and it was the duty of the jury to believe the testimony of the claimant in the absence of evidence or of facts tending to show his testimony to be false. It was held that the charge was doubly faulty. Its first clause sought to confine the jury's investigations to a part of the testimony, and the last clause was a palpable invasion of the province of the jury. *Nelson v. Warren*, 93 Ala. 408, 8 So. 413.

On trial of the right of property levied on under execution, third persons claiming under an alleged assignment from the execution defendant, a charge that the burden is upon plaintiff to make out a prima facie case that the property is defendant's, which burden is discharged when he shows that defendant was in possession thereof at the time of the levy, and that then the burden shifts to plaintiffs to show their ownership, did not place an unnecessary burden of proof on claimants when plaintiff had made out a prima facie case, since, if the proof of adequate consideration for the assignment was enough, it was because it proved title and ownership. *Lightman Bros. & Goldstein v. Epstein*, 164 Ala. 660, 51 So. 164.

On a trial of the right of property to slaves levied on under execution, and claimed by a son-in-law of the defendant in execution, it is not error to charge the jury that, in determining the bona fides

of the sale from the defendant to the claimant, they might look to circumstances of unusual particularity attending it, as tending, if unexplained, to show fraud. *Jones v. Stewart*, 19 Ala. 701.

On an issue whether property levied upon in the home of a husband and wife as the property of the husband belonged to the wife, there was evidence that prior to the creation of the debt of the plaintiff in execution the husband had given the wife part of the property, and that the remainder thereof, though purchased by the husband in his own name, was purchased for the wife, and paid for by her with her own money. Held, that it was proper to refuse to instruct that finding and levying on the property in the possession of the defendant in execution, who claims the same, makes out a prima facie case for the plaintiff in execution, since, when two persons have a common possession of personal property, the law refers the possession to the title. *Allen v. Hamilton*, 109 Ala. 634, 19 So. 903.

On an issue as to the right to property levied on, it appeared that claimant, the wife of the execution debtor, a few days prior to the levy disclaimed ownership, but that, when the levy was made, defendant stated that his wife had bought the property, and that she claimed it. There was no evidence that claimant owned the house in which she and her husband lived, and in which the property was, nor that she owned the furniture in it. Held, that it was proper to instruct that, though defendant may have said at the time of the levy that his wife bought the property, yet if this statement was not made in good faith, and if defendant was in possession when the execution was levied, the jury must find for plaintiff, unless claimant showed title in herself. *Ross v. Lawson*, 105 Ala. 351, 16 So. 890.

§ 138. — Verdict and Findings.

Construction.—The issues on a trial of the right of property, being an affirmation on the one side that it is liable to plaintiff's execution and a denial on the other, a verdict finding the issue in favor of the plaintiff, is equivalent to an affirmation of its truth in totidem verbis. *Phelan v. Fancher*, 5 Ala. 449.

On trial of the right of property between the plaintiff in execution and a claimant of property attached thereon, a verdict that part of the property is liable to the execution is equivalent to finding the residue not liable. *Lewis v. Lewis*, Minor 95.

A finding by a jury, on a trial of the right of property, in favor of the plaintiff in execution, is a condemnation of the property absolutely in discharge of the plaintiff's execution. *Williams v. Jones*, 2 Ala. 314.

Form and Sufficiency.—In a trial of the right of property to certain slaves which had been levied on under execution, and to which a claim had been interposed, if the jury assess the aggregate value of the slaves, instead of the separate value of each, that portion of their verdict is without legal warrant and wholly nugatory, and must be treated as surplusage; but the judgment will not be reversed on account of such defect, if the verdict is in other respects formal, and sufficient to authorize the judgment rendered upon it. *Willis v. Planters' & Merchants' Bank*, 19 Ala. 141.

Under Code 1896, § 4142, providing that in an action to try the right to property levied on the execution plaintiff shall allege that the property claimed is that of defendant and liable to satisfaction of the writ, the real issue is whether the property is subject to execution, and a verdict finding the property to be that of defendant in the writ and liable to plaintiff's execution does not render the judgment thereon invalid, on the ground that such verdict fails to find the issue in favor of plaintiff in execution. *Johnson v. Citizens' Bank*, 145 Ala. 654, 39 So. 577.

Under Code 1876, § 3343, providing that, where a jury subject property to the payment of the execution, "they must, as far as practicable, assess the value, at the time of trial, of each article separately," where the property consists of several bales of lint cotton and several thousand pounds of seed cotton, the different kinds should be assessed separately, though the different bales need not be when no difference in the quality of the cotton is shown. *Townsend v. Brooks*, 76 Ala. 303.

In an action for trial of right to property, where the property in controversy

consists of four yoke of oxen and certain carts, it is practicable, and therefore, under Code 1876, § 3343, the jury must assess the value of each of the articles involved separately, if they submit them to the execution of the execution creditor. *Tait v. Murphy*, 80 Ala. 440, 2 So. 317.

In a trial of the right of property between the plaintiff in an execution and a claimant under St. 1828, the jury, when they find property subject to execution, are to find the value of each article separately; but, if they are unable to do so, the claimants can not complain. *Hardy v. Gascoignes*, 6 Port. 447.

On a trial of right of property, it is error to receive a verdict which fails to assess the value of the property. *Brightman v. Meriwether*, 121 Ala. 602, 25 So. 994.

§ 139. — Damages or Penalties against Unsuccessful Claimant.

Where the jury find the property levied on to be subject to the execution, judgment should not be rendered against the claimant for its assessed value, where this exceeds the amount of the execution and costs. But whether an error in this respect is not a clerical misprision, amendable in the court below or on error, at the costs of the party complaining, *quære*. *Wallis v. Rhea*, 10 Ala. 451.

§ 140. — Judgment and Enforcement Thereof.

Form and Requisites.—Code 1896, § 4144, providing that, if the property is not delivered to the officer making the levy and costs paid, an execution shall be issued, does not require the judgment to be in the alternative, for the property or its value. *Johnson v. Citizens' Bank*, 145 Ala. 654, 39 So. 577.

A judgment on a trial of the right to property levied on under an execution will not be reversed because it provides that plaintiff recover the property or a certain sum, its assessed value. *Gray v. Raiborn*, 53 Ala. 40; *Ramey v. W. O. Peoples Grocery Co.*, 108 Ala. 476, 18 So. 805.

In a statutory claim suit to try the right to property on which an execution has been levied, the issue being found against the claimant, judgment should be rendered declaring the property liable to the

satisfaction of the execution; and it is erroneous to render a judgment, in the first instance, against the claimant and his surety for the assessed value of the property, before the bond has been returned forfeited. *Langworthy v. Goodall, etc., Co.*, 76 Ala. 325.

Judgment for plaintiff in execution, in a statutory claim suit, should be that the property is subject to execution, and not that he recover the property or its assessed value. *Parker v. Wimberly*, 78 Ala. 64.

Code 1876, § 3343, provides that on a trial involving the right of property which is levied on by execution or attachment, if the jury subject the property to the payment of the execution or debt, "they must, as far as practicable, assess the value at the time of the trial of each article separately." Held that, where the property is levied on by attachment, a judgment that the property levied on be "condemned to the satisfaction of the plaintiffs' debt" is improper, and that it should declare the property in controversy "subject to the levy of the attachment, and that it be condemned to the satisfaction of the judgment, if one is obtained." *Townsend v. Brooks*, 76 Ala. 308.

Where the judgment is rendered in favor of the "plaintiff," where there are more than one, it will be intended to be a mere clerical error. *Phelan v. Fancher*, 5 Ala. 449.

On trial of the right of property levied on under execution, a judgment adverse to claimants should condemn the property levied on to the satisfaction of plaintiff's demand, as claimants have the right to deliver the property to the officer making the levy, to pay the costs of the trial within thirty days of the judgment, and acquit themselves and their bondsmen of future liability, under Code 1907, § 6042, relating to the forfeiture of claim bonds, and a simple judgment for plaintiff for the value of the goods levied on is improper. *Lightman Bros. & Goldstein v. Epstein*, 164 Ala. 660, 51 So. 164.

Where property levied on is claimed, and after trial is subjected to the payment of the execution by the verdict of a jury, which also assesses damages for frivolous claim, it is irregular to render judgment

against the claimant for the debt, damages, and costs, to be levied on the property subjected, as the proper judgment is to declare the property subject to the execution, and that the defendant should recover from the claimant the damages assessed by the jury, together with his costs. Such a judgment, however, can not be reversed at the instance of the claimant, because he is not injuriously affected by the irregularity. *Lee v. Bryan*, 3 Ala. 278.

Agreement between Parties.—An agreement between the parties to a pending claim suit, to the effect that a judgment of condemnation should be rendered for plaintiff in execution, for a sum less than the real value of the slave in controversy, and that the title to the slave should vest in the claimant on payment of this agreed value within a reasonable time, does not render void an execution afterwards issued on the judgment of condemnation. *Patton v. Hamner*, 33 Ala. 307.

An agreement between the parties to a pending claim suit, to the effect that a judgment of condemnation should be rendered for plaintiff in execution for a sum less than the real value of the slave in controversy, and that the title to the slave should vest in the claimant on payment of this agreed value within a reasonable time, does not affect the authority of the sheriff to levy on and sell the slave under an execution afterwards issued on the judgment of condemnation, notwithstanding a tender of the agreed value by the claimant. *Patton v. Hamner*, 33 Ala. 307.

Waiver by Plaintiff.—On a trial of the right of property, if the verdict is for the plaintiff, he may waive everything which the verdict has ascertained, and take judgment for costs alone. *Phelan v. Fancher*, 5 Ala. 449.

§ 141. — Appeal.

When a trial of right of property has been had, it can not be assigned for error that no issue in writing was made up previous to the trial, as the party complaining should have insisted on trial that the issue be so made. *Dent v. Smith*, 15 Ala. 286.

A judgment in a statutory claim suit that plaintiff in execution recover the

property or its assessed value, instead of that the property is subject to his execution, will be amended on appeal. *Parker v. Wimberly*, 78 Ala. 64.

Objection that the affidavit of claim to property levied on is void, because the officer before whom it was taken had no authority to take it, can not be urged for the first time on appeal. *Ballard v. Mayfield*, 107 Ala. 396, 18 So. 29.

The claimant of property can not object on error that a judgment rendered on a verdict against him does not subject the property to the execution, or order a sale. *Phelan v. Fancher*, 5 Ala. 449.

The claimant of property under the statute, can not object on error that the jury in condemning it to the satisfaction of the plaintiff's execution, have not found the value of each article separately. *Phelan v. Fancher*, 5 Ala. 449. See the title APPEAL AND ERROR.

§ 142. — Costs.

Costs can not be awarded against the sureties in a bond given by a claimant, in proceedings to try the right of property seized in execution. *Hooper v. Pair*, 3 Port. 401.

A trial of the right of property after execution is not within Code, § 2396, requiring a nonresident plaintiff to give security for costs, as the plaintiff is brought into court by the act of another. *McAdams v. Beard*, 34 Ala. 478.

In case of a finding against the claimant of property taken in execution, the property can not be sold to pay the costs of the trial of the right of property. *Fryer v. Dennis*, 2 Ala. 144.

Under Code, § 3006, which authorizes execution against the sureties on the bond of a claimant of property seized under execution against another, when judgment is against the claimant, only in case the claimant fails to deliver the property in thirty days, a judgment for costs against the sureties, they not being parties to the suit, rendered at the time of the judgment against the claimant, is erroneous. *Petree v. Wilson*, 104 Ala. 157, 16 So. 143.

§ 143. Operation and Effect of Determination.

In General.—Where an affidavit of title to property levied on under execution is

made, and a claim bond executed, and upon the trial the property is found liable to execution, and, upon failure to deliver by the claimant within ten days, the claim bond is indorsed "Forfeited," and returned, the constable is unauthorized to accept affidavit of claim and claim bond from another party, while the property is withheld, so as to defeat the plaintiffs' right to execution. *Cooper v. Davis*, 88 Ala. 569, 7 So. 145.

A judgment was recovered, and an execution issued thereon levied on property to which a third person interposed a claim. Pending the trial of the right of property, the judgment was reversed, notwithstanding which the trial proceeded, and the property was condemned. Held, that the judgment of condemnation, beyond the amount of cost in the proceeding in which it was rendered, could not be enforced by execution; that, it being consequential and dependent, the reversal of the judgment in the principal case took from it a necessary and indispensable foundation. *Clements v. Elliott*, 11 Ala. 360.

Where the finding is against the claimant of property taken in execution, although he becomes liable to the amount of the value of the property, this does not vest it in him. It is not error, therefore, to direct the same to be sold by the sheriff. *Fryer v. Dennis*, 2 Ala. 144.

Where, on the trial of the right to property levied on by execution, the issue upon the record was that "the property levied on was, at the time of the levy, subject to the satisfaction of the execution," it was held that a verdict of the jury for the plaintiff in execution was not a finding of the invalidity of the mortgage through which the claimant deduced his title; that, to obtain a decision upon the validity of the mortgage, the issue submitted to the jury was immaterial; and that, the parties wishing to submit that question to the jury, a repleader should have been awarded. *Davidson v. Shipman*, 6 Ala. 27.

A judgment in favor of the claimant, on a trial of the right of property in goods seized on execution, is not a bar to an action for the tort committed by taking the property under such execution. *Lenoir's Adm'r v. Wilson*, 36 Ala. 600.

Parties Bound.—Sureties on the bond of a claimant of property taken in execution can not, in an action on the bond against them, object that the jury, in determining the question of property between the claimant and plaintiff in execution, omitted to notice a portion of the property taken. *Elliott v. Gray*, 4 Stew. & P. 168.

After the determination of a claim suit against a trustee, his cestui que trust is not entitled to re-examine the question of title, on the ground that he was a stranger to the claim. *Marriott v. Givens*, 8 Ala. 694.

A surety in a claim bond is not precluded, by a judgment improperly obtained against his principal, from resorting to a court of chancery to establish that the property levied on and condemned had been previously levied on by a senior judgment creditor and condemned, pending the trial of which the last levy was made, and that the property had been delivered in satisfaction of the judgment of the senior creditor. *Babcock v. Williams*, 9 Ala. 150.

§ 144. Relevancy on Property.

A surety against whom, with the principal, judgment was rendered, pointed out property of the latter to the constable, and, on its being levied on and offered for sale, produced a mortgage on it made for his indemnity, and forbade the constable selling, and in consequence thereof he bought it at about one-eighth of its value. Thereafter a *fi. fa.* against the principal on another judgment was levied on the same property, a claim interposed by the surety, and an issue made up to try the right. Held that, the bona fides of claimant's purchase being found against him on submission to the jury, the property should be subjected to plaintiffs' execution. *Carlos v. Ansley*, 8 Ala. 900.

§ 145. Liabilities on Bonds and Undertakings.

§ 146. — Claimants and Their Sureties.

In General.—A bond given by the claimant of property levied on by execution, pursuant to the first section of the Act of 1828 (*Aiken's Digest*, 169), will not warrant the circuit court, in rendering a summary judgment against the claimant's

securities, for the damages assessed on the trial, against the claimant, for putting in the claim for delay. *Hughes v. Rhea, etc., Co.*, 1 Ala. 609.

If the judgment rendered against the claimant for damages, for interposing a delay claim (authorized to be given by the Acts of 1812 and 1821. Aiken's Dig., 167, 168), can not be collected by execution, the remedy of the plaintiff against the claimant's securities, is by suit on the bond. *Hughes v. Rhea, etc., Co.*, 1 Ala. 609.

"Although the Act of 1828 consolidates the two bonds previously required by the Act of 1812, yet it introduces no change in the mode by which the securities are made chargeable, if the costs and damages assessed against the claimant remain unpaid. The bond is to have the effect of a judgment only, in the event of a failure to deliver the property found, subject to the execution; and the summary process of execution against the securities is authorized only on this failure. If the judgment against the claimant for the costs and damages can not be enforced by the ordinary process of execution, or is not paid, the bond can be prosecuted in the ordinary form by suit, and redress had against the claimant's securities, in this manner; but a judgment against them, on the verdict of the jury, in the trial of the right of property, is not warranted by any of the statutes in force." *Hughes v. Rhea, etc., Co.*, 1 Ala. 609, 611.

When a slave is levied on at the suit of three creditors, and is claimed by a stranger, who executes a claim bond to the junior execution only, and that creditor alone contests the title with the claimant, and succeeds in condemning the slave, the other creditors have no right to claim the money which he receives from the claimant in discharge of the claim bond. *Burnett v. Handley*, 8 Ala. 685.

Under the statute approved February 19, 1867 (Rev. Code, § 3016), a claimant of property, on which an execution was levied, was relieved from giving "sufficient surety" on his bond, but was not prohibited from giving sureties; and if he voluntarily executed a bond with sureties, without any compulsion on the part of the sheriff, and the property was thereupon delivered to him, such bond is supported

by a sufficient consideration, and is valid as a common law obligation. Such bond not being a statutory bond, no execution could properly be issued on it, when forfeited, against the sureties; yet, on the rendition of judgment against the principal, default being made in the delivery of the property according to the condition of the bond, one surety may voluntarily pay the judgment, and recover contribution from his cosurety; and the fact that he paid the money under an execution, which would have been quashed on motion, does not affect his right to contribution. *Jenkins v. Lockard*, 66 Ala. 377.

When a bond is extorted from a party by a public officer, without legal authority, and as a condition to the allowance of rights or privileges to which the party is entitled without bond, it is absolutely void; but, when a bond is executed voluntarily by a party, and is supported by a sufficient consideration, and is not violative of any statutory provision, or principle of public policy, though no statute required or authorized it, it will be upheld as a valid common law obligation. *Jenkins v. Lockard*, 66 Ala. 377.

Release from Liability.—The surety of the claimant to property taken in execution in the bond can not be discharged by substituting another bond, with other surety, without the consent of the other party, although done for the purpose of rendering the first surety a competent witness in the case. *Fryer v. Dennis*, 2 Ala. 144.

Surrender of Property by Claimant.—Petitioner claimed certain property levied on under an execution, and gave the statutory bond. On a trial of the right of property, judgment was rendered against the claimant, and the value of the property was assessed by the jury. The claimant delivered a part of the property to the sheriff; but, the balance not being delivered, the sheriff indorsed the bond "Forfeited," and execution issued on the bond for \$859.94, the total assessed value of the property, under Code, § 3008. The property delivered was sold by the sheriff for \$50, but the assessed value of the portion so sold was \$356.79. Held, that the claimant was entitled to credit on the execution for the amount for which the property was sold, regardless of its as-

sessed value; and the fact that the property levied on was separately described and valued, instead of being of such a nature that it could not be separately assessed, is immaterial. *Wilcox & Gibbs Guano Co. v. Piedmont Lumber Co.*, 97 Ala. 552, 98 Ala. 281, 11 So. 779.

Under Code, § 3344, providing that, if the claimant in attachment or execution fails to deliver the property to the sheriff within thirty days after judgment against him, the delivery bond must be returned forfeited, where judgment is rendered against a claimant to a stock of goods on which an execution has been levied, delivery of a part only of the goods works a forfeiture of the bond. *Munter v. Leinkauff*, 78 Ala. 546.

Where, after forfeiture of a claim bond, part of the goods levied on and others of like kind in lieu of the residue are delivered to the sheriff, and sold by him, but defendant in execution successfully claims them as exempt, the obligors are not entitled to credit on their liability for the goods so delivered. *Munter v. Leinkauff*, 78 Ala. 546.

On a statutory trial of the right of property in and to a stock of goods, on which an execution was levied, verdict and judgment being rendered against the claimant, if only a part of the goods are surrendered to the sheriff, the condition of the claim bond is forfeited, and it is the duty of the sheriff to return it forfeited (Code, § 3344); and the forfeited bond becomes a statutory judgment against the obligors for the amount of the original judgment, with interest thereon, not exceeding the value of the goods as assessed by the jury. *Munter v. Leinkauff*, 78 Ala. 546.

Where, after the forfeiture of a claim bond, part of the goods levied on and other goods of like kind in lieu of the residue are returned to the sheriff, and are sold by him, the amount realized is a discharge pro tanto of the liability of the obligors. *Munter v. Leinkauff*, 78 Ala. 546.

The plaintiff may rebut or reduce the claim to a credit for the proceeds of the goods so surrendered and sold, by showing that one of the defendants in the judgment has successfully asserted a claim of exemption to a part of the goods embraced

in the levy; but, if the claim of exemption is interposed before the forfeiture, and successfully maintained, this would, pro tanto, exonerate the obligors. *Munter v. Leinkauff*, 78 Ala. 546.

If, after the expiration of thirty days, some of the goods are restored to the sheriff, and other goods of like kind in lieu of the residue, and are sold by him, notwithstanding the return of the bond forfeited, the amount realized by the sale is a payment and discharge, pro tanto, of the liability of the obligors, and available on motion for a supersedeas of the statutory execution against them. *Munter v. Leinkauff*, 78 Ala. 546.

§ 147. — Enforcement in Proceedings for Trial of Right of Property.

In order to authorize a summary judgment against the security on a bond for the delivery of property taken in execution and claimed by a third person, the sheriff must have returned the bond forfeited. *Allen v. Hays*, 1 Stew. 10.

Code 1886, §§ 3365, 3368, provides that, where property levied on under a justice's execution is claimed by one not a party to the writ, claimant may try title, first making affidavit of title and giving a bond, and, if judgment is against claimant, and he fails to restore the property, the levying officer must return the bond indorsed "Forfeited," and thereupon execution shall issue against the obligors in the bond. Held, that the return of the levying officer was a condition precedent to the issuing of such execution. *Catching v. Bowden*, 89 Ala. 604, 8 So. 58.

VII. SALE.

As to injunction against sale, see ante, "Injunction," § 115. As to authority of attorney to control sale, see the title ATTORNEY AND CLIENT. As to effect of sale on execution as discharge of mortgage, see the title MORTGAGES. As to fees of officer for making sale, see the title SHERIFFS AND CONSTABLES. As to sales in justices' court, see the title JUSTICES OF THE PEACE. As to liability of sheriff or constable for irregular or invalid sale, see the title SHERIFFS AND CONSTABLES. As to mandamus to compel sale, see the title MANDAMUS. As to protection of exemption,

see the titles EXEMPTIONS; HOME-STEAD. As to sale under attachment before judgment see the title ATTACHMENT.

(A) MANNER, CONDUCT, VALIDITY, AND CONFIRMING OR VACATING.

§ 148. Nature and Requisites in General.

"A venditioni exponas in our practice is a writ of execution, directed to the sheriff commanding him to sell goods or chattels, or lands and tenements, on which he has previously levied, and which remains unsold. It is issued by the clerk, as other writs of execution are issued, without any express order from the court. It rests in the election of the plaintiff in execution to take out an alias execution, or a writ of venditioni exponas. *Garey v. Hines*, 8 Ala. 837; *Autry v. Walters*, 46 Ala. 476. If he desires merely a sale of the property on which a levy has been made, and not of other property, or the acquisition of a lien on other property, a venditioni exponas is the proper writ. The venditioni exponas continues the lien of the execution which has been levied, as to the property on which the levy was made, whether the property be real or personal. *Freeman on Executions*, § 60. The writ is, indeed, merely for the continuation and completion of the original execution. *Taylor v. Doe*, 13 How. (U. S.) 293, 14 L. Ed. 149. And if its mandate is for the sale of lands on which there has been a previous levy, it not only compels a sale, but confers the authority to sell, and the title of the purchaser has relation to the date of the lien of the execution. *Badham v. Cox*, 33 N. C. 456; *Taylor v. Mumford*, 3 Humph. 66. True, the statute declares a fieri facias issued and received by the sheriff during the life of a defendant may be levied after his decease, or if a term does not intervene, an alias may be issued and levied, and does not expressly authorize the issue of a venditioni exponas. The purpose of the statute is to continue the lien acquired in the life of the defendant, notwithstanding his death, and to authorize such process as is necessary to enforce the lien. A venditioni exponas is in its nature and operation, as to the property on which the levy may have been made, an alias execution; it merely com-

mands and authorizes, as to real estate, the completion of the execution already begun." *Dryer v. Graham*, 58 Ala. 623, 625.

The doctrine of caveat emptor applies to sales made by the sheriff under execution. *McCartney v. King*, 25 Ala. 681.

§ 149. Statutory Provisions.

Quære, can the court go so far in declaring the sale to be invalid, as to direct the purchaser to deliver up the sheriff's deeds. Whether a court of law may do this or not, is unimportant to the rights of the parties, as it may declare the deed to be void, and this will as effectually destroy it, as if it were cancelled in fact. *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. 679.

§ 150. Authority to Sell.

§ 151. — In General.

In General.—"To support a purchase of real estate under execution, at sheriff's sale, a judgment and execution, authorizing a levy and sale, are indispensable. These constitute the authority of the sheriff, and without them the sale is void." *McCoy v. Watson*, 51 Ala. 466, 468. See *Lewis v. Gouquette*, 3 Stew. & P. 184.

Under Rev. Code, § 2875, providing that a writ of fi. fa. issued and received by the sheriff during the lifetime of the judgment debtor may be levied after his death, the sheriff is authorized to sell lands under an execution received by him during the judgment debtor's lifetime, but levied after the judgment debtor's decease, since the right to levy conferred by the statute would be of no effect without a sale. *Hurt v. Nave's Adm'r*, 49 Ala. 459.

Sale by Officer after Expiration of Term.—Where a levy is made on land, in the life of a writ of execution, and during the term of office of the officers to whom it is delivered, he may make a sale of the property after his term has expired. *Bondurant v. Buford*, 1 Ala. 359.

§ 152. — Venditioni Exponas.

In General.—A sheriff does not begin to do execution of a fieri facias, until he has levied the same. But when a levy was duly made, he was authorized at common law, to sell the goods seized, even after the return day, without a venditioni ex-

ponas, and though he was out of office. *Bondurant v. Buford*, 1 Ala. 359.

An order of sale made by the circuit court, which recites the issuance of an execution by a justice of the peace of the county in which the lands lie and its levy by a constable of that county, and also states the numbers of the land, is sufficient, although it does not designate by name the county or the district in which the lands lie. *Weir v. Clayton*, 19 Ala. 132.

When an execution from a justice's court is levied on land, in default of personal property, a venditioni exponas, or order of sale from the circuit court, is only the means of satisfying the justice's judgment, and does not make it a judgment of that court. *Ellis v. White*, 25 Ala. 540.

Where, in an execution issued by a justice court, the town lot on which it was levied was described by its number and the name of the street on which it was located, and a motion for an order of sale in the circuit court so described it, and the order of sale referred to the motion, such description was sufficient to convey a valid title. *McConnaughy v. Baxter*, 55 Ala. 379.

A venditioni exponas is in the nature of an alias execution as to property upon which a levy has been already made, is within the spirit of the statute, and a proper writ to complete the execution already begun; and, if issued in continuation of the lien acquired in the life of the defendant, a sale under it will pass the decedent's title. *Dryer v. Graham*, 58 Ala. 623, cited on this point in note in 61 L. R. A. 373.

Loss of Writ or Defects Therein.—An order for the sale of lands, granted by the circuit court, under the levy of an execution issued by a justice of the peace, is void when either the execution or the levy is void. *Jones v. Calloway*, 56 Ala. 46.

Extent of Authority Conferred and Property Covered.—A writ of venditioni exponas, containing no fieri facias clause, does not authorize a sale of other property than is named, and does not create or continue a lien upon other property. *Quinn v. Wiswall*, 7 Ala. 645.

§ 153. Powers of Officer in Making Sale.

"The power of the sheriff, in this state, under fieri facias, to sell land, receive the purchase money, endorse the sale and receipt of the purchase money on the fieri facias, and execute a conveyance to the purchaser, is not a mere naked power, but a power coupled with a trust. It is a power which it is the duty of the sheriff to execute; made his duty by law, which has given him an interest extensive enough to enable him to discharge it. It is not given to him as a mere power, but as a trust and duty which he ought to fulfill; and his omission to do so, by accident or design, ought not to disappoint the object for which the power in the nature of a trust was conferred by the law." *Stewart v. Stokes*, 33 Ala. 494, 495.

Where an execution comes to the hands of a sheriff after the expiration of his term of office, it confers on him no authority whatever to levy upon and sell property. After the expiration of his term of office, he becomes, as to new writs, a mere private individual, and final process coming to his hands directed to the sheriff confers no authority on him for its execution. *Andress v. Broughton*, 21 Ala. 200.

§ 154. Place of Sale.

In General.—Personal property sold under execution should be at or near the place of sale. *Brock v. Berry*, 132 Ala. 95, 31 So. 517.

A sale under execution by consent of parties at a place other than that prescribed in the statute is not void, if there was no intention to defraud, and no other lien on the property at the time of the sale. *Cawthorn v. McCraw*, 9 Ala. 519.

Courthouse Door.—Under Code, § 2907, providing that execution sales of land shall be at the courthouse of the county, such sale can be at the courthouse where the city court of Anniston is held, that court being by the provisions of acts 1888-89, p. 564, establishing it, a court of the county, of coequal and co-ordinate authority with the circuit and chancery courts. *Anniston Pipe Works v. Williams*, 106 Ala. 324, 18 So. 111.

Sale in Another County, or Township, or Judicial District.—A sale made in the southern district of the state, by the

United States marshal of that district, of lands situated in the middle district, is absolutely void, and his deed to the purchaser may be impeached collaterally. *Pollard v. Cocke*, 19 Ala. 188.

Though a sale under execution by a special constable is irregular, under Code, § 3637, because made in a precinct and county other than that of the defendant's residence, it is not void. *Street v. McClerkin*, 77 Ala. 580, cited in note in 33 L. R. A. 96.

§ 155. Time of Sale.

In General.—A sheriff is not required to sell at the first sales day after the execution is in his hands. He has the discretionary power to sell on any of the sales days previous to the return day of the execution to be satisfied. *Powell v. Governor*, 9 Ala. 36.

Sale after Return Day.—A sale of land under an execution, made after the return day thereof, is void. *Smith v. Mundy*, 18 Ala. 182; *Hawes v. Rucker*, 94 Ala. 166, 10 So. 85; *Morgan v. Ramsey*, 15 Ala. 190.

A sheriff has no power to sell land, and pass the title to a purchaser, after the return term of the writ on which he made the levy, unless new process be issued to him for that purpose. *Morgan v. Ramsey*, 15 Ala. 190; *Smith v. Mundy*, 18 Ala. 182. See *Barton v. Lockhart*, 2 Stew. & P. 109; *Bobo v. Thompson*, 3 Stew. & P. 385; *Farmers' Bank v. Reid*, 3 Ala. 299.

Where Rev. Code, § 2852, places the return day of an execution three days before the first day of the return term, a sale thereunder on the first day of the term is void. *Sheppard v. Rhea*, 49 Ala. 125.

The sale of property under an execution after the return day is not void, if the levy was made before that day. *Bondurant v. Buford*, 1 Ala. 359; *Dennis v. Chapman*, 19 Ala. 29.

A constable who has levied executions on personal property, while they are in force, may sell after the return day of the writs. *Dennis v. Chapman*, 19 Ala. 29.

Sale by Consent of Parties.—A sale under execution by consent of the parties at a time other than that prescribed in the statute is not void, if there was no intention to defraud, and no other lien

on the property at the time of the sale. *Cawthorn v. McCraw*, 9 Ala. 519.

Property levied on may be sold after the return day of the execution, by the consent of the defendant, without a venditioni exponas. *Pickard v. Peters*, 3 Ala. 493.

§ 156. Notice of Sale.

As to effect of defects or irregularities on title of purchaser, see post, "Levy or Sale," § 193 (3). As to insufficient or defective notice as ground for vacating sale, see post, "Irregularities or Misconduct Affecting Sale," § 174. As to failure to have sale confirmed by a title to purchaser, see post, "Levy or Sale," § 193 (3). As to objection and confirmation or petition to set aside sale, see post, "In General," § 179 (1).

In General.—"Section 3017 of Code of 1886 provides that when personal property is sold under execution, the plaintiff in the process may pay the mortgagee, or his assignee, the amount owing on the debt secured by the mortgage; and, in such case, the property shall be sold as well for the payment of the mortgage debt as for the satisfaction of the process, the proceeds of sale to be first applied, after payment of costs, to reimburse the plaintiff for the amount so paid by him, or his assignee. The officer selling property by execution under this section (3017) is not required to give the notice which may be stipulated in the mortgage, before he can proceed with the sale." *Draper v. Nixon*, 93 Ala. 436, 8 So. 489.

§ 157. Postponement.

The Act of 1821, which declares that it shall not be lawful to levy an execution on the planted crop of the defendant until it is gathered, prevents the lien of a fi. fa. from attaching until that event; and if previous to that time the defendant makes a bona fide sale, or other disposition of his growing crop, the execution creditor can not subject it to the satisfaction of his judgment, when it is severed from the soil. *Adams v. Tanner*, 5 Ala. 740.

Conceding that a mortgagee, who, prior to the execution of his mortgage, consented to a postponement of the sale of the property under execution against the

mortgagor, is thereby estopped, in a contest with the plaintiff in execution, from saying that the delay is constructively fraudulent as against his mortgage, yet this does not prevent him from taking advantage of a subsequent postponement. *Albertson v. Goldsby*, 28 Ala. 711, cited in note in 27 L. R. A. 379.

§ 158. Sale in Parcels.

Personal property should not be sold on execution in mass where the articles can be sold separately at greater advantage. *Brock v. Berry*, 132 Ala. 95, 31 So. 517.

Where land levied on by fi. fa. will allow of division, it is the duty of the sheriff to sell only so much as is necessary to satisfy the execution. *Wheeler v. Kennedy*, 1 Ala. 292.

§ 159. Conduct of Sale in General.

A sale under execution of 240 acres of land, out of a tract containing 280 acres in a single body, when there is no description or other means of distinguishing the portion levied on and sold from the residue of the tract, is void for uncertainty and indefiniteness of description. *DeLoach v. State Bank*, 27 Ala. 437.

A sale under execution is not void merely because the officer sells a less interest in the property than the defendant really owns. *O'Conner v. Youngblood*, 16 Ala. 718.

§ 160. Persons Who May Purchase.

A deputy sheriff who has levied a fi. fa. may, it seems, bid for and purchase the property at a sale made by the sheriff; the case not coming within the reason of the rule which inhibits one from purchasing at a sale made by himself. *Wyatt v. Clepper*, 5 Ala. 703.

A sale of lands by the sheriff, under execution, to his own wife as purchaser, is voidable at the option of the defendant, but is not absolutely void; and if the defendant takes no steps to set it aside, he can not resist an action by the wife as purchaser, on the ground that the sale and sheriff's deed passed no title. *Dexter v. Strobach*, 56 Ala. 233.

"A sale by one acting as agent, trustee, sheriff, or otherwise, of the property of another, to himself, is voidable at the

option of the owner of the property, but not void. This rule is applicable to a sale by such intermediate vendor to his wife. If, though, notwithstanding a sheriff's sale of real estate, the defendant in execution intends to insist that he continues to be the owner, some step must be taken to prevent the sheriff's deed from operating as a conveyance. Action must be had for undoing what has been done, that the parties may be restored, as nearly as possible, to their situation before. It will not do, that the party to whom the option belongs, either to insist upon or to repudiate the sale, shall both keep the land, and have the benefit of the purchase money. If nothing be done to procure a rescission, it must be presumed that the owner acquiesces in the sale, and the deed will be received as a valid conveyance of the property to the purchaser." *Dexter v. Strobach*, 56 Ala. 233.

An execution sale by a sheriff to his wife is only voidable; and hence defendant can not resist an action by the wife, as purchaser, to recover possession, on the ground that the sale and deed passed no title, where he had taken no steps to set aside the sale. *Dexter v. Strobach*, 56 Ala. 233, cited on this point in note in 20 L. R. A. 506.

§ 161. Bids.

§ 162. — Acceptance or Rejection.

The sheriff should not sell land levied on under an execution for a merely nominal sum, but should retain the levy and reject the bid, and return the execution, stating the facts. *Lankford v. Jackson*, 21 Ala. 650.

Where the inadequacy of a bid on execution sale is so gross as to shock the conscience, the sheriff should not proceed with the sale, but should return the fi. fa., stating the levy and that the property was not sold for want of buyers. *Henderson v. Sublett*, 21 Ala. 626, cited on this point in note in 20 L. R. A., N. S., 1133.

§ 163. Failure to Comply with Bid.

§ 164. — Resale.

Where a purchaser of land sold on execution by the sheriff refuses to comply

with the terms of the sale, the sheriff may resell the land. *Robinson v. Garth*, 6 Ala. 204.

An execution sale is not void because the second bidder, who was declared the purchaser, refused to take the goods, and the sheriff thereupon delivered them to the first bidder without a resale. *O'Bryan v. Davis*, 103 Ala. 429, 15 So. 860.

§ 165. — Liabilities of Bidders.

A purchaser at a sheriff's sale, who refuses to comply with the contract of purchase, is liable to an action by the sheriff; and the right to recover the full price can not be controverted, if the sheriff, at the time of the trial, has the ability to deliver the thing purchased, or if that has been placed at the disposal of the purchaser by a tender. *Lamkin v. Crawford*, 8 Ala. 153.

When the sheriff resells the thing which the first purchaser refused to pay for, there is an implied contract by the first purchaser to pay the difference which is thus ascertained between his bid and the subsequent sale, and a count on a contract to pay the same is good. *Lamkin v. Crawford*, 8 Ala. 153.

An exception to the rule that the sheriff may recover the difference between the sales arises when the first purchaser is himself the owner of the property sold as the defendant in execution, or from having purchased it from the defendant in execution after its lien has attached. In such a condition of things, the surplus, after satisfying the execution, belongs to the party purchasing. *Lamkin v. Crawford*, 8 Ala. 153.

In an action by the sheriff against a purchaser at an execution sale for failure to take the property purchased, the loss actually sustained by the seller is, in general, the true measure of damages. *Lamkin v. Crawford*, 8 Ala. 153.

§ 166. — Actions on Bids.

See ante, "Liabilities of Bidders," § 165.

In General.—Though the sheriff may generally refuse to deliver the property to the purchaser until the purchase money is paid or tendered, yet if he makes it one of the conditions of the sale, when selling partnership effects under execution against one partner individually, that

he will actually deliver the goods to the purchaser, he can not, in an action by him to recover the purchase money, insist that he had no authority as sheriff to make such stipulation. *Andrews v. Keith*, 34 Ala. 722.

It is no defense to an action by the sheriff against a purchaser refusing to go on with the sale that the thing purchased was not the property of defendant in execution, as that is a matter to be ascertained by the purchaser previous to bidding. That is a matter to be ascertained by the purchaser previous to bidding and can not be urged against an action for the price. *Lamkin v. Crawford*, 8 Ala. 153.

Parties.—An action for refusing to comply with a contract of a sale made with the sheriff on the sale of property under execution is properly brought in the name of the sheriff. *Bell v. Owen*, 8 Ala. 312.

A sheriff selling land under execution may maintain in his own name an action for breach of contract against a purchaser who refuses to comply with the terms of the sale. *Robinson v. Garth*, 6 Ala. 204.

§ 167. Confirmation.

Any party to the suit or person connected with the title to land sold on execution, whether his interest be legal or equitable, may be heard on motion to set aside the sale for inadequacy of price. *Henderson v. Sublett*, 21 Ala. 626.

§ 168. Persons Who May Question Validity of Sale.

§ 169. — In General.

Interest in General.—"The rule is that no one can be heard to move for the vacation of a sale of this kind unless he not only has an interest, but that such interest will be injuriously affected by allowing the sale to stand." *McLaughlin v. Bradford*, 82 Ala. 431, 2 So. 515.

"The court will not interfere by summary motion, and set aside an execution sale of lands, at the instance of the purchaser, merely on the ground that he had the title, and the defendant in execution had no interest in the lands at the time of the sale, or of the issue of the execution." *McLaughlin v. Bradford*, 82 Ala. 431, 2 So. 515.

An execution issuing on a judgment, after the sheriff has paid the amount to the plaintiff, is not therefore void, but the defendant may have it set aside as having irregularly issued. But a stranger can not take advantage of it. *Fournier v. Curry*, 4 Ala. 321.

A sheriff's deed for land sold under judgment and execution can not be collaterally impeached by a stranger, who has no interest in either. *Smith v. Houston*, 16 Ala. 111.

Where the injury complained of is in the execution of the process, and not for defect in the process itself, it is competent for any persons whose interests are thereby prejudiced to move to set aside the sale. *Lee v. Davis*, 16 Ala. 516.

Vendees in General.—Where a judgment ceases to be a lien on land by reason of failure to issue execution thereon and keep it up without the lapse of an entire term, a sale of defendant's land thereunder does not prejudice the rights of a stranger to the judgment, who purchases of defendant after the judgment, and hence he can not maintain a motion to set the sale aside. *Shaw v. Lindsay*, 46 Ala. 290.

An execution sale of land will not be set aside on motion of a purchaser of the land to whom it had been conveyed, previous to the execution sale, by a grantee of the judgment debtor who obtained title previous to the recovery of the judgment, as the purchaser is not, in any proper legal sense, injured or prejudiced by such a sale. *McLaughlin v. Bradford*, 82 Ala. 431, 2 So. 515.

Creditors.—Where a constable has sold slaves under a levy made by him, there being at the same time an older levy on them by the sheriff, a creditor levying subsequently on them can not question the right of the constable to levy upon them under the circumstances, or object that the constable did not give the statutory notice of the sale. *Savage v. Forward*, 7 Ala. 463.

§ 170. — Waiver and Estoppel.

In General.—If the holder of a note, having bound himself by written contract to account for it to the owner, re-

covers judgment on it in his own name, and by private agreement with the sheriff, after sale under execution, takes the property at the purchaser's bid, he, being thereby rendered liable to the owner of the note for the amount in money, can not raise objections to the sale of which defendant in execution might avail himself; and if the amount was lessened by expenses, court costs, etc., the onus of proving it devolves on him. Nor is he entitled to a deduction for expenses incurred by him in pursuing defendant in execution, who had secretly left the county, taking his property with him, when such expenses are not shown to have been necessarily incurred, nor to have been such as the bailor would be bound to pay. *Hudson v. Crow*, 26 Ala. 515.

In an action against a sheriff for a wrongful levy and sale, it appeared that plaintiff delivered goods to a merchant for sale, without notice to the public that they were being sold otherwise than as the merchant's own. Part of them were redelivered to plaintiff's agent without notice to any one of the change of possession. Before they were removed they were taken by defendant under an execution against the merchant. Plaintiff's agent was present, and did not object, or give notice of his principal's claim thereto. Plaintiff was informed thereof, but gave defendant no notice of his ownership before the goods were sold. Held, that plaintiff was estopped from suing defendant. *Stephens v. Head*, 119 Ala. 511, 24 So. 738.

A creditor is not estopped to allege that levies under attachments by other creditors were fraudulent, though he did not take action to prevent prosecution of the attachment suits to judgment, and sale of the property, and distribution of the proceeds. *Glaser v. Meyrovitz*, 119 Ala. 152, 24 So. 514.

One claiming title to realty under a judicial sale, to satisfy a judgment obtained through collusion with the debtor, can not complain of the inadequacy of the price paid by another creditor at a subsequent execution sale of the same land. *Worthington v. Miller*, 134 Ala. 420, 32 So. 748.

Consent of Debtor.—A party who has pointed out property which is exempt from levy and sale by act 1833, to an officer having an execution against his goods and chattels, and executed a forthcoming bond, is not estopped from objecting to the sale, and claiming the privilege which the act affords to a poor debtor; especially if the plaintiff in execution, or some third person, is not prejudiced by the implied waiver of the exemption, as indicated by the direction to levy. *Jordan v. Autrey*, 10 Ala. 276.

Failing to Object at Sale.—An execution defendant is not estopped, by his presence at the sale, without interposing an objection, to avoid the sale as being on a dormant judgment, he not knowing the judgment was dormant. *Herzberg v. Hollis*, 119 Ala. 496, 24 So. 842.

Where defendant in execution is present at the sale of his land thereunder, forbidding the sale, and knows the value of the land, and by whom and at what price it is purchased, his motion to set aside the sale for inadequacy of price, made after expiration of the time for redemption, should be denied. *Bolling v. Garrett*, 93 Ala. 89, 9 So. 604.

Delay.—Where an application by a plaintiff in execution to set aside a sale, which is voidable at his instance, is not made until after the expiration of more than four years, he having neglected to avail himself of the ordinary and accessible means of information as to the facts, and in the meantime the property has passed into the hands of subsequent purchasers, who have received conveyances, and have made valuable improvements, the sale will not be set aside. *Daniel v. Modawell*, 22 Ala. 365.

When a party whose land has been sold under execution, delays more than four years, before he makes application to set it aside, during a large portion of which period, he has been engaged in litigating the title, with the purchaser, a much stronger case will be required to warrant the interference of the court, than if a prompt application had been made. *McCollum v. Hubbert*, 13 Ala. 282.

§ 171. Opening or Vacating.

As to rights and remedies of purchas-

ers on avoidance of sale, see post, "Rights and Remedies on Avoidance of Sale or Failure of Title," § 200. As to vacating judgment by default as affecting sale, see the title JUDGMENT.

§ 172. — Grounds in General.

In General.—A sale of land will be set aside where the sheriff has been guilty of a mistake, irregularity, or fraud, to the prejudice of either party or a third person. *Mobile Cotton Press & Building Co. v. Moore*, 9 Port. 679. See *Cawthorne v. Knight*, 11 Ala. 268, 269.

Courts of law and equity alike exercise the power of setting aside sales under execution, when made under judgments or decrees rendered by themselves, on the grounds of mistake, irregularity, fraud, misconduct in selling, and gross inadequacy of price. *Holly v. Bass*, 68 Ala. 206.

Mistake.—Where a sheriff sold property under execution against the wishes and to the injury of both the parties, under a clear mistake, the sale will be set aside. *Mobile Cotton Press, etc., Co. v. Moore*, 9 Port. 679.

Fraud.—The misrepresentation or fraud of a purchaser at a sheriff's sale furnishes just ground for setting aside a sale, even if the sheriff has executed the deed of conveyance to the purchaser. *Mobile Cotton Press & Building Co. v. Moore*, 9 Port. 679.

A fraud which will justify the court on motion, to set aside a sheriff's sale of land, must exist at the time of the sale. Subsequent irregularities will not have that effect, but the party will be remitted to his rights in another forum. *McCollum v. Hubbert*, 13 Ala. 282.

The circuit court has exclusive jurisdiction to vacate a sale of lands made under process issuing therefrom, where the only ground for annulling the sale is irregularity in the conduct of the officer making it; but where such sale was for a grossly inadequate price, creating the presumption of fraud, and was followed by the execution of deeds to the purchaser, an action to annul the sale may be maintained in a court of equity. *Ray v. Womble*, 56 Ala. 32.

Sale under Several Executions.—A sale

of land will not be set aside because made under several executions at one and the same time. *Draine v. Smelser*, 15 Ala. 423.

A sale of land under four executions, one of which is void, is not invalid, but at most irregular, and voidable on seasonable application. *Francis v. Sheats*, 153 Ala. 468, 45 So. 241.

"The sale was had under four executions; but it by no means resulted that the sale was such an entirety as that the voidness of one of the executions invalidated the sale. The rule is well declared in *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777, whether dictum or not, that in such cases the purchaser acquires title and that the sale is not a nullity. This principle is supported in reason and by many respectable authorities, and affirmed by eminent text writers, among them *Freeman on Executions*, § 325, and citations in note." *Francis v. Sheats*, 153 Ala. 468, 45 So. 241, 242.

Invalidity of Title of Defendant.—The court will not interfere in a summary way by motion, and set aside a sale of land made under execution, upon the ground of the invalidity of the title of defendant in execution, but will leave the party to defend his possession in the ordinary way, when the purchaser asserts his rights. *Nuckols v. Mahone*, 15 Ala. 212.

Purchase by Wife of Defendant.—A prior sale of land under execution, at which the wife of the defendant became the purchaser, furnishes no ground for setting aside a subsequent levy and sale thereof, on the motion of the defendant and his wife. *Sheffey v. Davis*, 60 Ala. 548.

Knowledge That Defendant Intended to Appeal.—The fact that the execution plaintiff and the purchaser of land at a sheriff's sale knew that defendant intended to appeal is not sufficient, on reversal of the judgment, to set aside the sale, where the supersedeas bond was filed on the day after the sale, though before the price was paid, but was not accepted by the clerk until after the money was paid. *Anderson v. Whitaker*, 103 Ala. 658, 15 So. 910.

Purchase from Attachment Defendant.—Where one purchased from an attach-

ment defendant, after issuance of the attachment, and before the venditioni exponas, and afterwards purchased at the sale by the sheriff while an exemption claim and contest were pending, and the exemption claim was afterwards dismissed in pursuance of a compromise between the plaintiff and defendant, the purchaser, on being substituted for defendant as the sole movant therefor, is not entitled to have the sale and venditioni exponas set aside. *Nearen v. Farrow*, 146 Ala. 623, 41 So. 421.

§ 173. — Defects or Irregularities in Execution or Levy.

"Our authorities all declare the invalidity of a sale of land under an execution which is inoperative at the time. *Smith v. Mundy*, 18 Ala. 182; *Morgan v. Ramsey*, 15 Ala. 190; *Barton v. Lockhart*, 2 Stew. & P. 109." *Sheppard v. Rhea*, 49 Ala. 125, 126.

Mere irregularities in a sale of land under execution, such as a failure to give the statutory notice, do not affect the title of the purchaser, and do not afford a sufficient reason for setting aside the sale; but, if followed by a sale manifestly injurious to the parties, the court will consider such irregularities in determining whether or not the sale shall be set aside; and although inadequacy of price, not sufficient to raise the presumption of fraud, will not vitiate a judicial sale, yet gross inadequacy, as here lands worth \$1,000 are sold for \$10, attended with great irregularities in the conduct of the sale, is conclusive against its validity. *Ray v. Womble*, 56 Ala. 32.

In the absence of all unfairness, oppression, or irregularity, the court might hesitate to set aside a sale under execution, on account of the inadequacy of the price, when the lands were worth \$1,800, were incumbered with a mortgage for \$400, and brought \$200 at the sale; but, where the mortgagee himself becomes a purchaser, although the case is not within the strict rule as to purchases of the equity of redemption by mortgages, the transaction will be jealously scrutinized, and it must be characterized by the utmost good faith, and supported by an adequate consideration; and if it appears that the sum bid was about the amount

of the execution debt, and was twenty times the sum bid by him, a short time before, at another sale under execution against the same defendant, for an adjoining tract of the same size, and of nearly the same value, which was entirely unincumbered, the two tracts together constituting the defendant's entire plantation—in decreeing that the first sale to be vacated, on account of the inadequacy of price, and irregularities in the conduct of the sale, the court will also set aside the sale of the equity of redemption of the mortgage tract. *Ray v. Womble*, 56 Ala. 32.

If the defendant in execution makes no objection to the irregularities of the process until his property is sold, and passes into the hands of purchasers, who are strangers to the suit, he can not afterward complain. Such a purchaser would acquire a good title. *Draper v. Nixon*, 93 Ala. 436, 8 So. 489.

§ 174. —Irregularities or Misconduct Affecting Sale.

In General.—A court of law is competent to control the acts of its officers in the execution of its process, and, when satisfied that a sale made under it is affected with fraud, or that the officer has been guilty of an irregularity to the injury of either party to the process, will set aside such sale. *Draine v. Smelser*, 15 Ala. 423.

Want or Insufficiency of Notice.—Defects in the advertisement of the sale by the sheriff, and in notice given to the defendant in execution, are mere irregularities, and do not furnish good grounds for setting aside the sale, without proof of consequent injury to the party complaining. *Holly v. Bass*, 68 Ala. 206.

An execution sale will not be set aside because the advertisement was in pale ink, which before the sale had become nearly illegible. *Holly v. Bass*, 68 Ala. 206.

Purchase by Disqualified Person.—When the deputy sheriff becomes the purchaser of lands sold under execution at an undervalue, after having himself forbidden the sale at the instance of the defendant in execution, the sale will be set aside on motion of the plaintiff in execution, if application is made in proper

time. *Daniel v. Modawell*, 22 Ala. 365, cited in note in 40 L. R. A., N. S., 848.

A purchase by a sheriff at his own sale on execution is not void, but voidable merely. It seems that the court, on motion of either of the parties, would set aside such a sale, and that creditors could have belief in equity. *Creagh v. Savage*, 9 Ala. 959, cited on this point in note in 20 L. R. A. 506.

Presence of Property.—It is the duty of the sheriff to have personal property present at the time and place of sale, but if this is not done, and a sale made, the property being absent, the sale is not void, but the purchaser acquires the title, subject to be divested by the order of the Court from which the execution issued, setting it aside. *Foster v. Mabe*, 4 Ala. 402, cited in note in 33 L. R. A. 95.

§ 175. — Inadequacy of Price.

As affecting bona fide purchaser, see post, "In General," § 190. As subjecting sale to collateral attack, see post, "Collateral Attack on Sale," § 180. As to inadequacy in connection with other objections, see post, "Inadequacy of Price in Connection with Other Objections," § 176.

In General.—Where the inadequacy of price at an execution sale is so gross as to shock the understanding or the conscience, it will, of itself, authorize the court to set aside the sale. *Henderson v. Sublett*, 21 Ala. 626.

Where a sheriff sells land levied on under an execution for a grossly inadequate price, the court, on application therefor by the execution debtor, will set aside such sale. *Lankford v. Jackson*, 21 Ala. 650.

Gross inadequacy of price is, ordinarily, a good and sufficient reason for setting aside a sheriff's sale of lands under execution, at which the plaintiff in execution became the purchaser; but this principle does not apply, where the inadequacy of price is caused, not by any fault on the part of the sheriff, the plaintiff, or his attorney, but by the acts of the defendant himself, or of persons connected with him, and claiming under him by intermediate conveyances. *Fabel v. Boykin*, 55 Ala. 383.

What Constitutes Inadequacy.—In a

proceeding to set aside an execution sale, on the ground of inadequacy of price, because of an irregularity, the defendant introduced several affidavits by persons not shown to be qualified as experts, who placed the value of the goods at from \$1,000 to \$2,027. For the purchaser an equal number of affidavits were introduced by persons shown to be experts, which showed the goods were shopworn and very unsalable, and worth only about \$600, the amount they were sold for. Held not sufficient to set aside the sale. *O'Bryan v. Davis*, 103 Ala. 429, 15 So. 860.

Where land of the value of \$800 is sold by an officer under legal process for \$400, in the absence of fraud and irregularity in the officer the sale will not be set aside for inadequacy of price. *Draine v. Smelser*, 15 Ala. 423.

An execution sale at which the purchaser secures, for \$140, an unincumbered title to \$2,000 worth of land, and an equity of redemption in \$4,000 worth more, the superior liens amounting to \$5,330, will be set aside for inadequacy of price. *Simmons v. Sharpe*, 138 Ala. 451, 35 So. 415.

Representation or Acts of Debtor Affecting Price.—The rule that gross inadequacy of price is ground for setting aside a sheriff's sale of lands on execution does not apply when the inadequacy is caused by acts of the defendant, or of those for whom he is responsible. *Fabel v. Boykin*, 55 Ala. 383.

§ 176. — Inadequacy of Price in Connection with Other Objections.

In General—Rule Stated and Limited.—"Inadequacy of price may not be sufficient cause for setting aside a sale of land under execution, but when coupled with other circumstances it has induced the courts to avoid the purchase." *Lee v. Davis*, 16 Ala. 516, 522.

"An expression, however, occurs in the opinion of the court, in the case of *Lee v. Davis*, 16 Ala. 516 which, without some explanation and limitation, can not command our assent. It is this: 'Inadequacy of price may not be sufficient cause for setting aside a sale of land under execution; but when coupled with other circumstances, it has induced the courts to avoid the purchase.' We readily

concede, that every inadequacy of price will not be sufficient to set aside a sale of lands under execution; but when the inadequacy is so glaring and gross, as at once to shock the understanding and conscience of an honest and just man, it will, of itself, authorize the court to set aside the sale. For instance, if, as in the case under consideration, a tract of land of the value of \$1800 is sold for \$5, the court out of which the execution issued should not hesitate to set aside the sale for this cause alone. In all such cases, the sheriff should not proceed with the sale, but return the *fi. fa.* levied, but the property not sold for want of buyers, and wait for a *venditioni exponas*. It would be difficult to lay down a general rule on this subject, which would adapt itself to all cases. The one just suggested would, perhaps, be as safe as any that could be proposed. Still, much would be left to the sound discretion of the sheriff, and should he fail to exercise it fairly, the court could review it, and thus decide the question of abuse or no abuse of process, according to the circumstances of each case as it arises. But it would be monstrous to hold, that a sale should be allowed to stand, which would invest the purchaser with the title to property, whether real or personal, at one three hundredth part of its value, or even less, as is the case here." *Henderson v. Sublett*, 21 Ala. 626, 629.

Specific Applications of Rule.—The omission of the sheriff and attorney of the plaintiff in execution, the latter of whom becomes the purchaser, to undeceive one who at the sale asserts a superior title to the property sold, and who has had no notice, but is evidently ignorant, that the judgment and execution under which the sale is about to be made create a lien prior in point of time to his title, coupled with gross inadequacy of price, is a sufficient ground for setting aside the sale. *Lee v. Davis*, 16 Ala. 516.

A sheriff's sale of land under execution will be set aside on motion where it appears that bystanders were deferred from bidding by the irregularities committed by the sheriff in conducting the sale, and that the lands were sold at a grossly inadequate price. *Hurt v. Nave's Adm'r.* 49 Ala. 459.

§ 177. — Application and Proceedings Thereon.

§ 177 (1) In General.

Parties.—There is no settled rule, as to who are the necessary parties defendant to a motion to set aside the sale of lands under execution. Generally, those persons only who have an interest in the sale, or who will be prejudiced by setting it aside, need be made defendants to the motion. *Beach v. Dennis*, 47 Ala. 262.

Form and Sufficiency of Affidavits, Motion and Pleadings.—A motion to set aside a sale of lands under execution is a proceeding of an equitable nature, to be determined upon equitable principles, and not always regulated by fixed rules. *McCaskell v. Lee*, 39 Ala. 131.

Affidavits which state simply that the lands "sold for greatly less than their value," not stating the value and price, or other facts from which these can be ascertained, being merely the statements of opinions, are not sufficient to set aside the sale. *Holly v. Bass*, 68 Ala. 206.

On a motion to set aside a sale made under execution by a constable, to which the purchaser at the sale and the constable are made defendants, it is not a good plea that the plaintiff in the motion had brought an action of trespass in the circuit court against the constable for levying on and selling the property, and had recovered a judgment against him, as such fact was immaterial; the action being no bar to the motion to set aside. *Staunton v. Simmons*, 20 Ala. 243.

§ 177 (2) Time for Application.

In General.—A party who seeks to set aside a sale under legal process, whether by motion in the court from which the process issued, or by bill in equity, must act promptly, or must satisfactorily explain any unreasonable delay; but no time can be definitely fixed, within which the application must be made, since the proceeding is of an equitable nature, dependent upon equitable principles, and necessarily governed by the varying facts of each particular case. (Doubting the correctness of the general rule declared in *Abercrombie v. Conner*, 10 Ala. 293, 296.) *Cowan & Co. v. Sapp*, 74 Ala. 44.

In this case, more than three years after

the sale having elapsed before the bill was filed to set it aside, the delay was held sufficiently explained by proof of the facts, that the payment of the judgment was made to the plaintiff in Nashville, Tennessee, on the same day the land was here sold under execution, and that he made no effort to recover possession, as purchaser at the sale, until about six months before the bill was filed. *Cowan & Co. v. Sapp*, 74 Ala. 44.

A motion to set aside an execution sale will be entertained at any time before the purchaser takes possession, or afterwards, if taken so promptly that the motion could not have been conveniently made before. *Abercrombie v. Conner*, 10 Ala. 293.

An application to quash an execution, and to set aside a sheriff's sale and deed under it, must be made with due diligence, and at the earliest opportunity (Rules of Practice, No. 13; Code, 160); and being made in this case after the lapse of seven years, without explanation or excuse for the delay, it was held to come too late. *Steele v. Tutwiler*, 68 Ala. 107.

While a sale made under execution may be set aside on the grounds of mistake, irregularity, fraud, mistake in selling, and gross inadequacy of price, the party asking relief must prosecute his motion within a reasonable time as determined by the facts of the particular case, and must show that the act complained of has resulted to his injury or prejudice. *Holly v. Bass*, 68 Ala. 206.

"The rule is well settled that a party seeking the vacation of a sale of lands under legal process, whether he invokes the jurisdiction of the court from which the process issued or the concurrent jurisdiction of a court of equity, must act promptly. Unnecessary, unreasonable delay in moving is regarded as a waiver, or as acquiescence in whatever of irregularity, or illegality, or unfairness, oppression, or fraud, may have attended the sale, if of the delay there is not a clear, satisfactory explanation." *Pate v. Hinson*, 104 Ala. 599, 16 So. 527, 528.

"No inflexible rule as to the time within which a motion to set aside and vacate a sale of land under execution must be made has been or can be an-

nounced. The general rule, that there must be promptness of action, no unreasonable delay, to be determined on the particular circumstances of each case, is well recognized. Ordinarily, the proceeding is regarded as equitable in its nature; and the question of laches, when involved, is determinable on equitable principles. *McCaskell v. Lee*, 39 Ala. 131." *Bolling v. Garrett*, 93 Ala. 89, 9 So. 604, 605.

"In an early case it was remarked 'that the motion should be made in a reasonable time—most regularly, at the first term succeeding the return of the process. But we will not, however, undertake to say, that there might not be circumstances under which the court should interfere at a subsequent term; especially, if there are sufficient reasons for not having sought its action earlier.' *Hubbert v. McCollum*, 6 Ala. 221. In a subsequent case it was declared that a motion to set aside a sale of land under execution may be made at any time before the purchaser takes possession, or recovers it by suit; the reason assigned being that there is no necessity for the party in possession to be active until the purchaser obtains possession, or makes an effort to acquire it. *Abercrombie v. Conner*, 10 Ala. 293, 296. The rule thus expressed has been virtually repudiated in subsequent decisions. *Cowan & Co. v. Sapp*, 74 Ala. 44. In *Powder v. Cheeves*, 90 Ala. 117, 7 So. 512, 513, *Stone, C. J.*, says: 'We think the rule declared in *Cowan & Co. v. Sapp*, more reasonable, and more in harmony with our rulings on kindred subjects, and we prefer to adhere to it, although in doing so we qualify, if we do not overrule, what seems to be the literal interpretation of the language used in *Abercrombie v. Conner*.' In *Cowan & Co. v. Sapp*, supra., it is said: 'The rules which apply are analogous to the known rules of a court of equity in granting relief to a mortgagor, or those claiming under him, seeking to avoid a purchase by a mortgagee, at his own sale, or a cestui que trust claiming to be relieved from a purchase by a trustee.'" *Bolling v. Garrett*, 93 Ala. 89, 9 So. 604, 605.

Specific Application of Rule.—An execution sale can not be set aside because the land was sold in bulk instead of in

parcels, in a court of law, after deed has been made to the purchaser and he has paid the purchase price and removed liens on the property, as the deed can be annulled and the purchaser's interests protected only by a court of equity. *Annis-ton Pipe Works v. Williams*, 106 Ala. 324, 18 So. 111.

An application to set aside an execution sale, made seven years after the sale, will be denied; the delay being unexplained. *Steele v. Tutwiler*, 68 Ala. 107.

Where decedent's administrator was his joint judgment debtor, and the execution was levied on decedent's land after his death for the full judgment, though part had been paid, to the administrator's knowledge, and the land sold for a small price, owing to the auctioneer's refusal to give specific descriptions, a motion to set aside the sale made by the administrator *de bonis non* at the first term after his appointment, and eighteen months after the sale, was not too late. *Hurt v. Nave's Adm'r*, 49 Ala. 459.

A motion to set aside an execution sale, made four years after the sale and two years after the purchaser's suit to recover possession, should be overruled, the delay being unexplained. *McCaskell v. Lee*, 39 Ala. 131.

Two years is a reasonable time within which a motion to vacate a sale of land under execution should be made, unless there is fraud, misconduct, or irregularity seriously affecting the sale, or satisfactory reasons why longer time should be allowed. *Bolling v. Garrett*, 93 Ala. 89, 9 So. 604.

§ 178. — Hearing and Determination.

The fact that the execution under which a sale is made has not been returned to the court whence it issued interposes no objection to its entertaining a motion to set aside the sale. *Lee v. Davis*, 16 Ala. 516.

§ 179. Actions to Set Aside Sale.

Where a bill sought to set aside a sale of land under execution for inadequacy of price, but showed on its face that, though the sale included all of the tract, the most valuable part thereof had been previously sold under a chancery decree, which sale had been confirmed, and there was nothing in the bill to negative the

fact that the amount paid at the execution sale was less than the value of the land sold, which was not covered by the chancery sale, the bill was demurrable. *Harris v. Stephenson*, 147 Ala. 537, 41 So. 1008.

§ 179 (1) In General.

A mistake in indorsing a levy, as having been made at a date prior to the issue of the execution, is an irregularity for which a sale of land might be set aside on motion, but it does not render the sale void so as to entitle the judgment debtor to sue in equity to redeem from the sale. *White v. Farley*, 81 Ala. 563, 8 So. 215.

At a sale under execution, land worth \$1,800, and mortgaged for \$400, was sold for \$200 to the mortgagee. The sum bid was about the amount of the execution debt, and twenty times the sum bid by him a short time before, at another sale under execution against the same defendant, for an adjoining tract of the same size and of nearly the same value and unincumbered; the two tracts constituting an entire plantation. Held, that equity would set aside the first sale for inadequacy of price, and also the sale of the equity of redemption of the mortgaged tract. *Ray v. Womble*, 56 Ala. 32.

Equity will not set aside a sale under execution issued on a judgment barred by limitations, where a seasonable application to quash the writ was not made to the court issuing it. *Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 15 So. 271.

"Though a sale by virtue of an execution issued on a dormant judgment is not void, it is voidable at the election of the defendant in execution, seasonably expressed, unless by some act he is stopped from asserting the right." *Herzberg v. Hollis*, 119 Ala. 496, 24 So. 842.

While by motion seasonably made in the court from which execution issues the sale thereon may be vacated for gross inadequacy of price, such relief can not be had in equity, in the absence of fraud or collusion in the sale, or inability of the court of law to afford adequate relief. *Empire Realty Co. v. Harton* (Ala.), 57 So. 763.

Parties.—The plaintiff in the execution under which a sale is made by a constable is not a necessary party to a motion to

set aside the sale on the ground that the constable had no authority to make it. *Stainton v. Simmons*, 24 Ala. 410.

§ 179 (2) Pleading and Evidence.

A bill to vacate a sheriff's sale, and to cancel a deed made thereunder, alleged that a sale of complainant's land was made to satisfy a judgment; that the sheriff's deed to defendant was for an inadequate consideration; and that defendant, who was the only bidder, was the attorney of the judgment plaintiff. The bill showed affirmatively that complainant afterwards litigated the right to possession with defendant, and that judgment was rendered against him, and that he made an agreement of record with defendant for a stay of the writ of possession for 120 days. Held, that the bill should be dismissed for want of equity. *Pate v. Hinson*, 104 Ala. 599, 16 So. 527.

Even if inadequacy of price were grounds for relief in equity against an execution sale, the fact that the land was worth \$10,000 and the sale was for \$50, does not show such inadequacy; the bill showing complainant's claim to the land was without merit, in that he had no title. *Harton v. Enslen* (Ala.), 57 So. 723.

Construing most strongly against complainant the allegations of his bill for relief against execution sale, that he purchased the land from M. "during the year 1887," and paid her certain cash, and on Nov. 29, 1887, M. executed a warranty deed to S., who afterwards conveyed to complainant's wife, one of the defendants, no deed from M. to plaintiff being exhibited, no acquisition of title by complainant from M. before she deeded to S. is shown. *Harton v. Enslen* (Ala.), 57 So. 723.

As against the claim of the bill for relief against execution sale that complainant acquired title to the land by quitclaim from M. "on or about, to wit, the 20th day of March, 1903," the bill, alleging that "on the 17th day of March, 1903," M. executed a quitclaim of the land to one of the defendants, a copy of which, with the notary's certificate of its acknowledgment on March 17, 1903, is made an exhibit, shows complainant acquired nothing by his quitclaim. *Harton v. Enslen* (Ala.), 57 So. 723.

§ 180. Collateral Attack on Sale.

Inadequacy of price at execution sale will not prevent the passing of title, or subject the sale to collateral attack, though it may be ground for vacating it in a direct proceeding. *Howard v. Corey*, 126 Ala. 283, 28 So. 682.

Title to realty acquired under a judicial sale can not be collaterally assailed for inadequacy of price. *Worthington v. Miller*, 134 Ala. 420, 32 So. 748.

Where an execution sale of land is void, in a proper case, it may be incidentally assailed and set aside on a bill to redeem; but if the sale is only irregular, and seasonably voidable, the party complaining must either make his motion in the court issuing the execution to vacate the sale, or by original bill in equity seek the vacation thereof. *Francis v. Sheats*, 153 Ala. 468, 45 So. 241.

Where land is sold under a pluries execution, issued since the war on a judgment rendered during the war, and defendant in execution does not question the validity of the process, a third person can not collaterally attack a sale under the execution on the ground that scire facias was necessary to authorize execution. *Parks v. Coffey*, 52 Ala. 32.

Where an execution from the chancery court, not having been levied, was taken by the sheriff, after the return day had passed, to the office of the register in chancery, and the register's deputy, at the request of the sheriff, thereupon erased the name of the month to which the execution was returnable, and substituted the name of the next month, and this was done a second time, without any formal return of the execution being made in either instance, held, that these alterations did not affect the validity of the execution, or of a sale made under it after the second alteration, when collaterally assailed. *Brevard v. Jones*, 50 Ala. 221.

A deed for land executed to a purchaser at a sheriff's sale is not void, because the purchaser made known at the sale the existence of certain deeds made to him by the defendant in execution, with the intention of purchasing the property below its value. Such deed, if impeachable, can only be impeached in equity. *Costillo v. Thompson*, 9 Ala. 937.

An execution on a judgment, issued after the lapse of a year and a day, without a revivor by scire facias, although forbidden by the statute (Rev. Code, § 2830), is not void, but voidable only at the option of the defendant, unless other persons have in the meantime acquired rights; and it is sufficient to sustain a sale, when collaterally assailed by another creditor of the defendant, although the plaintiff in execution was the wife of the defendant, and herself became the purchaser at the sale. *Brevard v. Jones*, 50 Ala. 221.

"Though an execution may be irregular, because not returnable at the proper time, or because issued on a dormant judgment, it must be respected and executed until vacated by motion to quash, or some other appropriate proceeding, instituted by the defendant in execution, and that neither he nor any one can call it in question collaterally. *Steele v. Tutwiler*, 68 Ala. 107; *Olmstead v. Brewer*, 91 Ala. 124, 8 So. 345." *Mitchell v. Corbin*, 91 Ala. 599, 8 So. 810, 811.

The levy and sale made under the execution, while irregular, are not void, nor can they be collaterally impeached; and hence, such irregularities constitute no defense to an action of ejectment by the purchaser, claiming under a conveyance made in pursuance of the levy and sale, the sale and conveyance not having been set aside. *Clark v. Spencer*, 75 Ala. 49.

§ 181. Presumption of Validity.

The presumption is in favor of the regularity of a sheriff's sale. *Brandon v. Snows*, 2 Stew. 255.

(B) TITLE AND RIGHTS OF PURCHASER.

§ 182. Nature and Effect of Transfer in General.

Where the defendant in an attachment had no interest in the property levied on, the levy and sale passed no title as against the true owner. *Milner & Kettig Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 36 So. 765.

When the plaintiff, claiming under a purchase at sheriff's sale, produces the judgment, execution and levy, and the sheriff's deed, and proves the possession of the defendant in execution at the time

of the levy and sale, he makes out a prima facie case of title; and the onus is then devolved on the defendant to show a superior title, either by documentary evidence, or by proof of adverse possession sufficient to perfect a title under the statute of limitations. *Elliott v. Dycke*, 78 Ala. 150.

"Even in sales of real estate under execution, the purchaser's title is made out by showing the judgment, execution, and sheriff's deed; and this title could not be defeated, except in a direct proceeding for that purpose, by showing that the sheriff violated every direction of the statute regulating such sales." *O'Bryan v. Davis*, 103 Ala. 429, 15 So. 860, 861.

Where a slave woman, loaned to a wife by her father, had remained in the possession of her husband for three years, without any deed or other instrument of record to show the real ownership, a purchaser under an execution against the husband acquired an absolute title as against the owner. *Knight v. Bell*, 22 Ala. 198.

"The defendant was a purchaser at sheriff's sale, and succeeded to the rights of the plaintiff in the judgment, under which he purchased. If the plaintiff in that judgment could have assailed the title of the plaintiff, as having been made to hinder, delay, and defraud the creditors of Burson, the defendant has the same right. *Carter v. Castleberry*, 5 Ala. 277; *Daniel v. Sorrells*, 9 Ala. 436; *De Vendell v. Hamilton*, 27 Ala. 156." *McCoy v. Watson*, 51 Ala. 466, 468.

"It is not a general creditor, but a creditor with a lien, created by judgment and execution, who can, in a court of law, impeach for fraud conveyances made by his debtor. *Pennington v. Woodall*, 17 Ala. 685." *McCoy v. Watson*, 51 Ala. 466, 468.

A purchaser at execution sale may impeach a deed by defendant, for fraud, in any case where the plaintiff in execution could have done so. *McCoy v. Watson*, 51 Ala. 466.

Plaintiff in ejectment, claiming under a sheriff's deed given the purchaser at execution sale, must prove judgment, execution, and levy, independent of the recitals in the deed. *Ayers v. Roper*, 111 Ala. 651, 20 So. 460.

When plaintiff in ejectment, claiming under an execution sale, produces a judgment, execution, and levy, and a sheriff's deed, and proves possession by defendant in execution at the time of levy and sale, he makes a prima facie case. *Elliott v. Dycke*, 78 Ala. 150.

A., who had only an equitable title to certain lands, conveyed the lands in ordinary form to B. Certain judgments were recovered against B., on which the lands were afterwards sold on the executions to C.; and subsequent to the recovery of the judgments, but previous to the sale on the executions, B. conveyed the lands to D. in trust to pay debts, and D. took possession. Afterwards, A. having died, his vendor conveyed the legal title to the heirs of A. Held, in trespass to try title by C. against D., that D. could not set up in defense that the legal title as in some third person, as the heir of A. *Whiteside v. Branch Bank*, 10 Ala. 249.

In ejectment by a purchaser at execution sale, he must show that the defendant in execution had some interest or estate in the lands sold on which the judgment could operate. *Hendon v. White*, 52 Ala. 597.

§ 183. Property Passing by Sale.

In General.—When lands are sold under execution, and a deed executed by the sheriff to the purchaser, whatever legal estate or interest the defendant in execution had is divested out of him, and vested in the purchaser, and nothing remains in the defendant but the naked right of redemption (Code, §§ 2877-80), to be perfected and enforced in the manner prescribed by the statute. *Searcey v. Oates*, 68 Ala. 111.

A written agreement was entered into between complainants and one A. for the entry and purchase, in partnership, of lands to be used for mining purposes. Complainants agreed to advance the purchase money, and A. was to enter the lands which he deemed most suitable for mining and to superintend the working of the mines. The money advanced by complainants was "to be refunded, with interest, out of the first funds realized by the company." A. entered several tracts of land in his own name with

money advanced by complainants, and afterwards transferred them to complainants, to whom patents were subsequently issued by the government. Some of the lands were sold under execution against A., after the entry in his name, but before the issue of complainant's patent, and were purchased at the sale by the judgment creditors, against whom complainants afterwards filed their bill, praying that the lands might be sold; that the purchase money advanced by them, and expenses incurred in payment of taxes, etc., might be refunded to them; and that the residue of the proceeds might be divided according to the terms of the agreement. Held, that the fact that the legal title to the lands vested in the purchaser at the execution sale would not entitle him to priority over complainants' superior equitable title. *Pool v. Cummings*, 20 Ala. 563.

Crops.—Growing crops pass as part of the realty to a purchaser of the land at execution sale. *Thweat v. Stamps*, 67 Ala. 96.

Right under Contract of Purchase.—When land has been sold under execution, a deed by the defendant in execution to his vendee, holding his bond for title for the land, made after the sale under execution, will not prevail against the purchaser at the sheriff's sale, who has the legal title of the defendant conveyed to him by the sheriff. *Nickels v. Haskins*, 15 Ala. 619.

Under Rev. Code, § 2871, an equitable title in lands arising from payment of the purchase money may be sold under execution; but the purchaser acquires only an equitable title, which will neither support nor defeat an ejectment. *Caldwell v. Parmer's Adm'r*, 56 Ala. 405.

Partnership Rights and Interests.—A purchaser at execution sale of a partner's undivided interest in partnership effects does not acquire a right to the exclusive possession, but only becomes a tenant in common with the other partners, and the effects are still liable to the partnership debts to the same extent as before the sale. *Andrews v. Keith*, 34 Ala. 722.

Real estate purchased and used for partnership purposes, and held in the name of the partners individually, can not be sold under execution at law against

a surviving partner as such; and a sheriff's deed to the purchaser at such execution sale conveys only the surviving partner's undivided interest. *Caldwell v. Parmer's Adm'r*, 56 Ala. 405.

When an execution against an individual partner is levied on partnership property, a purchaser at the sale under the levy acquires only that partner's interest in the assets after the partnership debts have been paid, and its affairs adjusted and this can only be ascertained by an account in equity. *Farley, etc., Co. v. Moog*, 79 Ala. 148.

Particular Estates and Interests.—When mortgaged lands are sold under execution against the mortgagor, the purchaser acquires the entire interest of the mortgagor, subject to his statutory right to redeem from the execution sale; and, if such right is not exercised within the period allowed by law, the execution purchaser becomes vested with the legal and equitable title, subject only to the mortgage. *Junkins v. Lovelace*, 72 Ala. 303.

A purchaser at a sheriff's sale under execution of the equity of redemption in mortgaged land, after maturity of the mortgage, does not acquire such title as will support ejectment or a statutory real action in the nature of an ejectment. *Atcheson v. Broadhead's Adm'r*, 56 Ala. 414, cited in note in 21 L. R. A. 38.

Where the levy of an execution against a mortgagor was on his interest generally, the purchaser acquires the entire interest of the mortgagor, whether the mortgage was valid or invalid, paid or outstanding. *Gassenheimer v. Moulton*, 80 Ala. 521, 2 So. 652.

Rights Passing as Incidents.—A purchaser at sheriff's sale under execution succeeds to the rights of the plaintiff in execution, and may impeach for fraud a deed executed by defendant whenever the plaintiff in execution might do so. *McCoy v. Watson*, 51 Ala. 466.

§ 184. Estate or Interest Acquired.

§ 185. — In General.

Property Levied On.—A purchaser at an execution sale of land acquires no greater or other interest therein than is levied on. *Hanna v. Steele*, 84 Ala. 305, 4 So. 271.

Right, Title and Interest of Defendant.

—The purchaser at an execution sale acquires the right, title, and interest of the debtor. *Avent v. Read*, 2 Port. 480; *Lawson v. Orear*, 4 Ala. 156; *Stevens v. King*, 21 Ala. 429; *Foster v. Moody*, 51 Ala. 473; *Searcey v. Oates*, 68 Ala. 111; *Sellers v. Farmer*, 151 Ala. 487, 43 So. 967.

A purchaser of lands at sheriff's sale under execution on a judgment at law, acquires only the title which the defendant in execution had at the time of the levy and sale. *Foster v. Moody*, 51 Ala. 473; *Milner, etc., Co. v. De Loach Mill Mfg. Co.*, 139 Ala. 645, 36 So. 765.

The purchaser at a judicial sale acquires no other or greater interest in such property than was possessed by the original owner at the time of the sale, and is charged with all equities and existing defects in the title; and such purchaser can enforce no rights which the original owner did not possess. *Gray v. Denson*, 129 Ala. 406, 30 So. 595; *Hendrix v. Southern Ry. Co.*, 130 Ala. 205, 30 So. 596; *Shaw v. Lindsey*, 60 Ala. 344, 349; *Lovelace v. Webb*, 62 Ala. 271.

Prior to the Code of 1852 an equity of redemption in lands was not the subject of a levy and sale under execution at law; and, under the present statutes, the purchaser of such equity at execution sale, acquires no greater interest than the debtor, and is subrogated to all the rights, and subject to all the disabilities of the judgment debtor. *Lovelace v. Webb*, 62 Ala. 271.

A plaintiff claiming under execution sale takes only the title which the defendant in the execution had and although that may have been such a legal title as was subject to levy and sale, yet the defendant may defend by showing a superior legal title outstanding in another. *Stevens v. King*, 21 Ala. 429.

By a purchase of land at sheriff's sale, the purchaser is invested with the title of the defendant in execution. If, therefore, the defendant is a tenant, his landlord can not be permitted to become a codefendant. *Lawson v. Orear*, 4 Ala. 156.

"A purchaser at a sale under execution acquires all the legal rights of the defendant; *Jackson v. Gridley*, 18 Johns. 98; and

the latter becomes quasi his tenant, and will be deemed to continue in that character, until an actual disseisin or disclaimer on his part. *Jackson v. Sternbergh*, 1 Johns. Cas. 153." *Davis v. McKinney*, 5 Ala. 719, 724.

In an execution sale, if the levy is general upon the entire estate, all the right and title of the defendant in execution passes to the purchaser by the sale and sheriff's deed, but, if the levy is upon a partial or limited and defined, interest—an undivided half interest—this is an equivalent of a negation that the entire interest and estate is levied on, and in such case the purchaser only acquires an undivided half interest. *Hanna v. Steele*, 84 Ala. 305, 4 So. 271.

Where one claims as a purchaser, at a sale under execution, it is only necessary to show that there was a legal title subsisting in the defendant at the time the judgment was rendered, without producing a regular chain of title from the United States to the purchaser. *Brock v. Yongue*, 4 Ala. 584; *Land v. Hopkins*, 7 Ala. 115, 118.

To authorize a recovery on a sheriff's deed, the grantee must show a judgment, execution, levy, sale and conveyance, though the recitals of the deed may make a prima facie case as to some of these facts; and the deed does not convey any greater estate or interest than it assumes and purports to convey, although the defendant in execution in fact had a greater interest subject to levy and sale. *Carrington v. Richardson*, 79 Ala. 101.

Where a husband conveys lands to his wife during coverture, and she dies after issue born alive, his interest as tenant by curtesy, if any, is only of an equitable estate, and a purchaser of such interest on execution does not acquire a title on which he can maintain ejectment. *Carrington v. Richardson*, 79 Ala. 101.

A purchaser of land at execution sale is the absolute owner, subject only to a right of repurchase outstanding in judgment creditors of the defendant in execution and others, and is not liable to the redemptioner for waste. *O'Connor v. Bank of Attalla*, 116 Ala. 585, 22 So. 902, distinguishing *Dozier v. Mitchell*, 65 Ala. 511.

§ 186. Rights Passing as Incidents.

Where land conveyed in trust to secure bonds is incumbered with a prior lien, and the mortgagor, in order to secure the bondholders against such lien, makes a money deposit with the trustee, a subsequent assignment of such deposit by the mortgagor to a third person is an election, the benefit of which is transmitted to the assignee, that the deposit must not be applied to the bonds until after the land has been exhausted; and a purchaser of the mortgagor's equity of redemption in the land at a sale under a judgment rendered after the assignment of the deposit acquires no interest whatever in the deposit. *Moses v. Philadelphia Mortgage & Trust Co.*, 131 Ala. 554, 32 So. 612.

§ 187. Liens or Incumbrances on Property.

As to effect by notice, see post, "Liens, Incumbrances, and Equities," § 191 (3).

In General.—As a rule, purchasers at execution sales take, as against implied trusts, only such title as belongs to the debtor with all incumbrances thereon. *Dickerson v. Carroll*, 76 Ala. 377.

"There are cases in which a purchaser at execution sale can tack on to his title the lien of the execution creditor, against an intervening incumbrancer. This is the means by which such execution, or lien creditor, can make his prior right available. He succeeds by his purchase, not to any newly acquired equity against the outside incumbrances. He only acquires the lien and right of the execution creditor, which dominates the incumbrancer's claim; and tacking it to the title acquired by his purchase, perfects it. *Daniel v. Sorrells*, 9 Ala. 436; *Jordan v. Mead*, 12 Ala. 247; *Governor v. Davis*, 20 Ala. 366; *DeVendell v. Hamilton*, 27 Ala. 156. These authorities do not affect the present case." *Dickerson v. Carroll*, 76 Ala. 377, 379.

A sale under execution is subject to all the rights of all who hold a prior lien by judgment or otherwise on the property, and the priorities are governed by such rule and not by the time at which sales under different judgments are made. *Jefferson County Sav. Bank v. Miller*, 145 Ala. 237, 40 So. 513.

Mortgages.—One holding a junior equity in lands by virtue of a judgment can

not, by a purchase of the legal title at execution sale, defeat or postpone a senior equity under an equitable mortgage. *Fash v. Ravesies*, 32 Ala. 451.

A purchaser of mortgaged property at execution sale acquires no other or greater interest than that possessed by the execution debtor. *Electric Lighting Co. v. Rust*, 117 Ala. 680, 23 So. 751.

A purchaser of mortgaged property sold on execution against the mortgagor is estopped from denying the mortgagor's title. *Rust v. Electric Lighting Co. of Mobile*, 124 Ala. 202, 27 So. 263.

Where a sheriff sells property on execution which is incumbered by a deed of trust to secure the payment of a debt not due, the sheriff has not authority to adjust such debt and pay the same out of the proceeds of sale. *Baylor v. Scott*, 2 Port. 315.

Mortgages.—A sale of mortgaged property under execution against the mortgagor will not prejudice the rights of the mortgagee. *McDonald v. Foster*, 5 Ala. 664.

Under Code 1876, § 3209, subjecting an equity of redemption to levy and sale under execution, and subrogating the purchaser to all rights and subjecting him to all disabilities of the execution defendant, a purchaser of mortgaged lands at execution sale under a judgment against the mortgagor takes subject to the paramount lien of the mortgage. *Lovelace v. Webb*, 62 Ala. 271.

Estoppel of Purchaser by Recognition of Lien.—A purchaser at an execution sale of a slave, without notice that it had been previously conveyed by a trust deed, acquires no title adverse to the trustee which will prevent execution of the trust before the time allowed for registration of the trust deed has expired. *Echols v. Derrick*, 2 Stew. 144.

Where the levy of an execution against a mortgagor was on the equity of redemption only, the purchaser acquires only that interest, and is estopped to deny the validity of the mortgage. *Gassenheimer v. Molton*, 80 Ala. 521, 2 So. 652.

§ 188. Equities against Debtor.

A grantee in a sheriff's deed takes subject to all pre-existing equities in favor of third persons against the execution

debtor. *Clemons v. Cox*, 114 Ala. 350, 21 So. 426.

§ 189. Bona Fide Purchasers.

§ 190. — In General.

Application of Doctrine of Caveat Emptor.—The rule of caveat emptor applies to purchasers at sheriffs' sales on execution. *O'Neal v. Wilson*, 21 Ala. 288.

A surviving partner having executed a mortgage of realty of his firm to secure notes which he had executed in the name of the firm as surviving partner, but which created no obligation as against the firm, such realty was subsequently sold under judgments older than the mortgage, which had been rendered against him as surviving partner, and was purchased by one of the plaintiffs, who thereupon entered on the land and was in possession at the time of the sale under the mortgage. The first purchaser, having bought the interest of the second and compromised with the administrator of the deceased partner, presented his bill in equity against the heirs to obtain a divestiture of their legal title. Held, that the court could not lend its aid to perfect such sale, nor to disturb the legal title of such heirs, as the maxim, "Caveat emptor," as applicable to sheriffs' sales, applies as well in equity as at law. *Lang v. Waring*, 25 Ala. 625.

Claim or Irregularities in General.—The quashing of an execution for irregularity does not of itself set aside a sale of land made under it. Nor should the sale be set aside if the purchaser, without notice of the irregularity, has paid his money and obtained a deed. The onus of proving such notice lies on the party making the motion. *Chambers v. Stone*, 9 Ala. 260.

The invalidity of an execution issued after the death of the plaintiff does not warrant setting aside a sale of lands made under it to a bona fide purchaser without notice. *Nuckols v. Mahone*, 15 Ala. 212.

A judgment is a lien upon all the lands of the debtor within the state; but a bona fide purchaser, under an execution issued upon a junior judgment, would be protected. *Campbell v. Spence*, 4 Ala. 543.

A latent interest existing in the sheriff in the avails of an execution, and not appearing on the record, will not affect a

purchaser at a sale under such execution, who has no notice of the sheriff's interest. *Boren v. McGehee*, 6 Port. 432.

Liens, Incumbrances, and Equities.—A purchaser of a slave at a constable's sale, who has notice of an unregistered mortgage on the slave, may nevertheless protect himself under the lien of the plaintiff in the execution, if the latter had no notice of the mortgage until after his lien attached by the levy of his execution. *Jordan v. Mead*, 12 Ala. 247.

A judgment registered before a prior conveyance of land by the debtor is recorded on notice thereof brought home to the judgment creditors, being a lien on the land, a purchaser of the land at an execution sale under the judgment acquires title as against the conveyance, as he succeeds to all the rights of the judgment creditors, notwithstanding his knowledge of the conveyance. *Motley v. Jones*, 98 Ala. 443, 13 So. 782.

A purchaser of land at a sheriff's sale will be protected in equity against a prior deed of trust not recorded within sixty days of its execution, and of which the purchaser had no actual notice till after rendition of the judgment on which the land is sold. *Fash v. Ravesies*, 32 Ala. 451.

What Constitutes Bona Fides.—If a judgment creditor, not having actual notice of a deed of trust not duly recorded, becomes the purchaser at the sheriff's sale under his own judgment, he is entitled to protection as a purchaser without notice, although the deed of trust had been recorded before the sale under execution. *Fash v. Ravesies*, 32 Ala. 451.

An assignment of a judgment and execution, if made in a proper manner, is not of itself notice to any one, and therefore an assignment on the sheriff's memorandum book of executions in his hands, as the law does not require him to keep such a book, is notice to no person of the assignment, except the parties to the transaction. *Boren v. McGehee*, 6 Port. 432.

Under Code 1896, § 1005, which protects the rights of judgment creditors who, at the time of the recovery of their judgments, have no notice, actual or constructive, of prior deeds, it is not necessary for a purchaser at a sheriff's sale without no-

tice of prior unrecorded deeds to show in ejectment an unbroken execution lien from rendition of the judgment. *Hall v. Griffin*, 119 Ala. 214, 24 So. 27.

Satisfaction.—Where a judgment has been satisfied before a sale has been had thereunder, but such satisfaction has not been entered of record, the execution not being void, but voidable, a purchaser without notice takes a good title under the sale. *Boren v. McGehee*, 6 Port. 432.

Purchasers from Execution Purchaser.—When the defendant in execution, having an equitable title to land, directs the sheriff to levy on it, which the latter does, and the land is sold, and the proceeds applied to the satisfaction of the execution, and the defendant delivers up possession to purchaser, assuring him that the title is perfectly good, he is estopped from setting up the legal title, subsequently acquired, against subpurchasers for valuable consideration, who have paid the purchase money and received conveyances, without notice of the defect in title, and will be enjoined in equity from proceeding in ejectment at law. *Stone v. Britton*, 22 Ala. 543.

§ 191. — Notice.

§ 191 (1) In General.

It requires an actual change of possession, as distinguished from a constructive one, to charge a purchaser on execution sale with notice of an unrecorded deed, under Code 1907, § 3383, providing that unrecorded deeds shall be of no effect as against purchasers, mortgagees, and judgment creditors without notice; it not being enough that the tenant in possession agreed to hold for the grantee. *Brown v. International Harvester Co. (Ala.)*, 60 So. 841.

Under Code 1907, § 3383, providing that an unrecorded deed is of no effect as against a purchaser, mortgagee, or judgment creditor without notice, it is incumbent upon a party holding under an unrecorded deed to show notice, in order to defeat ejectment by the purchaser at execution sale against the grantor. *Brown v. International Harvester Co. (Ala.)*, 60 So. 841.

Where a wife took a bond for title from her husband, rented the land, collected the rents, and obtained a deed, which was

not recorded until after levy of execution against her husband, a purchaser at the sale was charged with notice of the transfer. *McCullars v. Reaves*, 162 Ala. 158, 50 So. 313.

Under Code, § 1005, providing that conveyances of unconditional estates are void as to purchasers and judgment creditors having no notice thereof, unless recorded within thirty days from date, where a judgment creditor before the recovery of his judgment had no notice of an unrecorded deed by the debtor, a purchaser of the land at the execution sale will not be affected with notice given on the day of sale, as he is entitled to the same protection as the judgment creditor. *Danner v. Crew*, 137 Ala. 617, 34 So. 822.

Where real estate was sold, as the property of a debtor, by a marshal, under execution, and, at the time of the sale, a deed, purporting to express valuable consideration and be bona fide, was exhibited, executed by the debtor, long anterior to the judgment under which the execution issued, and containing an acknowledgment before, and certificate by a foreign notary, it was held, that the time and manner of the notice to the purchaser, was sufficient to protect the outstanding title. *Toulmin v. Austin*, 5 Stew. & P. 410.

The title of the purchaser of land at a sale under execution will not be prejudiced, though he have notice of an unregistered deed, if the plaintiff in execution was ignorant of its existence. *Daniel v. Sorrells*, 9 Ala. 436.

A bill to reform a mortgage so as to make it include a slave alleged to have been omitted by mistake, and which has been levied upon by the judgment creditors of the mortgagor, is not insufficient, although there is no allegation that the judgment creditors had notice of the mistake before the issuing of their executions. As against the purchasers at execution sale, notice of the mistake before or at the sale is sufficient. *Williams v. Hatch*, 38 Ala. 338.

Notice given, at the time of a sheriff's sale, of an unextinguished equity, is sufficient to charge the purchaser; and in this respect there is no distinction between sheriffs' and other sales. *Williamson v. Branch Bank*, 7 Ala. 906.

Although a court of equity will some-

times interfere in peculiar cases to prevent fraud, or to relieve against mistakes, yet it will not interpose to relieve a purchaser from the consequences of his own folly or temerity, when he purchased with knowledge that the property was under deed of trust, and after the sale had been forbidden by the trustee. *O'Neal v. Wilson*, 21 Ala. 288.

§ 191 (2) Possession as Notice.

An execution that is prematurely issued on a valid judgment and is not on that account void but only irregular and voidable, and not having been set aside in a direct proceeding for that purpose, a sale under it can not be collaterally impeached. *De Loach v. Robbins*, 162 Ala. 288, 14 So. 777.

The possession of a vendee who is in open, notorious and exclusive occupancy of real estate claiming it as his own, is constructive notice of the vendee's title, which will prevent the lien of an execution issued against the vendor from attaching, although the vendee's deed is not recorded. *Brunson v. Brooks*, 68 Ala. 248.

Where lands of defendant were at the time of sale under execution in the possession of tenants of his vendee under a prior unrecorded deed, such defendant's want of possession should have put the purchaser on inquiry, and, if he failed to inquire, he would not be protected against the deed. *Tutwiler v. Montgomery*, 73 Ala. 263.

Where land is conveyed by a deed which is not registered, but the purchaser enters and holds under the deed for several years, after which a stranger enters on the possession, and holds without any connection with the title, these facts are sufficient notice to prevent a lien from attaching to the land by a judgment obtained against the vendor of the land six years after his sale and conveyance; and a purchaser under the judgment obtains no title, being charged with notice by the outstanding possession existing at the time of his purchase. *Powell v. Allred*, 11 Ala. 318.

Open possession by a grantee in an unrecorded deed, personally or by tenant, is notice to an execution purchaser of a change of ownership. *McCullars v. Reaves*, 162 Ala. 158, 50 So. 313.

§ 191 (3) Liens, Incumbrances and Equities.

B., after purchasing land of W., and taking W.'s bond for title on paying the note given for the purchase money, procured H. to take up the note, with the understanding that H. was to retain it and a deed which W. was to execute to B., until the amount paid on taking up the note was refunded; but H., on doing so, kept the deed in his possession unrecorded, and F., a judgment creditor of B., purchased the land at execution sale. Held that the escrow not taking effect as a conveyance without a delivery, B. held only the bond, and not the legal title; and F., holding only B.'s interest, took merely an equity, and was chargeable with notice of the vendor's lien. *Fuller v. Hollis*, 57 Ala. 435.

§ 192. — Judgment Creditor as Purchaser.

The purchaser at an execution sale, where the sheriff is not indemnified, buys at his own risk, and is liable for the amount of his bid, though the property, because exempt was improperly sold, a recovery therefor was afterwards had from the officer selling it. *Johnson v. Motlow*, 157 Ala. 405, 47 So. 568.

"The rule of law, as settled by the decisions of this court is, that when a plaintiff in execution becomes the purchaser of lands sold under it at his instance, the judgment is satisfied in whole or in part, to the amount of his bid; and in the absence of fraud, imposition or surprise, he can not repudiate the purchase, nor resist an entry of satisfaction because the defendant in execution had no title to or interest in the land. *Thomas v. Glazener*, 90 Ala. 537, 8 So. 153; *Goodbar v. Daniel*, 88 Ala. 583, 7 So. 254; *Lindsay v. Cooper*, 94 Ala. 170, 11 So. 325; *Clemons v. Cox*, 114 Ala. 350, 21 So. 426." *McGough v. Deposit Bank*, 141 Ala. 434, 38 So. 181, 182.

Complainant, in 1892, took possession of property under a deed that was void as a conveyance but was valid as a contract to convey, and he paid the purchase price. Defendant took judgment against plaintiff's grantor in 1894, and acquired sheriff's deed by execution sale in 1895. Held, that defendant was not a bona fide

purchaser, and acquired no title against complainant. *Murphy v. Green*, 120 Ala. 112, 22 So. 112.

Under the statute for the protection of purchasers and creditors against parol trusts in lands of which they have no notice (Code, § 2200), as judicially construed by this court, while creditors are placed on the same footing as purchasers, the protection of the statute is only extended to judgment creditors who have acquired a lien; and a creditor who has recovered a judgment before a justice of the peace, and had his execution levied on land in default of personal property, but receives notice of such trust before he procures an order for the sale of the lands, and then becomes the purchaser at the sale under his execution, is not entitled to the protection of the statute. *Dickerson v. Carroll*, 76 Ala. 377.

A vendor's lien, accruing where lands are conveyed by warranty deed reciting payment of purchase money, but without payment in fact, is an implied trust, within Code 1878, § 2200, providing that no trust in lands shall be valid against creditors without notice; but where, after execution from justice court was levied on land and application made to the circuit court for an order of sale, the holder of such a vendor's lien gave the execution creditor notice of his lien, a purchase by the creditor at a sale under an order subsequently granted does not defeat the vendor's lien. *Dickerson v. Carroll*, 76 Ala. 377.

Where plaintiff in ejectment, claiming under a sheriff's deed, shows that his debt existed prior to the execution of the deed under which the defendant claims, and the execution debtor was in possession of the land at the time of the execution sale, which took place after the making of the deed to defendant, the burden is on defendant to show that the conveyance under which he claims was supported by both valuable and an adequate consideration. *Mobile Sav. Bank v. McDonnell*, 89 Ala. 434, 8 So. 137.

When a creditor purchases under his own execution, although he may be chargeable with constructive notice of a latent equity or trust, he nevertheless acquires all the rights of the execution defendant against whom a resulting trust

in the lands sold is claimed and asserted. *Walker v. Elledge*, 65 Ala. 51.

§ 193. Effect of Defects or Irregularities in Execution, Levy, or Sale.

As to defects or irregularities as ground for setting aside sale, see ante, "Defects or Irregularities in Execution or Levy," § 173.

§ 193 (1) In General.

A levy and sale under execution would pass title to the purchaser on which he could maintain ejectment, even though a claim of exemption had been interposed before the sale, and was not disposed of. *Ayers v. Roper*, 111 Ala. 651, 20 So. 460.

The title of one who claims under a purchase at a sheriff's sale, made by virtue of a venditioni exponas from the circuit court, can not be impeached on account of irregularities in the proceedings upon which the order of the circuit court is founded. *Weir v. Clayton*, 19 Ala. 132.

The deed of a sheriff or marshal can not be impeached on account of any irregularities in his proceedings or in the process under which he sold the land. *Pollard v. Cocke*, 19 Ala. 188.

§ 193 (2) Judgment or Execution.

When the execution is void, because issued against a deceased defendant, it necessarily follows that the sale of such property made under such process is void, and confers no title on the purchaser. *Meyer v. Hearst*, 75 Ala. 390. See, also, *Beach v. Dennis*, 47 Ala. 262; *Whitlock v. Whitlock*, 25 Ala. 543.

A sale of property under void process is also void, and confers no title on the purchaser. *Meyer v. Hearst*, 75 Ala. 390.

A sale of land made under an execution issued on a judgment, after the death of the plaintiff, conveys no title to the purchaser. *Stewart v. Nuckols*, 15 Ala. 225, cited on this point in note in 61 L. R. A. 354. See ante, "Death of Creditor before Issue of Writ," § 44.

A sale of property of an estate under an execution on a judgment rendered against the decedent after his death is void, and vests no title in the purchaser. *Swink v. Snodgrass*, 17 Ala. 653.

The sale under a junior judgment which is not a lien upon the lands sold, can not be sustained by referring the sale

to the authority given by an older execution, and judgment, when the older execution was not in the sheriff's hands at the time of the sale. *Quinn v. Wiswall*, 7 Ala. 645.

Where the writ and declaration describe the plaintiff as an administrator, suing for the use of another, and his name is merely stated upon the margin of the judgment entry, without indicating that he sues in a representative character or for the use of another, the title of a purchaser under an execution issued upon the judgment, in which the plaintiff's character, etc., is described in the same manner as in the writ and declaration, will not be affected by the discrepancy. *Randolph v. Carlton*, 8 Ala. 606.

To make out a title by purchase at sheriff's sale, the purchaser must show a valid judgment, an execution thereon, a levy and sale, and a sheriff's deed; and if his deed shows on its face that the sale was made under an execution issued on a judgment which was not valid, or which could not be enforced by execution, he can not supplement his title thus acquired by showing that there was also in the sheriff's hands at the time of the sale an execution issued on a valid judgment. *Barclay v. Plant*, 50 Ala. 509. See *Quinn v. Wiswall*, 7 Ala. 645.

Where a judgment has not been duly registered, an execution sale of certain stock thereunder without revivor, though irregular, will pass title, unless set aside in some appropriate proceeding. *Howard v. Corey*, 126 Ala. 283, 28 So. 682.

An irregularity in the entry of the levy on an execution can not affect the title of the purchaser, and as evidence intended to explain it is immaterial and unnecessary, its admission, though erroneous, can not avail as a ground of reversal. *Forrest v. Camp*, 16 Ala. 642.

An execution issued after ten years from the date of the last preceding execution is voidable only, and a purchaser will take title. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

A sheriff's sale, when made under two executions, either of which is valid, is sufficient to transfer to the purchaser the execution debtor's title to property sold. *De Loach v. Robbins*, 102 Ala. 288, 14 So. 777.

An execution, issued on a judgment after the lapse of ten years from the date of the last execution, is voidable only on proceedings by the execution defendant, or third persons who have acquired rights prior to its issue; and a sale under such execution is sufficient to transfer the title, though the execution plaintiff be the purchaser. *Leonard v. Brewer*, 86 Ala. 390, 5 So. 306.

A judgment rendered by default without personal notice to the wife, on a levy of an attachment on her statutory estate, is void so far as it condemns such estate, and the execution purchaser can not maintain ejectment, as a judgment gives no authority to sell under execution, unless proceeding from the court having competent jurisdiction, not only as to the subject-matter, but also the person whose estate was sold. *Cauly v. Blue*, 62 Ala. 77.

§ 193 (3) Levy or Sale.

Irregularity in execution sale of homestead after claim filed is no defense to ejectment by a purchaser at the sale. *Clark v. Spencer*, 75 Ala. 49.

§ 194. Effect of Modification, Vacation, or Reversal of Judgment.

As to rights and remedies of parties, see post, "Rights and Remedies on Avoidance of Sale or Failure of Title," § 200.

Reversal.—If a defendant suffers his land to be sold under a judgment or decree which is afterwards reversed on error or appeal, the sale must stand, and the purchaser be protected, notwithstanding the reversal; but where the appeal is sued out by the plaintiff in the judgment or decree, and a sale under the decree is made pending the appeal, the purchaser is chargeable with notice of the pending proceedings, and the sale is liable to be set aside, after the reversal of the decree, on account of the inadequacy of price and the want of notice to the defendant. *Morton v. Underwood*, 49 Ala. 419.

§ 195. Possession.

§ 196. — In General.

Where the purchaser of land at execution sale fails to demand possession, the failure to demand is a valid reason for failing to deliver possession. *Francis v. White*, 142 Ala. 590, 39 So. 174.

The owner of personal property wrongfully sold on execution, being entitled to the present possession of it when he has been deprived of it, has a right to retake it whenever he can obtain the possession without a breach of the peace, whether he believes his title bona fide, or otherwise. *Ewing v. Sandford*, 19 Ala. 605.

When a mortgage reserves no right of possession in the mortgagor, or the law-day has passed, nothing but an equity of redemption remains in the mortgagor, and a purchaser under execution against him does not acquire such title as will sustain an ejectment; but, where the mortgage reserves to the mortgagor the possession and enjoyment of the property, with the right to use and rent it, until default shall be made in the payment of the secured bonds, extending through several years, this is a clear legal right, which is subject to levy and sale under execution against him; and a purchaser at the sale would acquire a title on which he might recover, in ejectment, against any one who does not show a paramount title. *Bernstein v. Humes*, 60 Ala. 582.

Under Code 1886, § 180, requiring a debtor to deliver land sold under execution to the purchaser within ten days, where the levy was on an undivided interest, the purchaser is not entitled to sole possession. *Hanna v. Steele*, 84 Ala. 305, 4 So. 271.

When land is sold by the sheriff, under execution, as the property of the defendant therein, which is at the time in the actual possession of another, claiming bona fide to hold it in his own right, whether by color of paper title or otherwise, the purchaser acquires only a right of property, connected with a right of possession, which can only be enforced by an action at law, and can neither be sold nor asserted by force. *Coleman v. Hair*, 22 Ala. 596.

§ 197. — Remedies for Recovery.

§ 197 (1) In General.

Right of Action and Defenses.—The purchaser at an execution sale may demand possession of the debtor in person or by his authorized agent. *Farley v. Nagle*, 119 Ala. 622, 24 So. 567.

Where one has been in possession of land for several years, built a house and made other valuable improvements thereon, the inference is, that his occupancy is legal, and that he has such an interest as may be sold under execution. The purchaser of land thus occupied, at a sale under execution, may maintain an action to recover the possession of the occupant. *Heydenfeldt v. Mitchell*, 6 Ala. 70.

Semble, an order permitting the son to defend an ejectment, brought against the father, for the recovery of the possession of lands, to which the former claims title, is unobjectionable. *Davis v. McKinney*, 5 Ala. 719.

In a case where land is purchased at a sheriff's sale, as the property of a defendant in execution, who, together with a stranger to the execution, are in possession, and trespass to try title is brought by the purchaser, against the latter, the doctrine of estoppel does not apply, and the defendants, in the absence of fraud, may set up an outstanding title, by giving in evidence, a deed made to a vendee, by the defendant in execution (before the judgment against him); and thus, show that they are tenants under the prior purchaser. *McGee v. Eastis*, 5 Stew. & P. 426.

In an action of ejectment by a purchaser under a sheriff's sale against the debtor, who refuses to give up possession, the defendant can not show title in another. *Avent v. Read*, 2 Port. 480.

One who is in possession of land before the rendition of a judgment under which it is afterwards sold may protect himself against the purchaser at the sheriff's sale by showing his own possession and an unregistered deed executed by the judgment debtor prior to the rendition of the judgment, although he does not connect himself in any manner with the deed, or show that he claims under it. *Strickland v. Nance*, 19 Ala. 233, cited in note in 13 L. R. A., N. S., 109.

Where action is brought by a purchaser at sheriff's sale under a *fi. fa.* against defendant in execution, admission of the latter's landlord to defend with him, it would seem, could not prejudice plaintiff, as he would not be permitted to set up a title consistent with the ten-

ant's possession to defeat recovery. *Davis v. McKinney*, 5 Ala. 719.

If a sheriff, acting under a writ of possession which does not cover the premises in complainant's possession attempts to disturb such possession, complainant can not restrain the execution of the writ as to such property; but his remedy is under Code 1896, § 919, giving the circuit court power after final judgment to secure parties in their rights against any abuse of process. *Bolen v. Allen*, 150 Ala. 201, 43 So. 202.

Form of Action.—Ejectment is the remedy of a purchaser at sheriff's sale of land which the debtor has fraudulently conveyed. *Gunn v. Hardy*, 130 Ala. 642, 31 So. 443.

§ 197 (2) Pleading and Proof.

In ejectment, a sheriff's deed, judgment, order of sale, and execution, under which the lot in question was sold and purchased by defendant, was properly excluded, where there was nothing to show against whom the judgment, order, or execution was directed, or whose title the sheriff's deed purported to convey, and no evidence sufficient to constitute title by adverse possession. *Bynum v. Hewlett*, 137 Ala. 333, 34 So. 391.

The agent of an execution purchaser orally demanded possession of the debtor, who said that, when he gave possession, it would be with a shotgun; and on the same day the agent handed and held before him a written demand, which he refused to receive or read it. Two witnesses testified that the debtor said he would not surrender possession; and he denied any written demand, and attempted to explain the verbal demand. Held sufficient to show that a proper demand was made. *Farley v. Nagle*, 119 Ala. 622, 24 So. 567.

A purchaser at sheriff's sale, who brings ejectment against the grantee of the execution defendant, is not required to prove the demand on which the judgment on which the execution issued was founded, but may recover on proof of the judgment, execution, and sheriff's deed. *De Vendell v. Hamilton*, 27 Ala. 156.

In an action for the recovery of land, purchased under a fieri facias, against the

defendant in execution, it is not allowable for the latter to impeach the deed by showing an irregularity in the sale and proceeding preparatory thereto; and the purchaser's knowledge of the manner in which the levy and sale were made, will not authorize the application of different rule. *Hubbert v. McCollum*, 6 Ala. 221.

§ 197 (3) Trial or Hearing and Relief.

Where an action is brought to recover the possession of several adjacent tracts of land which plaintiff claims as a purchaser under execution with a sheriff's deed, it is error to charge that, if defendant was in possession of any parcel or tract of land in question, they should find for the plaintiff for all the lands lying contiguous thereto described in the declaration and the sheriff's deed. *Carwile v. House*, 6 Ala. 710.

It is error to give a general charge in favor of the grantee under a sheriff's deed, bringing ejectment for the land, as against the execution debtor's wife, introducing in evidence a deed from her husband, executed and filed before the issuance of the execution. *Hardy v. Gunn*, 122 Ala. 666, 25 So. 621.

§ 198. Rents and Profits.

The purchaser of land under an execution, which issued from the federal court, and was in the hands of the marshal before the defendant therein had made a lease of the land, is entitled to the rent due and unpaid under such lease, as against one who had purchased the note given for such rent, without notice of the execution creditor's claim. *Kirkpatrick v. Boyd*, 90 Ala. 449, 7 So. 913.

The purchaser of a lessor's interest at a sheriff's sale is entitled to the rent payable after the execution and acknowledgment of the sheriff's deed. *Spoor v. Phillips*, 27 Ala. 193.

The purchaser of land at sheriff's sale under execution, on receiving the sheriff's deed, becomes the absolute owner, and is entitled to the rents and profits on entering into possession; and nothing is left in the former owner, or his judgment creditor, but the naked right to redeem, which must be asserted in the time and

manner prescribed by the statute. *Spoor v. Phillips*, 27 Ala. 193.

§ 199. Actions to Confirm or Try Title.

In ejectment by the execution purchaser against the execution defendant, it is not necessary for him to deduce a regular chain of title subsisting in the defendant in execution. It is sufficient if he shows a legal title in the defendant at the time of the rendition of judgment. *Brock v. Yongue*, 4 Ala. 584.

§ 200. Rights and Remedies on Avoidance of Sale or Failure of Title.

§ 201. — In General.

If the plaintiff in execution purchases at the sheriff's sale, after having indemnified the sheriff, and with notice of a defect in the title, he can not come into equity, after paying a recovery had against him by the true owner, to be relieved of his purchase. *McCartney v. King*, 25 Ala. 681.

§ 202. Liabilities of Purchasers.

The purchaser of personal property at execution sale need not show the regularity of the sale, in an action by a claimant. The burden is on the claimant to show the illegality. *Brandon v. Snows*, 2 Stew. 255.

(C) REDEMPTION.

§ 203. Right to Redeem in General.

Section 1886, Code Ala. 1886, requiring a debtor on his bill to redeem land sold under execution to show a delivery to the purchaser within ten days after the sale, does not require a delivery of land not levied on as a condition precedent to redemption. *Hanna v. Steele*, 84 Ala. 305, 4 So. 271.

Redemption of land sold on execution can not be effected by piecemeal, but must be of the entire tract sold. *Francis v. White*, 160 Ala. 523, 49 So. 334.

Act 1842 (Clay's Dig., p. 502), authorizing the redemption of lands sold under execution, does not operate on a sale made since the passage of that act by the marshal under an execution issued on a judgment of the circuit court of the United States for the Southern district of Alabama, rendered in 1840. *Beck v. Burnett*, 22 Ala. 822.

Where several lots are included in one sale under execution, and defendant has no title to one of them, he may maintain a bill to redeem the others, averring his want of title to the omitted lot, and deducting the amount due, without any deduction therefor. *Richardson v. Dunn*, 79 Ala. 167.

§ 204. Persons Entitled to Redeem and Priority of Right.

Creditors.—A creditor, who obtains a judgment, after a sale of the debtor's land under judgment and execution against him, and before the expiration of the time allowed by the statute for redemption, may redeem the land from the first purchaser. *Pollard v. Taylor*, 13 Ala. 604.

Under Code, § 2881, allowing a creditor to redeem from a sale under a judgment obtained, etc., "except by confession of the debtor;" and § 2882, as to credit "upon a subsisting judgment," neither a purchaser resisting redemption of the property nor a creditor seeking to redeem can use a confessed judgment therefor. *Mobile Mut. Ins. Co. v. Steele*, 61 Ala. 253.

The term "creditors," in act 1842, allowing creditors to redeem real estate sold on execution, does not mean creditors at large of the debtor, but such only as have ascertained the bona fides of their debts by obtaining judgment. *Thomason v. Scales*, 12 Ala. 309.

"The term 'bona fide,' when applied to a purchaser, has a definite ascertained meaning, but when the same term is applied to a creditor, the sense in which it is used is not so clear, especially in the connection in which it is found. One may assert an unfounded claim against another, but in no just sense can he be termed a creditor. The term is the correlative of debtor, and can only be applied to one who has a just claim for money. It is therefore quite probable, that in prefixing the emphatic term 'bona fide,' such an ascertained claim as the law presumes to be bona fide, was intended, because it is ascertained to be due, by the judgment of a court, after a contestation. It is but fair to presume it was not employed without meaning, and this was most probably what was passing in the legislative mind at the time of its

enactment." *Thomason v. Scales*, 12 Ala. 309, 312.

Code, § 2881, provides that judgment creditors who, without fraud or collusion, obtained the judgment before sale of the land, or within two years thereafter, except by confession of the debtor, may redeem from the purchaser under certain requirements. Held, that the owner of a judgment by confession is not entitled to redeem under this section. *Mack v. Owen*, 83 Ala. 177, 3 So. 295.

A creditor by judgment in a justice's court of another state is not within the meaning of act 1842, allowing bona fide judgment creditors to redeem from sale on execution. *Freeman v. Jordan*, 17 Ala. 500.

The right of redemption from execution sale which is secured to judgment creditors by Code, §§ 2881, 2882, will not be extended by a court of equity to simple-contract creditors, though their debts are ascertained by its decree. *Seals v. Pfeiffer*, 77 Ala. 278.

An offer made by a creditor, who has a judgment then in force which is afterwards reversed, does not entitle him to redeem under another judgment, recovered under the same cause of action, after the expiration of the two years. *Barringer v. Burke*, 21 Ala. 765.

A creditor, by virtue of whose judgment the land of the debtor has been sold, has the right under the statute to redeem it. *Freeman v. Jordan*, 17 Ala. 500.

The execution creditor is included in "all judgment creditors of the debtor," who, under Code, § 2881, may redeem from the purchaser, if his judgment was not obtained by confession and was not satisfied by the sale. *Posey v. Pressley*, 60 Ala. 243.

Judgment Debtor.—Under Code 1886, § 1879, allowing the debtor to redeem an interest in land sold under execution, the levy on the land as the property of the debtor, and its sale and purchase as such, are conclusive on the purchaser that the debtor had a redeemable interest in the land sold, if he stands in the same relation to the land which he did at the time the lien attached or the levy was made. *Henderson v. Prestwood*, 115 Ala. 464, 22 So. 15.

Assignees.—An assignment of the stat-

utory right of redemption of land sold under execution does not pass a right, interest, or estate in the property. *Searcey v. Oates*, 68 Ala. 111.

A tender, or offer to redeem, on compliance with the terms of the statute, by the judgment debtor himself, "reinvests him with the legal title;" but the statute does not extend to his alienee or assignee, whose rights, if any passed by the assignment (a question which is not decided), can only be enforced in equity. *Searcey v. Oates*, 68 Ala. 111.

The right to redeem from an execution sale of land, conferred by Code 1896, § 3510, upon "all judgment creditors of the debtor, who, without fraud or collusion, had obtained such judgment before the sale of the land," is personal to those named in the statute, and does not pass by an assignment of a judgment. *Chambers v. Pollak*, 143 Ala. 438, 39 So. 316.

The assignment of a judgment does not operate as an assignment of the personal privilege conferred by statute on the judgment creditor to compel a redemption of personal property of the debtor sold under execution. *Sloss v. Steiner Bros.*, 146 Ala. 692, 40 So. 511.

§ 205. Waiver, Estoppel, and Laches.

Joinder of the execution defendant with the purchaser at execution sale in conveyance to a third person, with covenants of warranty, of a part of the property, is not a waiver of right to redeem the rest of the property, but a waiver of the right of the purchaser at execution sale to deal with the redemption on the basis of a redemption in toto only. *Francis v. White*, 166 Ala. 409, 52 So. 349.

Where a judgment creditor purchased at an execution sale, the debtor's statutory right to redeem from a foreclosure, the purchase did not, prior to its report to and confirmation by the court, operate as a satisfaction of the judgment, and hence did not destroy the right given the judgment creditor by Code, 1896, § 3510, to redeem from the foreclosure. *McGaugh v. Deposit Bank*, 141 Ala. 434, 38 So. 181.

§ 206. Amount Required to Redeem.

A mortgagee, to protect the rights of the mortgagor, may remove a prior incumbrance; but neither the mortgagor nor any one else can redeem without

compensating the mortgagee. A creditor claiming such right to redeem must not only pay the sum bid at the sheriff's sale, with ten per cent per annum thereon, but also pay the mortgagee's debts. These are "lawful charges" within the Ala. Code, § 2889. *Grigg v. Banks*, 59 Ala. 311.

A debtor agreed with his creditor that a slave should be sold at a constable's sale, and purchased by the creditor; that the property might be redeemed, and, when redeemed, should belong to the debtor's son as a gift from his father. Held, that a sufficient amount of hire, received by the creditor, redeemed the slave under the contract. *Smith v. Wiggins*, 3 Stew. 221.

Code, § 1889, provides that the redeeming debtor must pay the party in possession the value of all permanent improvements, and that, in case of disagreement as to the amount, each must appoint a referee. Section 1890 provides that, if the person in possession refuses to make such appointment, he shall forfeit his claim to such compensation. Held, that where the debtor appointed a referee to ascertain the disputed value of the improvements, and the party in possession refused to do so, the latter is not entitled to the value thereof. *Steele v. Hanna*, 91 Ala. 190, 9 So. 174.

If an averment of a tender of a conveyance, to be executed by the purchaser, be necessary to the equity of a bill to redeem in any case, an averment that the defendant denies the complainant's right to redeem dispenses with its necessity, since it shows that such tender would be nugatory. *Richardson v. Dunn*, 79 Ala. 167.

The "lawful charges" which the judgment debtor, seeking to redeem, is required to pay or tender (Code, § 2879), include only claims and demands which are in the nature of a lien or incumbrance, on the land; and neither insurance on buildings paid by the purchaser nor a judgment rendered by a justice of the peace, unless an execution thereon has been levied on the land, is embraced in such lawful charges. *Richardson v. Dunn*, 79 Ala. 167.

§ 207. Tender and Payment into Court.

A judgment debtor, desiring to redeem lands which have been sold under execu-

tion against him, is only required to "pay or tender" the purchase money, etc. (Rev. Code, §§ 2511-12); and if the tender is refused, he may maintain an action of unlawful detainer for the land without paying the money into court. *Jonsen v. Nabring*, 50 Ala. 392.

Under Code 1896, §§ 3505, 3507, giving an execution defendant the right to redeem by paying the purchase money with ten per cent interest, the execution defendant need not, where the purchaser has resold part of the land, tender the full amount necessary to redeem all the land to each owner of a part thereof, but he may file a bill to redeem, tendering the amount into court to be distributed. *Francis v. White*, 142 Ala. 590, 39 So. 174.

On a bill to redeem from an execution sale, allegations that defendant was absent from the state, and that plaintiff had written to him repeatedly, asking for an account of the legal charges on the property which defendant claimed to have paid, had made diligent inquiry, and tendered into court the amount of all charges he had been able to ascertain, showed a sufficient tender of the lawful charges. *Francis v. White*, 142 Ala. 590, 39 So. 174.

Where one seeking to redeem from an execution sale went to the owners of a part of the land, and offered to pay their proportion of the purchase money and interest, and to pay for improvements and all lawful charges, and they refused to give any information as to charges or improvements, a tender was unnecessary. *Francis v. White*, 142 Ala. 590, 39 So. 174.

When a purchaser of land at execution sale is absent from the state, a tender for the purpose of redemption must be made by a deposit of the money in court on the filing a bill to redeem. *Francis v. White*, 142 Ala. 590, 39 So. 174.

Where the purchaser at execution sale has sold and conveyed the land to another person, who is in open possession under his purchase, a tender can only be made to the latter. *Camp v. Simon*, 34 Ala. 126.

When lands sold under execution are purchased and held by the trustee of a married woman, an offer of a judgment creditor to redeem under the statute, if made to the trustee, is sufficient. *Barringer v. Burke*, 21 Ala. 765.

Under Code, § 1881, providing that a

debtor redeeming lands sold under execution, on payment or tender of all lawful charges, together with accrued interest at the rate of ten per cent per annum, shall be reinvested with the title, a judgment creditor who has refused such tender can not afterwards recover interest for a longer period. *Steele v. Hanna*, 91 Ala. 190, 9 So. 174.

If a tender be made in the bill of a judgment creditor to redeem the lands of his debtor, it is sufficient to authorize a court of equity to decree the redemptions, although no tender was made before the filing of the bill; but in such case should the defendant concede the complainant's right to redeem, the court, in the exercise of a sound discretion, would scarcely fail to tax the latter with the costs. *Freeman v. Jordan*, 17 Ala. 500.

§ 208. Proceedings on Redemption.

Where the complaint in an action to quiet title alleged the invalidity of a prior sheriff's deed for want of consideration, it was not necessary to offer to redeem. *Worthington v. Miller*, 134 Ala. 420, 32 So. 748.

"The statute makes it a condition precedent to redemption, that the debtor must within ten days after the sale, have delivered possession of the property sold to the purchaser on his demand or that of his vendee. Unless the debtor remains in possession after such demand as the tenant of the purchaser, a failure to deliver possession in the time prescribed forfeits the right of redemption. *Stocks v. Young*, 67 Ala. 341." *Farley v. Nagle*, 119 Ala. 622, 24 So. 567, 568.

When a sufficient legal offer to redeem is made, either to the purchaser at sheriff's sale, or to a creditor who has redeemed from such purchaser, and is at once rejected by him, he can not retract his refusal on the next day, and claim that he should be allowed a reasonable time within which to make his response to the offer. *Walker, etc., Co. v. Ball*, 39 Ala. 298.

Where land is sold under execution, and a judgment creditor claims the right to redeem from the purchaser, the latter must within a reasonable time make his election whether to allow the redemption or pay the amount of the creditor's claim, and must notify the creditor of such election and tender a compliance. Merely

saying he will pay the sum bid and retain the land without offering to pay or securing a payment amounts to nothing. *Couthway v. Berghaus*, 25 Ala. 393.

"When land has been sold under execution or by virtue of any decree in chancery, or under any deed of trust, or power of sale in a mortgage, and the debtor desires to redeem, 'the possession of the land must be delivered to the purchaser, within ten days after the sale thereof, by the debtor, if in his possession, or of any one holding under him by privity of title, if in his possession, on the demand of the purchaser or his vendee. If the land is in the possession of a tenant, notice to him by the purchaser, or his vendee, of the purchase, after the lapse of ten days from the time of the sale, and that it has not been redeemed, vests the right to the possession in him, in the same manner as if the tenant had attorned to him.' Code 1896, §§ 3506, 3507 (1880, 1881)." *Farley v. Nagle*, 119 Ala. 622, 24 So. 567, 568.

When permanent valuable improvements have been erected on the land, by the purchaser at execution sale, or other person holding possession under him, the creditor proposing to redeem must pay, or offer to pay, their value, as a part of the "lawful charges" (§§ 2881, 2887); but, if he makes a general offer to redeem, and his right to redeem is denied, he is excused from making any particular inquiry, as to a claim for improvements. *Posey v. Pressley*, 60 Ala. 243.

§ 209. Redemption from Prior Redeeming Creditor.

A judgment creditor, seeking to redeem lands sold under execution, either from the purchaser at sheriff's sale, or from another creditor who has redeemed from the purchaser (Code, §§ 2120-22), is not required actually to credit his judgment with an amount equal to ten per cent of the sum originally bid for the land, in order to perfect his right of redemption, though such actual credit is necessary, if his offer is rejected, to vest in him the title to the land; nor is he required to pay the amount due to the other creditor, either on his original judgment, or on other judgments purchased by him. *Walker, etc., Co. v. Ball*, 39 Ala. 298.

C. purchased land sold at a sheriff's

sale under execution against one M., and conveyed it to B., who, as a creditor, had redeemed the same from the purchaser at the execution sale. The complainant, who was a creditor of M., tendered to B., within two years from the sale, the amount paid by B. to obtain the land, together with ten per cent per annum thereon, and offered to credit the debtor with an amount equal to ten per cent. upon the sum originally bid for the land. Held, that the complainant's proposition was in strict compliance with the prerequisites to a redemption prescribed by the statutes, and, this proposition being rejected, he had a right to relief in chancery. *Walker, etc., Co. v. Ball*, 39 Ala. 298.

§ 210. Defects, Objections, and Waiver.

In an action of unlawful detainer, brought by a judgment debtor to recover lands which had been sold under execution against him, and which he has attempted to redeem, if issue is joined on the plea of not guilty, he must show a sale by the sheriff, a purchase by the defendant or the person under whom he holds, a delivery of possession by him to the purchaser, a payment or tender of the purchase money, with ten per cent per annum interest and all lawful charges, and a notice in writing to the tenant in possession to quit. *Jonsen v. Nabring*, 50 Ala. 392.

§ 211. Actions to Redeem and for Accounting.

Right of Action and Defenses.—An execution defendant, who has made a statutory tender to redeem property sold under the execution, may sue to enforce the right of redemption; and equity is not deprived of jurisdiction by the fact that the purchaser claims title under a prior sale on an execution against the same defendant, and not under the one from which redemption is sought, the title so claimed not being adverse to that of the execution defendant. *Vick v. Beverly*, 112 Ala. 458, 21 So. 325.

Where a debtor whose land has been sold on execution surrenders possession to the purchaser, and afterwards offers to redeem, in compliance with Code, §§ 1879-1881, the purchaser at the execution sale, or those claiming under him, can not in-

terpose, on a bill to redeem, title derived after the sale from any other source. *Aycock v. Adler*, 87 Ala. 190, 5 So. 794.

Where the owner of a judgment assigns it, he is not entitled to sue to compel a redemption of certain property sold under execution. *Sloss v. Steiner Bros.*, 146 Ala. 692, 40 So. 511.

Unlawful Detainer to Recover Possession.—A judgment creditor who has been denied the right to redeem on an execution sale may maintain an action of unlawful detainer for the recovery of possession. *Posey v. Pressley*, 60 Ala. 243.

If the purchaser at execution sale, or person holding possession under him, afterwards acquires an outstanding or superior title, he can not refuse an offer of redemption on that account, nor set up that title in defense of an action of unlawful detainer at the suit of the person offering to redeem; he must surrender the possession, and convey the interest which he acquired by the sheriff's deed, and then assert his superior title by proper action. *Posey v. Pressley*, 60 Ala. 243.

Tender and Payment into Court.—

Where the action of the court is necessary to ascertain what sum is to be paid, in a suit to redeem land sold on execution, an offer by the complainant to pay such sum as the chancellor may decree, and to bring the same into court, is sufficient to entitle him to its aid. *Freeman v. Jordan*, 17 Ala. 500.

Under Code, § 2120, a judgment creditor who wishes to redeem his debtor's land by bill in equity need only tender to the purchaser, and offer to credit the debtor, the sum fixed by statute. If he wishes to have the title by force of the statute, instead of by process in equity, he must actually make the credit according to the statute. *Moore v. Gore*, 35 Ala. 701.

In order to perfect a judgment creditor's equitable right of redemption (Code, § 2120), it is not necessary that he should actually give the debtor credit, on his judgment, for a sum equal to ten per cent on the amount bid for the land; it is sufficient that he offers to give the credit to the debtor, and pays or tenders to the purchaser the amount prescribed by the statute. *Moore v. Gore*, 35 Ala. 701.

Delivery of Possession.—The burden is

on one filing a bill to redeem from an execution sale, under Code 1896, §§ 3506, 3507, requiring the execution debtor to deliver possession to the purchaser within ten days after demand, to prove such delivery, and that he tendered the amount prescribed by statute. *Farley v. Nagle*, 119 Ala. 622, 24 So. 567.

In a suit to redeem from an execution sale, under Code 1896, §§ 3506, 3507, requiring the debtor to have delivered possession to the purchaser within ten days after demand, the debtor can not avoid a demand for the premises, made on him, on the ground that he was not in possession, where possession was held by his cotenant, since the cotenant's possession was the possession of the debtor. *Farley v. Nagle*, 119 Ala. 622, 24 So. 567.

Parties.—In a bill to redeem lands sold under execution filed by the judgment debtor, the heirs at law of the purchaser thereof, he having died intestate, are necessary parties. *Bondurant v. Sibley*, 37 Ala. 565.

An assignee of a judgment is a necessary party plaintiff to a suit by his assignor to compel a redemption of certain property of the judgment debtor sold under execution. *Sloss v. Steiner Bros.*, 146 Ala. 692, 40 So. 511.

Pleading.—Where a bill by a judgment debtor to redeem land sold under execution alleges that at the time of sale the lands were in possession of a tenant, to whom notice was given by the purchaser, and from whom the purchaser afterwards collected rents, it is unnecessary to allege that complainant delivered possession to the purchaser within ten days after sale. *Richardson v. Dunn*, 79 Ala. 167.

If a judgment debtor, or his assignee of the equity of redemption, fails to allege in his bill, filed to redeem lands sold on execution, that possession was delivered without suit, the bill is without equity. All that the statute requires of him must be alleged to have been performed. He must allege a tender of the amount of the purchaser's bid, with ten per cent interest thereon, and an offer to credit the judgment which he holds with an additional ten per cent, or a larger sum. *Paulling v. Meade*, 23 Ala. 505.

If the defendant in execution files a bill to redeem, he must allege that he deliv-

ered possession to the purchaser without suit, or that the latter consented to his retention of possession as tenant. *Sandford v. Ochlatomi*, 23 Ala. 669.

A plea that the administrator seeking to redeem decedent's real estate sold on execution had not paid or tendered the amounts due is insufficient, since it does not deny that decedent or his heirs might not have paid the lawful charges. *Francis v. White*, 160 Ala. 523, 49 So. 334.

On a bill to redeem from execution sale, an averment of the tender of lawful charges paid by the purchaser must state that the money is paid into court. *Francis v. White*, 142 Ala. 590, 39 So. 174.

Evidence.—The levy of execution on land as the property of the judgment debtor, and its sale and purchase as such, are conclusive on the purchaser as to the interest of the execution defendant on the filing of a bill to redeem. *Francis v. White*, 142 Ala. 590, 39 So. 174.

Accounting for Rents and Profits.—Rents and profits accruing before tender and refusal may be set off against improvements made; but, if they exceed the value of the improvements, the purchaser is not liable for the excess. He is liable only for rents and profits after the tender. *Weathers v. Spears*, 27 Ala. 455; *Spoor v. Phillips*, 27 Ala. 193.

Where, subsequent to the death intestate of a purchaser at an execution sale, a bill to redeem is filed by a judgment creditor against his administrator and minor heirs, a tender in the bill, unless accompanied by the payment of the money into court, does not put the defendants in default, so as to entitle the complainants to a decree for the rents and profits. *Spoor v. Phillips*, 27 Ala. 193.

Tenants by the year under a purchaser of land at sheriff's sale are entitled to the growing crops on redemption by the judgment debtor. *Gardner v. Lanford*, 86 Ala. 508, 5 So. 879.

The liability of the purchaser to account for rents and profits, except "by way of offset to the improvements made," does not arise until he is put out in default. *Spoor v. Phillips*, 27 Ala. 193.

The right to redeem land sold at sheriff's sale on execution is not perfect, and can not be enforced in equity, until there has been either a full performance by the

plaintiff of all the statutory requisitions, or a valid and sufficient excuse for non-performance, without any fault or neglect on his own part; and, when the bill alleges such an excuse for nonperformance, the excuse must be accompanied with an offer in the bill to perform all that the statute requires. *Spoor v. Phillips*, 27 Ala. 193.

If a bill to redeem does not show that a tender was made before it was filed, a tender made in it is not sufficient to authorize a decree for the redemption, unless, in connection with such offer, the bill also shows a valid and sufficient excuse for the omission to make a tender before it was filed. *Spoor v. Phillips*, 27 Ala. 193.

Decree and Relief Awarded.—The property of A. was taken on execution against him in favor of a bank, in whose notes he was about to pay the amount of the judgment, but was persuaded by B. that the payment would not be good, and to convey the property to B., with the privilege of redeeming in three months, and B. paid the execution in the notes of the bank. On a bill filed by A. against B., after the expiration of the three months, to redeem the property, the court decreed restitution of the property to A. on his paying one-half the nominal amount of the notes paid by B. to satisfy the judgment. *May v. Eastin*, 2 Port. 414.

A judgment debtor is authorized by statute to redeem from sale on execution only the "interest that may have been sold;" and, in a suit to redeem, a court of equity is not authorized to determine conflicting titles, and to put the judgment debtor in a better position than he occupied when the land was sold. *Weathers v. Spears*, 32 Ala. 481.

On a bill by the judgment debtor to redeem land sold under execution, where it appeared that he was not in possession of the land at the time of the sale, but that the purchaser was then holding possession under a claim of title from a third person, the court is not authorized, on decreeing a redemption, to award a writ of possession. *Weathers v. Spears*, 32 Ala. 481.

Where the statute authorizes a judgment debtor to redeem "the interest in his land that may have been sold," a decree

that the purchaser shall convey the land by quitclaim deed is erroneous, since he may have acquired some other interest than that which passed at the sale. *Weathers v. Spears*, 27 Ala. 455.

The purchaser of land sold on execution is entitled, on decree of redemption, to ten per cent interest on his purchase money until the tender and refusal, and to eight per cent afterwards. *Weathers v. Spears*, 27 Ala. 455.

Under Code 1896, § 3517, authorizing the appointment of a referee in proceedings to redeem from an execution sale, where the parties are unable to agree as to the value of improvements, the appointment of a referee is unnecessary where the parties from whom it is sought to redeem are absent from the state or refuse to entertain any proposition as to payment of lawful charges and for improvements. *Francis v. White*, 142 Ala. 590, 39 So. 174.

Where equity has acquired jurisdiction in an action to redeem from an execution sale, it will determine the rights of the parties in the property, and enforce them by partition when necessary. *Vick v. Beverly*, 112 Ala. 458, 21 So. 325.

§ 212. Operation and Effect.

Tenants holding under a purchaser of land at sheriff's sale, may be ousted by one who redeems, under the statute, from the landlord, although the lease by its terms extends beyond that time. The estate of the landlord, though absolute until redemption, is destroyed thereby, and with it fall the lease and other mere dependencies or incidents. *Morris v. Beebe*, 54 Ala. 300.

Upon redemption, the estate of a purchaser of land at a sheriff's sale, together with all leases and other dependencies, is destroyed and determined. *Morris v. Beebe*, 54 Ala. 300.

Where a judgment creditor obtains title to the debtor's land by redeeming it from sale, under Code, § 2120, providing that judgment creditors may redeem land sold under execution by paying or tendering the amount bid for such land at the sale thereof, with ten per cent per annum thereon, together with all lawful charges, and by further offering to credit the debtor on a subsisting judgment

with a sum at least equal to ten per cent of the amount originally bid for the land, and, on such payment or tender being made and credit actually given to the debtor, the title to such land vests in the creditor, and the purchaser must convey to him such title as he has, at the costs of the creditor, he may employ the summary statute proceeding to obtain possession, or may file a bill for the conveyance and possession. *Moore v. Gore*, 35 Ala. 701.

(D) CONVEYANCE TO PURCHASER.

§ 213. Necessity and Nature in General.

Although the cancellation or destruction of a deed after its delivery does not annul it as a conveyance, yet, where a sheriff's deed to a nominal purchaser of lands sold under execution is destroyed by him at the instance of the grantee and the person who furnished the purchase money, and for whom the purchase was made, and another deed is executed to the latter, a court of equity will, in the absence of intervening equities in favor of third persons, treat the second deed as conveying the title. *Carithers v. Lay*, 51 Ala. 390.

A conveyance from the sheriff is necessary to perfect the title of a purchaser of real estate at an execution sale. *Kelley v. Governor*, 14 Ala. 541.

§ 214. Statutory Provisions.

Code 1886, § 2917, relating to the execution of deeds to purchasers at judicial sales, only applies to sales made by the sheriff. *McGaugh v. Deposit Bank*, 147 Ala. 229, 40 So. 984.

§ 215. Right to Conveyance.

The power of a sheriff to sell land on execution, receive the purchase money, and execute a deed, is a power coupled with a trust, and hence may be enforced in equity, on his death before executing a conveyance, where he had received the purchase money and made due return of the execution. *Stewart v. Stokes*, 33 Ala. 494.

§ 216. Time for Making.

The statute which requires the sheriff to advertise lands thirty days before the sale, is directory merely. *Ware v. Bradford*, 2 Ala. 676.

A motion to require a sheriff to execute

a conveyance of lands sold under execution by his predecessor must be made within a reasonable time; and the refusal of such motion, made more than ten years after the sale, without explanation or excuse for the delay, the purchaser and those claiming under him not having had or claimed possession during the interval, was not error. *McCall v. White*, 73 Ala. 562.

The sale at which the plaintiff in this case purchased was not a sale under execution on a decree; but the sale was made under a decree which condemned the specific property that was sold, to be sold by the register to obtain money with which to satisfy plaintiff's claim or judgment. It was essentially a judicial sale in which the court in legal effect was the seller. Such sale is unlike a sheriff's sale on ordinary common law or statutory execution, which is a ministerial, and not a judicial act, and in making which the law regards the officer, and not the court as the vendor. The fact that the decree directed that the register, in advertising and selling the lands, should proceed in the manner prescribed by law for sale of lands levied on under execution, can not be construed as changing the nature of the sale. In other words, it can not be construed as making the register or the complainant the vendor. This only requires and authorizes the register to advertise the land in the manner and for the length of time that is required by the statute applicable to execution sales and to sell at public auction at the courthouse. There is no other significance to be attached to it. And since the adoption of the Code of 1896, it may be doubtful as to the authority of the register at such sale in the absence of express authority, given by the discretal order of sale, to make a deed to the purchaser before confirmation. *McGaugh v. Deposit Bank*, 147 Ala. 229, 40 So. 984, 986.

§ 217. Form and Contents.

§ 218. — Recitals.

That a sheriff's deed recites that the execution under which the sale was made was issued January 1, 1895, instead of December 27, 1894, does not invalidate the deed. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

The fact that a sheriff's deed recites a wrong date is no ground for refusal to admit it in evidence. *Driver v. Spence*, 1 Ala. 540.

When the return of an execution upon land, and the sheriff's deed, do not correspond as to the recital of defendant's interest in the land, the deed controls. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

A variance between the return of an execution upon land and the sheriff's deed, as to the recital of defendant's interest, does not render the deed void. *Davidson v. Kahn*, 119 Ala. 364, 24 So. 583.

The admissibility of the sheriff's deed for the purchaser is not affected by a variance between the judgment and execution and the recitals thereof in the deed. *Wilson v. Campbell*, 33 Ala. 249.

§ 219. — Description of Property.

The fact that a sheriff's deed failed to describe the land in a certain and designated manner, or by metes and bounds, is not a sound objection against its admission in evidence. *Driver v. Spence*, 1 Ala. 540.

A variance between the sheriff's deed and the levy indorsed on the execution is not a valid objection to the admission of the deed in evidence. *Driver v. Spence*, 1 Ala. 540.

§ 220. Execution.

A sheriff's sale of land on execution vests in the purchaser a perfect equity, which will defeat a suit by the defendant in execution to redeem, though the sheriff's deed is not acknowledged as required by statute, the return on the execution and the deed being each a sufficient memorandum under the statute of frauds. *White v. Farley*, 81 Ala. 563, 8 So. 215.

§ 221. Recording and Registration.

The statute which requires the registration of deeds within six months after their execution applies to the deeds of sheriffs and marshals. *Pollard v. Cocke*, 19 Ala. 188.

§ 222. Amendment or Reformation.

Correction by Officer.—When a sheriff, by mistake, in advertising lands for sale under an execution, or order of sale from

the circuit court, misdescribes a portion of the tract, as by inserting the northeast instead of the southeast quarter of the section, and the mistake is carried into his deed to the purchaser; he may, by leave of the court, pending an action by the purchaser against the defendant in execution for the lands, correct the erroneous description in the deed; and when the amendment is thus made under the order of the court, and in its presence, it relates back to the date of the deed, and entitles the plaintiff to a recovery. *Ridgway v. Glover*, 60 Ala. 181.

"The only difference between the power and duty of a sheriff under a *fieri facias*, and under an order directing him to sell specific property, is, that in the latter case, his authority is confined to the particular property—he can sell and convey no other. His duty to sell and convey is the same as if he had levied on it a *fieri facias*. A sale by him, improperly made, the court, on a proper application, would set aside. From the process of the court, his authority to sell, and to execute the statutory power of conveying, is derived. The purchaser could obtain from the court an order compelling a conveyance, if, on demand, he refused to execute it. No other court than that from which the process issued could compel him to convey. Courts of equity do not, except in peculiar cases, to relieve against fraud or accident, intervene to aid the execution of mere statutory powers. Mistakes will occur in the execution of official deeds, as they often occur in deeds or contracts between individuals in private transactions. The security of suitors, and of purchasers, requires that the court issuing the process, having an inherent power to superintend and control its execution, should intervene, and correct such mistake." *Ridgway v. Glover*, 60 Ala. 181, 183.

"If a sheriff, directed to sell particular property, should, by accident or design, sell other property, the court could not hesitate to vacate the sale, though it may be void. If he should really sell other property, but his conveyance should recite a sale, and should convey the property ordered to be sold, it would be the duty of the court to prevent the abuse of its process, by setting aside the sale. Or,

if an irregular sale, of prejudice to the parties in interest, is made, the court has power to vacate it. The power of the court is plenary for the correction of the misfeasance, malfeasance, or nonfeasance of its ministerial officers, in the issue, or in the execution of its process. Where a sheriff, by mistake, in the conveyance to the purchaser, misdescribes the lands he has sold, he may, under the supervision of the court from which the process issued, make a new deed, describing the land sold properly. *Ware v. Johnson*, 55 Mo. 500; *Freeman on Execution*, § 332. Such a mistake, in a deed made by an individual, could be corrected by the execution of a new deed, or by any proper instrument in writing, between the parties. The sheriff is the officer of the court, and may be by the court compelled to do that which he ought to do as an individual, if acting individually, and his individual rights were involved. A court of equity alone would have jurisdiction to reform the deed, and conform it to the intention of the parties, if it was not made officially by the sheriff. The court of law, in compelling the correction of such mistakes, does not infringe the jurisdiction of the court of equity. It exercises only its inherent power to superintend the execution of its process, for the protection of its suitors, and of purchasers at sales made by authority of its process. The manner in which the correction is made, must rest largely in the discretion of the court. Ordinarily, the court should order a new deed to be executed, and the former deed surrendered and cancelled, avoiding the registration of two seemingly inconsistent conveyances, and the existence of a conveyance which, it may be, would cast a cloud on the title of the lands the first conveyance improperly purports to pass. But when, as in this case, the conveyance is of several parcels of land, one of which only is misdescribed, we can not say the court errs in directing the correction of that error, by striking out the erroneous, and inserting the correct description, there being in the presence of the court a redelivery of the conveyance." *Ridgway v. Glover*, 60 Ala. 181, 184.

Relief by the Court.—Equity will not reform a sheriff's deed for incorrectness in

the description of the land, where the sale itself was a nullity. *Martin v. Dollar*, 32 Ala. 422.

Code 1876, § 3207, authorizing the court, in case a sheriff has died or vacated his office without making a conveyance of lands he has sold under order of the court, to order his successor to execute the conveyance, does not authorize the court to order the reformation of a defective conveyance. *McCall v. White*, 73 Ala. 562.

§ 223. Cancellation.

Where a complainant acquired ownership and possession of land prior to the execution of a sheriff's deed, but did not procure a valid deed from his grantor until after the levy on the land, under execution, such deed relates back to the date of his purchase, and he will be entitled to a decree canceling the sheriff's deed as a cloud on his title. *Murphy v. Green*, 120 Ala. 112, 22 So. 112.

When a sale of lands under execution at law is impeached, because of mere error in the process, or on account of some error, attending its execution, the court from which the process issued has exclusive jurisdiction to set aside the sale; but, if fraud or illegality attends the sale, or it has been followed by the execution of a conveyance casting a cloud upon the title, a court of equity has jurisdiction concurrent with the court of law to set it aside. *Cowan & Co. v. Sapp*, 74 Ala. 44.

If the judgment was in fact satisfied at the time of the sale under execution, the court from which the process issued has undoubted jurisdiction to set aside the sale; but, if the process is regular on its face, and the sale is followed by a regular conveyance to the plaintiff in execution as the purchaser, the fact of payment resting in parol, a court of equity will intervene, at the instance of the defendant in possession, set aside the sale, and cancel the conveyance as a cloud on the title. *Cowan & Co. v. Sapp*, 74 Ala. 44.

§ 224. Construction and Operation.

§ 225. — In General.

A sheriff's deed conveys only the estate which it purports to convey, though de-

fendant in execution had a greater interest subject to levy and sale. *Carrington v. Richardson*, 79 Ala. 101.

§ 226. — Conclusiveness of Recitals.

In an action of trespass to try title by the purchaser of land under execution sale, all that is essential is a judgment, execution thereon, levy, and the sheriff's deed; and the deed can not be collaterally impeached for any irregularity in the proceedings or in the process under which the land was sold. *Ware v. Bradford*, 2 Ala. 676.

A sheriff's deed is conclusive, and can not be impeached on a collateral issue, except for fraud in its execution, wherever the process under which the land is sold is supported by an existing, operative, and unsatisfied judgment. *Love v. Powell*, 5 Ala. 58.

§ 227. — Relation Back.

The recording of a judgment, as provided by Code 1907, § 4156, operates, as provided by § 4157, to impose a lien on all the property of the debtor in the county where recorded, and a sheriff's deed, on a sale under execution, under the judgment relates back as of the date of the attaching of the lien on the recording of the judgment, and a deed to a third person, before the execution of the sheriff's deed but after the lien had attached, passes no legal title. *Cranford Mercantile Co. v. Anderton (Ala.)*, 60 So. 874.

(E) PROCEEDS.

As to reception of proceeds as creating estoppel to vacate sale, see ante, "Waiver and Estoppel," § 170. As to proceeds of sale of homestead as exemption, see the title **HOMESTEAD**.

§ 228. Disposition in General.

It is not competent for a court of law, on motion, to order the sheriff to retain, out of money collected for a plaintiff, the charges of an attorney for commission or compensation for extra services. *Long v. Lewis*, 1 Stew. & P. 229.

Money in the hands of a sheriff, collected under execution, when not more than sufficient to satisfy the debt and lawful costs, is the money of the plaintiff in execution; and the extent of the

sheriff's hire upon the fraud, in case of a controversy, must be settled between him and the plaintiff. *Chenault v. Walker*, 22 Ala. 275.

§ 229. Preferred Claims.

As to priorities between executions in general, see ante, "Priorities between Executions," § 76. As to priorities between executions and other claims, see ante, "Priorities between Executions and Other Liens or Claims," § 77.

Code, § 419, which makes it the duty of a sheriff selling property under a levy to ascertain and pay the taxes due upon the property, or by the owner thereof, is not a remedial statute, and can not be extended by construction beyond the plainly expressed intention of the legislature. *Holding v. Thomas*, 62 Ala. 4.

Code 1876, § 419, making it the duty of a sheriff selling property under a levy to ascertain the amount of taxes due, and pay them over to the tax collector, has no application to taxes due to, and collectible by, a municipal corporation. *Holding v. Thomas*, 62 Ala. 4.

§ 230. Application to Judgment.

In an action on an attachment bond, to recover damages for the wrongful or vexatious suing out of the writ, the plaintiff may show by extrinsic evidence what property of his was seized under it and delivered to the plaintiff therein, by whom it was converted, although the return on the writ is silent as to such property, or has been altered so as to omit it. Such evidence does not contradict the record, but shows what the true record was and should be. *Hensley v. Rose*, 76 Ala. 373.

§ 231. Distribution Among Different Judgments or Executions.

As to priorities between execution and other claims in general, see ante, "Priorities between Executions and Other Liens or Claims," § 77. As to priorities between executions in general, see ante, "Priorities between Executions," § 76.

Where several executions, having an equal lien, are levied upon goods of the defendant, and there is not enough money to satisfy all in full, the amount must be equally divided among them; and, if any surplus remains from the full payment

of one or more of the executions, this must, in like manner, be divided among such as are not satisfied in full. *Bizzell v. Hardaway*, 42 Ala. 471; *Jones v. Hutchinson*, 43 Ala. 721.

A senior judgment lienor is not entitled to have the proceeds of an execution sale of land under a junior judgment, subject to the lien of the senior judgment, applied to the satisfaction of his senior lien. *Caldwell v. Houser*, 108 Ala. 125, 19 So. 796.

Where property is simultaneously levied on under two or more executions, and the property is not of value sufficient to discharge all the executions thus levied, the liens being equal, the money, irrespective of the amounts of the several claims, must be applied equally to the several debts, unless a surplus remains after a full payment of one or more of the claims. *Rutledge's Adm'r v. Townsend*, 38 Ala. 706.

§ 232. Rights to Surplus.

Where several levies are made simultaneously on the same property, and it is not of sufficient value to satisfy them all, and a surplus remains after the full payment of some of the claims, it must be applied equally to the balance of the unpaid debts. *Rutledge v. Townsend*, 38 Ala. 706.

A person, by purchasing land at a sale on execution, is not estopped to deny the defendant's title as against any but the plaintiff in execution. If, therefore, he purchased for a sum more than sufficient to satisfy the plaintiff's execution, as against other creditors, he may insist upon his right to the excess. *Wheeler v. Kennedy*, 1 Ala. 292.

§ 233. Proceedings for Distribution.

Upon a motion to the court to direct the application of money in the hands of the sheriff, if there is no controversy about the facts, there is no necessity for impaneling a jury. *Pickard v. Peters*, 3 Ala. 493.

In a contest between several judgment creditors respecting the application of money on their several executions, where a bill of exceptions showed that the cause was tried on an agreed statement of facts, which is set out, which statement is silent as to the time when the defendant in the

execution acquired or owned the property levied upon and sold, except so far as the levy is evidence of it, it can not be presumed that the defendant acquired the property before the executions were issued or the judgments rendered, or the acts of 1861 and 1863 were repealed; and it was error to hold that the senior judgments had any lien superior to the junior ones. *Kirksey v. Hardaway*, 41 Ala. 338.

The court should not, on the mere motion of the sheriff to direct him how to dispose of the proceeds of property sold by him under execution, order its application, first to the discharge of the liens of laborers who are not parties to the suit nor judgment creditors, and next to the satisfaction of the judgment. The defendant is entitled to an opportunity to defend against such claims. *Leonard v. Johnson*, 43 Ala. 596.

Where the parties interested in the distribution of money in the sheriff's hands appear and state an agreed case, the court may determine the right, although the sheriff has not made the application to the court, nor is a party to the case. *Turner v. Lawrence*, 11 Ala. 427.

Where a party moves against a sheriff for an order to appropriate money in his hands to the satisfaction of an execution in favor of the mover, it is competent for the court to permit a third person, having an interest, to litigate the motion. *Wheeler v. Kennedy*, 1 Ala. 292.

When money in the custody of the court is allowed to go into the hands of a solicitor, on his giving bond to keep it subject to the order of the court, and to pay it as the court may direct, he may be compelled to pay over the money by the summary process of attachment, of which he should have notice, and an opportunity to show cause against the order. But the court has no power to order a summary execution against the sureties on his bond. *Dudley v. Witter*, 51 Ala. 456, overruled. *Smith v. Alexander*, 80 Ala. 251.

VIII. RETURN.

As to directions for return of writs, see ante, "Directions for Return," § 61. As to necessity of return of execution against property to authorize execution against the person, see post, "Previous Issue and

Return of Execution against Property," § 260. As to return in justices court, see the title JUSTICES OF THE PEACE. As to necessity of return to prevent dormancy of judgment, see the title JUDGMENT. As prerequisite to creditors suit, see the title CREDITORS' SUIT. As prerequisite to garnishment, see the title GARNISHMENT. As prerequisite to suit to avoid fraudulent conveyance, see the title FRAUDULENT CONVEYANCES. As to liability of sheriff or constable for failure to make return, see the title SHERIFFS AND CONSTABLES. As to liability of sheriffs and constables for making false return, see the title SHERIFFS AND CONSTABLES. As to admissibility of sheriff's return as evidence, see the title EVIDENCE.

§ 234. Necessity.

The return of an execution must be made to the clerk (Rev. Code, § 2852), and is not complete when the execution is found in the sheriff's office, after the return day, with his return indorsed on it. *Balkum v. Harper*, 50 Ala. 429, cited in note in 30 L. R. A. 123.

Where an execution has been issued, directed to a certain county, it must be returned to the proper court therein, whether executed or not, and can not be transmitted to another county for levy without such return. *Brown v. Baker*, 9 Port. 503.

§ 235. Officer Who Must Make.

No matter how well founded the belief of the attaching creditor, that a statutory ground exists for suing out the attachment, if he be mistaken or misinformed, and no ground in fact exists therefor, then the attachment is wrongful, and there may be a recovery of the actual damages sustained, which is measured by the actual injury which the issue and levy of the attachment occasion. *Pollock & Co. v. Gantt*, 69 Ala. 373.

"The bond in attachment, and in garnishment, which is only a species of attachment, is intended to protect defendants against an unnecessary resort to this extraordinary remedy. If there is no ground for such process, damages may be recovered, although the debt

claimed is actually due, and is recovered." *Bolling v. Tate*, 65 Ala. 417, 424.

§ 236. Time for Making.

Under the general statutes of the state, the return term of an execution is the term next after its date, except when it is issued less than fifteen days before the commencement of that term (Code, § 3191), and the sheriff is required to make return of the writ three days before the first day of the term; but, under the special statute regulating the practice in the circuit court of Mobile, approved February 28th, 1870, which is still of force in this particular, an execution is returnable on the first Monday in the month next after the expiration of five months from the day it is issued. *Shelton v. Merrill*, 63 Ala. 343.

"By a statute of this state, it is made the duty of sheriffs 'to return all writs and executions to the clerk's office from which they shall issue, at least three days previously to the term of the court, to which they shall be returnable.' Aik. Dig. 279. Under this act, it has been held that although a sheriff is not bound to return an execution at a day earlier than it directs, yet he may at any time after its receipt return 'no property found,' and that such return will be evidence for an indorsee in an action against an indorser. *Reese v. White*, 2 Ala. 306." *Woodward v. Harbin*, 4 Ala. 534, 537.

A writ issued on the 7th January, 1847, and made returnable to "our next circuit court, to be holden for said county, on the third Monday in October next," is returnable to the next term of the court, as ascertained by law, and the insensible mention of the month of October, will be rejected. *Lore v. McRae*, 12 Ala. 444.

The return of an execution should be made three days before the return term, and it is no excuse that the sale of the property levied on was not made until after such time, the writ being unnecessary for that purpose. *Neale v. Caldwell*, 3 Stew. 134.

Act Feb. 28, 1870, which provided that, so far as the circuit court of Mobile county was concerned, all executions should be made returnable on the first Monday of the month next after the expiration of five months from the date of

the issuance thereof, is still in force, as it was not repealed by Code 1876, §§ 3190, 3191. *Shelton v. Merrill*, 63 Ala. 343.

§ 237. Form and Requisites.

As to effect of variance between return and deed, see ante, "Recitals," § 218.

Quære. Is it competent for the sheriff to indorse a return upon an execution in any other form than the statute prescribes? *Haden v. Walker*, 5 Ala. 86.

An indorsement not responsive to the mandate is no return. A sheriff must obey the directions of the mandate and the requisitions of the law. The indorsement in this case, contains neither the form or substance required by law, and is no return. *Anderson v. Cunningham*, Minor 48.

§ 238. — In General.

A return of nulla bona can not be justified by proof of a prior lien, unless the executions creating it were actually levied. *Bell v. King*, 8 Port. 147.

The return of an execution not fully satisfied, without stating that the defendant had no other property from which the residue of the execution could be made, is defective. *Casky v. Haviland*, 13 Ala. 314.

The forms of returns to be made to process, as prescribed by statute, are not exclusive of all others, expressing the same meaning. A return of a sheriff, to an execution, which states a levy and sale of certain lands, and the appropriation of the proceeds to older executions, but which does not affirm, that the defendant had no other property from which the residue of the execution can be satisfied, is substantially defective. *Casky v. Haviland, etc., Co.*, 13 Ala. 314.

A return by the sheriff to a *fi. fa.* that judgment had been satisfied by defendant in execution is bad, as it is his duty to execute the writ if the court had jurisdiction to render the judgment, and leave the settlement of questions arising from the satisfaction to the parties to the record. *Abercrombie v. Chandler*, 9 Ala. 625.

§ 239. — Description of Property.

As to effect of insufficient description on sale, see ante, "Levy or Sale," § 193 (3). As to effect of insufficient description in

deed, see ante, "Description of Property," § 219. As to description in entry of levy, see ante, "Description of Property," § 95.

In a return to an execution under which lands have been sold, it is not necessary to describe particularly the land sold—the identity of the property sold may be shown by parol proof. And it is no objection to an execution offered in evidence, that the sheriff's return does not describe the land levied on with minuteness. *Webb v. Bumpass*, 9 Port. 201.

The sheriff returned a writ of fieri facias indorsed thus, viz.: "Levied on one tract of land adjoining the lands of Ira Carlton, Mrs. Gray, and others, containing two hundred acres, more or less." Held, that the return was sufficiently certain, that the precise location of the land might be shown by extrinsic proof, and that, as the sheriff was directed to make the money of the defendant's estate, it would be intended, for the purpose of the levy, that the defendant was the proprietor of the land. *Randolph v. Carlton*, 8 Ala. 606.

§ 240. Amendment.

As to conclusiveness of amended return, see post, "Conclusiveness," § 245.

In General.—The right of a sheriff to amend his return, according to the truth of the case, is always conceded to him by the court, when it does not impair rights which have vested in others. *Cawthorne v. Knight*, 11 Ala. 268. See *Watkins v. Gayle*, 4 Ala. 153; *McGehee v. McGehee*, 8 Ala. 86.

"It is allowable for a sheriff to amend his return at a term subsequent to that at which it is made, and the amendment will relate back to the proper return day, * * * and it has been permitted, even after the lapse of several years. * * * So such amendments have been permitted after the sheriff went out of office, and after a writ of error sued out to reverse the judgment. * * * But such amendments will not be permitted to affect the rights which have vested subsequent to the return; and if they are allowed, the intervening rights of third persons will not be prejudiced. * * * These propositions are supported by the decisions of this court. See *Brandon v. Snows*, 2 Stew. 255; *Woodward v. Har-*

bin, 4 Ala. 534; *Watkins v. Gayle*, 4 Ala. 153; *McGehee v. McGehee*, 8 Ala. 86; *Hodges v. Laird*, 10 Ala. 678; *Cawthorne v. Knight*, 11 Ala. 268; *Governor v. Bancroft*, 16 Ala. 605." *McMichael v. Branch Bank*, 14 Ala. 496, 498.

Where a sheriff, having the execution in his hands is referred by the defendant to a third person, from whom, in settlement, he takes his promissory note for the amount, and returns the execution satisfied, he is bound by the return, and can not amend it. Conceding that the sheriff may amend his return in cases of mistake or fraud, in this case there was neither the one nor the other. *Holt v. Robinson*, 21 Ala. 106.

The right conceded to a sheriff to amend his return is always at the instance of the sheriff himself, who is responsible for the consequences attending the act. It could not be permitted, that a stranger to the proceedings should be allowed thus to affect the rights of parties, by changing the return made by the sheriff. *Cawthorne v. Knight*, 11 Ala. 268.

A stranger to the proceedings can not move to amend the return made by the sheriff, by striking out a levy made on a slave, upon the ground that it did not belong to any of the defendants in the execution, but was the property of the applicant. *Cawthorne v. Knight*, 11 Ala. 268.

Power of Court.—The pendency of a suit, or of a rule, against the sheriff does not deprive a court of its power to permit him to amend the return by which he is sought to be charged, however such a circumstance might induce the imposition of terms on the sheriff; and the amended return operates on the suit, or rule, as if made in that form in the first instance. *Hodges v. Laird*, 10 Ala. 678.

The pendency of a rule against a sheriff for failure to pay over money collected on a *fi. fa.* does not deprive the court of its power to permit him to amend the return to show that the purchaser of the property sold under the *fi. fa.* had never paid for it. *Hodges v. Laird*, 10 Ala. 678.

Presence of Parties.—An amendment of the sheriff's return on an execution, so as to make it show that the purchase money of lands sold under the writ was

paid by the purchaser to the plaintiff in execution, if proper in other respects, should not be made in the absence of the sheriff who made the sale, and of the plaintiff in the execution. *Bibb v. Collins*, 51 Ala. 450.

Time.—A sheriff may by leave of the court amend his return on an execution, pending a motion against him for failing to pay over the money collected on it. *Niolin v. Hamner*, 22 Ala. 578; *Wilson v. Strobach*, 59 Ala. 488.

"It is settled by repeated decisions of this court, that a sheriff may, by leave of the court, during the pendency of a suit or motion against him, amend his return or process, though the amendment if true, will relieve him from liability. *Niolin v. Hamner*, 22 Ala. 578; *Governor v. Bancroft*, 16 Ala. 605; *Leavitt v. Smith*, 14 Ala. 279; *Hodges v. Laird*, 10 Ala. 678. A return of a ministerial officer, is the officer's answer to the mandate of the process, disclosing its execution, or the reason for not executing it. If it is of nonexecution, it may properly embrace any legal excuse for the failure." *Wilson v. Strobach*, 59 Ala. 488, 491.

A sheriff may amend his return to a writ of *fi. fa.*, issued at the suit of an indorsee against the maker of a note, so as to make it conform to the statute, although several years have elapsed, an action been commenced against the indorser, and a declaration filed alleging that the return was such as it was made by the amendment; and the return, so amended, will be evidence in an action against the indorser. *Woodward v. Harbin*, 4 Ala. 534.

It is proper to allow a sheriff to amend his return, even at a subsequent term, and the amendment will relate to the proper return day. *Brandon v. Snows*, 2 Stew. 255.

Scope or Purpose of Proposed Amendment.—A sheriff's return on an execution, made at the proper time and correctly stating the facts then existing, can not be amended by incorporating into it the fact of the payment of the purchase money of land sold under the execution by the purchaser to the plaintiff in the writ after the return day. *Bibb v. Collins*, 51 Ala. 450.

A return of "Satisfied," made on an execution, creates a presumption that the money was paid at the date mentioned in the return; and the officer will not be permitted to amend his return by showing that the execution was satisfied after the return day. *Barton v. Lockhart*, 2 Stew. & P. 109.

Effect.—An amended return of the sheriff on an execution that the property levied on had been claimed by a third person by affidavit, and bond given to try the right, entered on the execution before any proceedings are commenced against the officer, has the same effect as evidence of the correctness of the facts returned, as if it had been entered in due time, as required by law. *Leavitt v. Smith*, 14 Ala. 279.

§ 241. Quashing or Setting Aside.

Where a sheriff, having the execution in his hands, is referred by the defendant to a third person, from whom, in settlement, he takes his promissory note for the amount, and returns the execution satisfied, he is bound by the return and can not have it set aside. *Holt v. Robinson*, 21 Ala. 106.

The proper mode of impeaching the return of a sheriff that a delivery bond on execution is forfeited is by supersedeas to the execution issued upon the forfeited bond. *Anderson v. Rhea*, 7 Ala. 104.

A return made by the sheriff on an execution which issued in favor of the bank, "Settled in bank," may be set aside on motion, upon proof that the return is false and the judgment unsatisfied, and leave given to issue another execution. *McMichael v. Branch Bank*, 14 Ala. 496.

Where a sheriff, having an execution in his hands, is referred by the defendant to a third person, from whom, in settlement, he takes his promissory note for the amount, and returns the execution satisfied, the plaintiff may have the return set aside as prejudicial to his rights, but the sheriff himself is bound by it. *Holt v. Robinson*, 21 Ala. 106.

On a motion to set aside the sheriff's return on an execution, it is competent for defendant in execution to show that the money had been paid as the return showed, and had been offered and re-

fused, and, by tendering it anew, to avoid interest and any further issue of execution; and, if he does not do this, he can not come into equity for relief, unless he explains the omission satisfactorily. *Minter v. Branch Bank at Mobile*, 23 Ala. 762.

§ 242. Construction.

The return of a sheriff on a writ of *fi. fa.*, that "the property levied on was claimed by another, and not sold for want of indemnity," does not authorize the conclusion that he has parted with the possession of it. *Branch Bank at Decatur v. McCollum*, 20 Ala. 280.

The return of satisfaction upon execution, without any date or evidence in connection with it, refers to the return day of the execution. *Price v. Cloud*, 6 Ala. 248.

The return of the sheriff that he has levied on certain property by virtue of the writ is an affirmation that it is the property of defendant. *Thornton v. Winter*, 9 Ala. 613.

A return by a sheriff on an execution that "I know of no property subject to the within *fi. fa.*" is equivalent to a return of "No property found." *Gunn v. Howell*, 35 Ala. 144.

§ 243. Operation and Effect.

§ 244. — In General.

Discharge of Lien.—A return of satisfaction, upon an execution made by the sheriff, by the directions of the plaintiff's agent, precludes the plaintiff from issuing another execution, upon the judgment, whilst the return continues in force, and discharges the lien of the execution, as against a purchaser from the defendant in execution, who bought prior to the return being made. *Branch Bank v. Ford*, 13 Ala. 431.

Where, after a sale of land subject to a judgment lien by the judgment debtor, the execution was returned satisfied, the purchaser held the land discharged of the lien, although the return was made by mistake. *Branch Bank v. Ford*, 13 Ala. 431.

When the sheriff, under the act of 1828, returns the copy of an execution, with the levy returned on the original, his certificate is proof of all the facts, pre-

cisely as his return upon an original execution. *Garrett v. Rhea*, 9 Ala. 134.

Evidence for or against Officer.—The return of a sheriff on a *capias* is in its nature, both the highest and best evidence of the fact of execution, and it can not be called in question collaterally, nor be impeached or varied by the parol proof of the sheriff or any other person. Nor can the sheriff be allowed to depose to a state of facts inconsistent with his return. *Martin v. Barney*, 20 Ala. 369.

A return to an execution, "Stayed by the plaintiff till further orders," does not import verity, when the motion is against a sheriff for a false return; but he is required to sustain it by proof. *Andress v. Crawford*, 11 Ala. 853.

On motion by S. for judgment against a sheriff for money made on an execution in his favor, B. claimed the money under an execution against the same person. A former execution on B.'s judgment had been returned satisfied. Held, that S. was entitled to the money. If B. had not received his money, the sheriff on the proper motion against him would be concluded by his own return. *Barnes v. Baker*, Minor 373.

Aider by Extrinsic Evidence.—When a sheriff has indorsed a levy on property which is afterwards taken from him by a writ, it is proper he should state the fact in his return; but his omission to do so will not preclude him from proving the fact by evidence aliunde. *Governor v. Gibson*, 14 Ala. 326.

Parol evidence identifying property as that described in a sheriff's return on an execution is not improper as showing a levy by parol. *Broadus v. Smith*, 121 Ala. 335, 26 So. 34.

§ 245. — Conclusiveness.

In General.—The endorsement of a levy on an execution by the sheriff or his deputy, being an act required by law, is to be considered as true, until impeached. *Barron v. Tart*, 18 Ala. 668.

It will not be presumed, in the absence of all proof, (even against a party demurring to evidence), that a sheriff returned an execution placed in his hands, before the time when, by law, it was returnable. *Woodward v. Harbin*, 4 Ala. 534.

A memorandum, indorsed by the sheriff on a *fi. fa.*, in these words, "Case arranged in bank, as per instruction," is not equivalent to a return of "Satisfied," nor sufficient ground to enter satisfaction of the judgment, or to quash a subsequent execution. *Gilchrist v. Branch Bank*, 11 Ala. 408.

On motion for an order against a sheriff, requiring him to execute to the purchaser a conveyance of lands sold under execution by his predecessor (Rev. Code, § 2869), the return on the execution is conclusive, until it is amended, or vacated in a direct proceeding; and if such an order can be granted on parol proof of the fact that the purchase money has been paid, it can only be when the parties to be affected by the fact are before the court. *Bibb v. Collins*, 51 Ala. 450.

As to Delivery Bond.—The return of a sheriff that a delivery bond is forfeited may be impeached. *Anderson v. Rhea*, 7 Ala. 104.

As to Sale.—The sheriff's return is not conclusive as to who was the purchaser at the execution sale. *Wyatt v. Stewart*, 34 Ala. 716.

The sheriff's return on an execution, showing who was the purchaser at his sale, is not conclusive on the real purchaser. *Wyatt v. Stewart*, 34 Ala. 716.

Conclusiveness as to Parties and Privies.—The return of a sheriff on an execution is conclusive only between parties and privies; and where a suit is brought in the name of the payee of a note, for the benefit or use of a third person, the payee is not a privy. *Crow v. Hudson*, 21 Ala. 560.

Impeachment.—The evidence required to impeach or falsify a return must be sufficient to rebut the very strong presumption which the law allows in favor of the truth of the statement of its officer, and must therefore be very clear and decisive. *Loeb v. Waller*, 110 Ala. 487, 18 So. 268.

§ 246. Failure to Make.

Irregularities in the decree on which the execution was issued, can only be taken advantage of by appeal from the decree itself, and can not be made the ground of an application to set aside the sale. *Holly v. Bass*, 68 Ala. 206.

IX. PAYMENT, SATISFACTION, AND DISCHARGE.

As to abatement or discharge of execution against the person, see post, "Discharge on Prison Limits Bond," § 266; "Discharge on Surrender of or Disclosure as to Property," § 268; "Discharge of Poor Debtors," § 269. As to payment, satisfaction and discharge in justices courts, see the title JUSTICES OF THE PEACE.

§ 247. Payment.

Time of Payment.—A sheriff has no authority to receive payment of money on an execution after the expiration of his term of office; but if the money is handed over to the plaintiff's attorney as a payment, and is accepted, the payment is good, and will discharge the execution. *Dubberly v. Black's Adm'r*, 38 Ala. 193.

An execution is satisfied by payment of money to the sheriff before the return day. *Webb v. Bumpass*, 9 Port. 201.

Payment by Codefendant.—An execution which has been satisfied by a surety will not be enforced against the principal, unless it appear by satisfactory evidence that the enforcement is for the benefit of such surety. *Clemens v. Prout*, 3 Stew. & P. 345.

Payment by Third Persons.—Whether an attorney at law charged with the collection of a debt be authorized to receive money on an execution of a stranger, under an agreement with him that the execution shall remain open for his benefit, is not material, if the money thus received is paid over to plaintiff in the judgment. In such case, the party thus paying the money is entitled to an execution for his reimbursement. *Leach v. Williams*, 8 Ala. 759.

Payment by Officer.—Payment by a sheriff of an execution in his hands is a satisfaction of it if the parties so elect to treat it, although no indorsement or return of satisfaction is made or entered. *Henderson v. Planters', etc., Bank (Ala.)*, 59 So. 493.

Satisfaction of Indebtedness of Officer.—The settlement of an account by the defendant in execution with the sheriff for money due him from the sheriff, is no discharge of the execution, although the sheriff receipts for the amount of the

account as for money. *Williams v. Charles*, 7 Ala. 202.

Authority of Officer as to Payment.—Neither a clerk of court nor sheriff has authority to receive anything in payment of a judgment or execution but money, and a payment in anything else would be no discharge of the defendant in execution, though the sheriff would be precluded by his return from denying that he had received money in its discharge. *Haynes v. Wheat*, 9 Ala. 239.

The payment of the amount of an execution in Confederate money to a sheriff, who accepts and receipts for the same, and who turns it over to the judgment creditor's attorney, who accepts the same in satisfaction of the judgment, does not constitute a discharge thereof, as the attorney had no right to accept illegal money in satisfaction thereof. *Chapman v. Cowles*, 41 Ala. 103.

Although the sheriff, by a return of satisfaction, subjects himself to pay the plaintiff in coin, he has the power to receive, in discharge of the writ, such bank notes as are then passing in the community current as money, although they may not be convertible into specie at pleasure, at the nominal amount; and such a receipt, if bona fide, will discharge the defendant in execution and fix the liability of the sheriff and his sureties. *Haynes v. Wheat*, 9 Ala. 239.

"To pay the amount of an execution to a sheriff after the return term has arrived, does not amount to a satisfaction of that execution. (*Chapman v. Harrison*) 4 Rand. 336; (*Gaines' Heirs v. Clark*) 1 Bibb. 608; (*Rudd v. Johnson*) 5 Litt. 19; *McBroom v. Rives*, 1 Stew. 72. The execution has become functus officio, and no proceeding can be had under it. After such payment is made, the plaintiff might sue out another execution, and have the money collected by virtue of it, if the sheriff were to fail to pay the money to him; and no motion can be made against the sheriff for money so received, under any of the statutes; he must be proceeded against as other individuals, who have received money for the use of another; and his securities can not be made liable." *Barton v. Lockhart*, 2 Stew. & P. 109, 111.

It is no satisfaction of a judgment to

pay the amount thereof to an officer after he has returned the execution issued thereon; nor to pay the amount thereof, to such officer, before the issuance of execution. *Bobo v. Thompson*, 3 Stew. & P. 385.

"A sheriff has no authority, after he has gone out of office, to receive payment of an execution which he has returned; yet, if he receives the money and pays it over to the plaintiff's attorney by whom it is accepted as a payment, the payment is good, and the execution thereby discharged." *Henderson v. Planters'*, etc., Bank (Ala.), 59 So. 493, 496. See *Dubberly v. Black*, 38 Ala. 193; *Chapman v. Cowles*, 41 Ala. 103.

Payment of money on a judgment to a sheriff having an execution satisfies it, and, if the judgment creditor does not receive it, his only remedy is against the sheriff. *Henderson v. Planters'*, etc., Bank (Ala.), 59 So. 493.

Payment by Order of Court.—Where money in litigation had been paid over to defendant, by an order of the court granting an injunction, in discharge of an execution held by the defendants, the court could not summarily on motion direct its application elsewhere; it was impossible to say to what extent the rights of the defendant might not be compromised by such a course. *Bank v. Planters'*, etc., Bank, 1 Ala. 109.

Necessity of Notice of Motion to Enter Satisfaction.—A party before moving the court to direct a sheriff to enter a credit on an execution, or satisfaction of a judgment, must give notice of his intention so to do to the opposite party. *Baylor v. McGregor*, 1 Stew. & P. 158.

Where a motion is made to enter satisfaction of an execution, whether the alleged satisfaction appears by the sheriff's return or otherwise, the plaintiff is entitled to notice; and an order directing satisfaction to be entered without such notice is consequently erroneous. *McKissack v. Davis*, 18 Ala. 315.

Evidence of Payment or Satisfaction.—The return of "Satisfied" on an execution raises the presumption that the money due on it was paid before the return day; and the mere fact that the date of the officer's return was subsequent to the return day will not rebut that pre-

sumption. *Barton v. Lockhart*, 2 Stew. & P. 109.

Where, in a proceeding to have entry of satisfaction of an execution, the only issue joined is the fact of payment, proof that the judgment was assigned to a third person before the payment does not tend to establish or disprove the issue, and is consequently inadmissible. *Edwards v. Lewis*, 16 Ala. 813.

Effect of Payment.—Where a defendant pays the money to the sheriff on a *fi. fa.* he is discharged from the execution, and if the plaintiff fails to receive it, he must have recourse to the sheriff. *Webb v. Bumpass*, 9 Port. 201.

Executions Issued to Different Counties.—Two executions were issued on a judgment against defendant; one being sent to the sheriff of C. county, and the other to the sheriff of S. county. The latter returned the execution "Satisfied" after the former had levied on defendant's land and advertised it for sale, and, the costs of the levy and advertisement not having been paid by the day advertised for the sale, the former sold the land to satisfy them. Held, that the return and satisfaction of the judgment by the sheriff of S. county was not a satisfaction of the execution directed to the sheriff of C. county, and that the sale was valid. *Slater v. Alston*, 103 Ala. 605, 15 So. 944.

Subrogation to Rights of Creditor on Payment by Officer.—A payment and satisfaction of an execution by the sheriff is a discharge of the judgment, and no execution can afterwards rightfully issue on it for his reimbursement. *Crutchfield v. Haynes*, 14 Ala. 49.

If a sheriff has become liable for a failure to collect the money on an execution, and pays the same to plaintiff, another execution can not be issued on the judgment for the purpose of reimbursing the sheriff. *Roundtree v. Weaver*, 8 Ala. 314.

Where a sheriff pays to a judgment creditor the amount of an execution which the latter has placed in his hands, the execution in the hands of the sheriff is not void, but merely voidable, and a subsequent purchaser from the sheriff under an execution sale will obtain a good title, where the execution debtor does not procure the execution sale to be

set aside. *Fournier v. Curry*, 4 Ala. 321.

A payment by the sheriff of the sum demanded by an execution in his hands to the plaintiff's attorney, for which the sheriff received an assignment of the judgment and execution on his own book from the attorney, made without knowledge or consent of the defendant in the execution, is a payment and discharge of the judgment, and in law has the same effect, and will be attended by the same results, as if made by the defendant. *Boren v. McGehee*, 6 Port. 432.

§ 248. Set-Off of Execution.

The sheriff having two executions, one in favor of and the other against the same person, is not competent to determine that one shall be set off against the other. *Brazeal v. Smith*, 5 Ala. 206.

§ 249. Delivery of Property in Satisfaction.

An officer has no authority to receive specific property in satisfaction of an execution to him directed. *Bobo v. Thompson*, 3 Stew. & P. 385.

§ 250. Levy on Personal Property.

As to levy on real property, see post, "Levy on Real Property," § 251. As to release of discharge without satisfaction, see post, "Release or Discharge without Satisfaction," § 253.

The seizure and levy of goods on execution are not a satisfaction of the execution, where they are restored to the defendant on the execution of a delivery bond. *Crawford v. Bank of Mobile*, 5 Ala. 55. See *Campbell v. Spence*, 4 Ala. 543.

A levy and seizure of goods to satisfy an execution is a satisfaction thereof to the extent of the value of the goods as to the defendant in execution, and, if they are lost or wasted by the sheriff, plaintiff's remedy is against him. *Henderson v. Planters', etc., Bank (Ala.)*, 59 So. 493.

If the sheriff take goods in execution under a fi. fa., whether he sell them or not; the defendant shall not be liable to a second execution. *Webb v. Bumpass*, 9 Port. 201.

A levy and seizure by the sheriff of goods sufficient to satisfy the execution will as it respects the defendant in exe-

cution, be a satisfaction, although the goods be wasted by the sheriff. *Campbell v. Spence*, 4 Ala. 543.

When a levy is made on property sufficient to satisfy the execution, and the plaintiff directs the sheriff to leave it with the defendant on his promise to have it forthcoming on the day of sale, and it is not so delivered, such levy will be regarded as a satisfaction of the execution as it respects junior judgment creditors. *Campbell v. Spence*, 4 Ala. 543.

A levy and sale under a senior execution, will be considered a satisfaction as it respects a junior execution subsequently levied on other property of the defendant, although the sheriff may make a misapplication of the money, and the plaintiff in the senior execution will be remitted to his claim against the sheriff. *Campbell v. Spence*, 4 Ala. 543.

While the taking of goods in execution by a sheriff, of value sufficient to satisfy the writ, generally operates a satisfaction, this is not the effect of such levy, when the personal property levied on, was restored to the possession of the defendant in execution, or to the possession of a claimant, on the execution of a bond for the trial of the right of property. *Rapier v. Gulf City Paper Co.*, 69 Ala. 476.

§ 251. Levy on Real Property.

As to levy on personal property, see ante, "Levy on Personal Property," § 250. As to release or discharge without satisfaction, see post, "Release or Discharge without Satisfaction," § 253.

A mere levy is not a satisfaction of the judgment, when it is released without concurrence of the plaintiff. This does not pay the debt, or defeat its payment by the misconduct of the plaintiff. One of these must occur before a defendant occupying the condition of a surety can complain. *Summerhill v. Trapp*, 48 Ala. 363, 365. See *Henderson v. Huey*, 45 Ala. 275; *David v. Malone*, 43 Ala. 426.

§ 252. Sale.

In General.—When property is levied on and sold under an execution, it is a satisfaction of the execution to the extent

of the proceeds of the sale. *Rutledge's Adm'r v. Townsend*, 38 Ala. 706.

A levy and sale of property under execution is a satisfaction of it pro tanto, if the property is subject to the execution; but, if it is not in fact subject, the party having the better legal right may appear before the court and claim the money, which is then no satisfaction of the execution, nor even a credit to be applied to it. *Niolin v. Hamner*, 22 Ala. 578.

Failure of Purchaser to Pay.—If a sheriff sell land under execution, and consummate the sale by executing a deed to the purchaser, the execution, unless the sale is set aside, must be considered as satisfied to the extent of the sum bid, although the sheriff may not have received the purchase money; and, being satisfied, the sheriff is liable to the plaintiff, and not to the defendant in the execution, for failing to collect it. *Moore v. Barclay*, 18 Ala. 672.

§ 253. Release or Discharge without Satisfaction.

As to levy, see ante, "Levy on Personal Property," § 250; "Levy on Real Property," § 251.

Where a defendant taken on a ca. sa. escapes, or is rescued, plaintiff may take out a new execution, and is not compelled to take his remedy against the sheriff. *Webb v. Bumpass*, 9 Port. 201.

§ 254. Vacating Entry of Satisfaction.

Where a return of satisfaction to an execution has been quashed, and a new execution directed, the execution defendant, who had notice of such proceedings, is precluded by the order as long as it remains in force, and can not, by a motion to quash the execution issued in pursuance thereof, raise the questions determined on the hearing of the motion on which it was granted. *Saint v. Ledyard*, 14 Ala. 244.

X. SUPPLEMENTARY PROCEEDINGS.

As to creditors suit to reach property not subject to execution, see the title CREDITORS' SUIT. As to proceedings for collection of taxes, see the title TAXATION.

§ 255. Proceedings for Examination of Third Persons.

§ 256. — Pleadings or Affidavits and Parties.

A judgment creditor may resort to a court of equity not only to subject the equitable interests of his debtor, but for the purpose of removing impediments to the sale at its value, of an estate which may be reached by a fieri facias. *Dargan v. Waring*, 11 Ala. 988.

§ 257. Actions by Creditors or Officers.

A judgment creditor may resort to equity to remove impediments to the sale at its value of an estate which may be reached by a fi. fa. *Dargan v. Waring*, 11 Ala. 988.

XI. EXECUTION AGAINST THE PERSON.

As to effect of bankruptcy, see the title BANKRUPTCY. As to execution against a person in justices court, see the title JUSTICES OF THE PEACE. As to execution against person in bastardy proceedings, see the title BASTARDS.

§ 258. Nature and Purpose of Remedy.

"It is true that, as an incident to the proceeding for the trial of the right of property, the claimant obtains a restoration of his property; but this restoration results from the fact, that he has given a security deemed by the law a full equivalent. The property is not recovered by suit, and its obtainment is not the result of any judgment." *Lenoir v. Wilson*, 36 Ala. 600, 603.

"The trial of the right of property is an anomalous proceeding, initiated by the claimant, and in which the plaintiff in execution is the actor, or plaintiff. When the property of one is levied on, by virtue of an execution against another, the statute gives to the owner the privilege of arresting the proceeding under execution against his property, upon making the prescribed bond and affidavit, until the plaintiff shall obtain a judicial ascertainment of the liability of the property to the execution. It arms the claimant with the right of compelling the plaintiff in execution to suspend the proceeding under execution against the property, and become the plaintiff in a statutory suit, in

which he affirms the liability of the property to his execution; and that he should maintain his side of the issue, before he can obtain a sale of the property. The claimant does not, by originating the trial of the right of property, seek or obtain redress for the injury done by the trespass; but simply, in the exercise of a privilege given him by the statute, throws upon the plaintiff the onus of maintaining the liability of the property in a judicial proceeding, before he can obtain a sale of it under execution. The object of the law is to throw around the plaintiff's proceeding under his execution a safeguard against unnecessary injury, not to give redress to the claimant for the injury done to him by committing the trespass. The law says to the plaintiff, that the bond and affidavit having been made by the claimant, he can not proceed further with his execution against the particular property, until he obtains a judgment of condemnation. The object of the suit is to remove the obstacle in the way of the proceeding against the property, and to establish its liability. The redress of the past wrongs to the claimant is not the purpose. The trial of the right of property is not a suit upon any part of the claimant's cause of action resulting from the trespass, and a judgment in favor of the claimant could not bar a subsequent suit for damages." *Lenoir v. Wilson*, 36 Ala. 600, 602.

§ 259. Constitutional and Statutory Provisions.

Proceedings to obtain discharge, instituted by a debtor who was in custody under bail process sued out before the Code went into operation, but who was surrendered by his bail after that time, must be conformable to the provisions of the Code; hence an oath which complied with the requirements of the Code, but not with the old law, was a valid basis for discharge. *Goldsmith v. Lang*, 25 Ala. 486.

Act 1839, abolishing imprisonment for debt, did not authorize the discharge of a debtor then in actual or constructive custody. *Kennedy v. Rice*, 1 Ala. 11.

Act 1839, abolishing imprisonment for debt, provides (§ 1) that if plaintiff or his agent swears to certain facts it shall be lawful to arrest the debtor, but that in

case the latter swears that the grounds for his arrest are untrue and that he has no estate, etc., he shall be released by an arresting officer immediately. Held, that it was intended thereby to put oath against oath, without requiring any notice to be given plaintiff before the discharge, or interposing any restrictions, except on the debtor's conscience. *Morrow v. Weaver*, 8 Ala. 288.

§ 260. Previous Issue and Return of Execution against Property.

A fi. fa. being in the hands of an officer does not preclude plaintiff from suing out a ca. sa. at the same time. *Cary v. Gregg*, 3 Stew. 433.

§ 261. Proceedings to Procure.

An affidavit setting out the principal and interest due upon a judgment, in one sum, is sufficient to warrant the issuance of a ca. sa. *Kenan v. Carr*, 10 Ala. 867.

An affidavit to hold to bail is sufficient to authorize the issue of a ca. sa. after judgment. *Stewart v. Cunningham*, 22 Ala. 626.

To authorize a ca. sa. to be issued, the affidavit which act 1839 requires to be made must be made, although the defendant was held to bail previous to the passage of that act. *O'Brien v. Lewis*, 8 Ala. 666.

§ 262. Issuance.

The clerk need not indorse on the ca. sa. "that the sheriff hold the defendant to bail in double the sum sworn to be due." The writ shows both the amount due and the order to arrest. *Ex parte Cleveland*, 36 Ala. 306.

§ 263. Form and Requisites.

When a writ of *capias ad satisfaciendum*, after commanding the sheriff to take the body of the defendant in the judgment to satisfy the plaintiffs' debt and costs, contains the further direction: "And that you have the said moneys at our next circuit court, to render to the said plaintiffs for their damages and costs aforesaid," the latter direction is mere surplusage, and does not vitiate the writ. *Stewart v. Cunningham*, 22 Ala. 626.

A writ of a ca. sa. need not contain an indorsement that the sheriff is to hold

the defendant to bail in double the sum sworn to be due. *Ex parte Cleveland*, 36 Ala. 306.

§ 264. Making Arrest.

A ca. sa. is not confined in its operations to the county of defendant's residence; the statute not so restricting it. *Ex parte Cleveland*, 36 Ala. 306.

§ 265. Discharge on Motion.

Act 1839, abolishing imprisonment for debt, provides (§ 1) that, if plaintiff or his agent swears to certain facts, it shall be lawful to arrest the debtor, but that, in case the latter swears that the grounds for his arrest are untrue, and that he has no estate, etc., he shall be released by the arresting officer immediately. Held, that a discharge can take place, by reason of the debtor's denial of the truth of the grounds for his arrest, only when he is in the actual custody of the officer, but that this does not prevent his discharge if he omits to take the oath until after he is enlarged on a prison-bonds bond. *Morrow v. Weaver*, 8 Ala. 288.

§ 266. Discharge on Prison Limits Bond.

Statutory Provisions.—St. 1839, "to abolish imprisonment for debt," does not discharge the obligors from liability upon a bond for the liberty of the prison bounds, where a breach had occurred previous to the passage of the act. *Mongin v. Harrison*, 1 Ala. 22.

Act 1824 (Clay's Dig., p. 499, § 2), requiring a prison-limit bond to be taken in double the sum of the debt, etc., is directory merely, and is complied with, whether the penalty is greater or less than the prescribed sum, since the extent of the obligor's liability is to be admeasured by the amount of the execution. *Croom v. Travis' Adm'r*, 10 Ala. 237.

Performance or Breach of Bond.—A bond conditioned to keep within the "limits of the prison bounds," pursuant to Act 1824, becomes absolute by the failure of the principal to surrender himself to close custody, or to discharge himself by making a surrender of his effects and taking the oath of insolvency within sixty days from the time of its execution; nor can the measure of the recovery upon such bond be reduced below what the statute prescribes by proof of the inability

of the principal ca. sa. issued, either in whole or in part. *Croom v. Travis' Adm'r*, 10 Ala. 237.

An actual surrender in discharge of the condition of a prison-bonds bond can not be vitiated by the motive or intention, which influenced the surrender into custody. *Tait v. Parkman*, 15 Ala. 253.

Satisfaction of Bond.—Whether or not a surrender to the sheriff by an imprisoned debtor, enlarged on a prison-limits bond, is colorable merely, and not intended to discharge his sureties, is a question for the jury in an action on the bond. *Morrow v. Weaver*, 8 Ala. 288.

If one in the limits under a prison-bonds bond to surrender himself at an expiration of sixty days voluntarily surrenders himself before that time, it discharges his sureties, unless such surrender is colorable merely, and not intended to have that effect. *Morrow v. Weaver*, 8 Ala. 288.

Though one in the limits under a prison-bonds bond, who voluntarily surrenders himself in the common jail of the county and to the custody of the sheriff, thereby discharges the bond, yet if such surrender is colorable merely, and not intended to be for the purpose of discharging the bond, it does not have that effect. The intention of going within the jail and the surrender to the sheriff is a matter for the determination of the jury. *Morrow v. Weaver*, 8 Ala. 288.

§ 267. Discharge on Bond to Proceed under Insolvent Laws.

As to liabilities on bonds, see post, "Liabilities on Bonds, Undertakings, or Recognizances," § 270.

Form, Requisites and Approval.—It is not essential that such bond should recite that the justices appointed the time and place of appearance and surrender. *Thompson v. Pierce*, 3 Stew. 427.

Performance of Breach.—A bond conditioned that the obligor shall appear before certain justices, and surrender his property for the benefit of his creditors, according to the law for the relief of insolvent debtors, and shall in all things stand to and abide by all orders to be made by said justices in relation thereto, is not void for excess; the condition being only a verbal departure from the

statute, and imposing no additional specific obligation. *Thompson v. Pierce*, 3 Stew. 427.

The bond of a debtor, conditioned for his appearance before the justices to take the benefit of the act for the relief of insolvent debtors, is not forfeited if, after ten days' notice to the creditor, he appears at the time and place appointed, with the intention of complying with its condition, but is prevented from doing so by the failure of one of the justices to attend. *Rust v. Paine*, 16 Ala. 352.

Public notice that a debtor would appear at a place designated "on Saturday, the 28th of July next," and render a schedule of his property as an insolvent debtor, was sufficient, though in fact the 28th of July was on a Friday. *Briggs v. Hobson*, 3 Ala. 404.

Where a creditor had been duly notified of the intended application of an insolvent debtor to render a schedule of his property and take the oath, but the justice of the peace refused to permit the debtor to take the oath, the condition of the bond was not broken. *Briggs v. Hobson*, 3 Ala. 404.

§ 268. Discharge on Surrender of or Disclosure as to Property.

§ 268 (1) Application and Proceedings Thereon in General.

When a debtor applies to be discharged under the statute abolishing imprisonment for debt, and his schedule shows that he has property in another state, he will not be compelled to bring it into Alabama as a condition to his discharge. *Croom v. Davis*, 6 Ala. 40.

§ 268 (2) Notice of Application and Schedule of Property.

Act 1839, abolishing imprisonment for debt, provides (§ 2) that the debtor may discharge himself by rendering a schedule of his estate and taking a particular oath, and that, if plaintiff desire to controvert them, then, on swearing that he believes them untrue, any justice of the peace shall be legally authorized to summon a jury to try the question, etc.; and the remaining section directs what shall follow a verdict against the debtor. Held to require a notice to the creditor of the debtor's intention to render the schedule

and take the prescribed oath. *Morrow v. Weaver*, 8 Ala. 288.

The statutes of 1807, '11, '21, '33, and '39 in respect to insolvent debtors, are parts of an entire system, and to be considered in *pari materia*: these several acts regard the schedule of the debtor rendered after arrest, when accepted by a court or judicial officer, as a transfer in law of the effects to which it refers, to the sheriff of the county in which they are found. But if the creditor fail to obtain judgment, or the debtor is otherwise legally discharged, the legal assignment is avoided and the property reverts in the debtor. *Wade v. Judge*, 5 Ala. 130.

Quære. Does the acceptance of a schedule operate a transfer of the real and personal estate of the debtor which may be extra territorium. *Wade v. Judge*, 5 Ala. 130.

§ 268 (3) Hearing, Determination, Discharge, and Review.

When a debtor who is held to bail endeavors to procure his discharge under the insolvent laws by rendering a schedule of his property, and takes an appeal to the circuit court under the provisions of § 2185 of the Code, he is entitled to be discharged from custody on giving the bond required by that section. *Ex parte Whitehead*, 23 Ala. 93.

The debtor in custody under bail process, who wishes to discharge himself by rendering a schedule of his property under the statute (§ 3, Clay's Dig., p. 70), may make his application for the discharge to any justice of the peace, and the latter is authorized to act upon it alone. *Hutchisson v. Governor*, 23 Ala. 809, overruling *Morrow v. Weaver*, 8 Ala. 288.

Act 1839, abolishing imprisonment for debt provides (§ 2) that the debtor may discharge himself by rendering a schedule of his estate and taking a particular oath, and that, if plaintiff desire to controvert them, then, on swearing that he believes them untrue, any justice of the peace shall be legally authorized to summon a jury to try the question; and the remaining section directs what shall follow a verdict against the debtor. Held, that the act was to be construed in connection with act 1821 on the same sub-

ject, and under it, when the debtor sought a discharge by a surrender of his property or by swearing that he had none, the application must be made to a judge or two justices of the peace, as required by that act; but, if the schedule be contradicted, one justice would be sufficient to try the question raised thereby, under act 1839. *Morrow v. Weaver*, 8 Ala. 288, overruled in *Hutchisson v. Governor*, 23 Ala. 809.

§ 269. Discharge of Poor Debtors.

A surety in a bond for the appearance of an insolvent debtor to render his schedule, etc., is not liable, if the debtor appear and obtain his discharge, although it be fraudulently obtained, if the surety be not a party to the fraud. *Davis v. Cahey*, 1 Stew. 402.

Before discharging a person imprisoned for debt, the court may order him to deliver up money, choses in action, or other property about his person or near at hand. *Wade v. Judge*, 5 Ala. 130.

§ 270. Liabilities on Bonds, Undertakings, or Recognizances.

As to form and requisites of prison limits bond, see ante, "Discharge on Prison Limits Bond," § 266.

§ 270 (1) In General.

Breach.—The condition of a bail bond may be broken (Code, §§ 2734, 2737, 2740), not only by the principal obligor's passing beyond the prison bounds, that is, the boundary of the county, but also by his failure to surrender himself to the jailor at the expiration of the term of sixty days. *Stewart v. Warfield*, 37 Ala. 446.

§ 270 (2) Actions.

Defenses.—Where a writ of *capias ad satisfaciendum* issues at the suit of one for the use of another, and the defendant is arrested thereon, and enters into bond with sureties, payable to the nominal plaintiff, for the use, etc., as expressed on the face of the process, conditioned that the defendant will continue a prisoner within the limits of the prison bounds, in an action brought thereon in the name of the obligee for the benefit of the party shown to be really interested, a surety is not estopped from alleging

that the obligee did previous to the institution of the suit. *Tait v. Frow*, 8 Ala. 543.

Where a *ca. sa.* was issued against defendant without the affidavit required by the nonimprisonment act, and is returned "*Non est inventus*," defendant's bail may take advantage of the omission by a plea to the *scire facias* to subject them to the payment of the judgment. *O'Brien v. Lewis*, 8 Ala. 666.

It is a good defense to an action for the breach of a prison-bounds bond that, previous to the breach assigned or within sixty days after the execution of the bond, the prisoner surrendered himself to the sheriff, with the intention bona fide of performing the condition of the bond and discharging his sureties. *Morrow v. Parkman*, 14 Ala. 769.

Pleading.—A plea in avoidance of a bond for the prison bounds, on the ground of a discharge under the statutes relating to the discharge of debtors, is bad if it does not aver that notice was given to the creditor, and which does not show a discharge by a judge or two justices of the peace, as provided by act 1821. *Morrow v. Weaver*, 8 Ala. 288.

In a debt on a prison-bounds bond, assigning breaches, it is a good plea that the prisoner, within sixty days from the date of said bond, surrendered himself to the jailer without having committed any escape in the meantime. *Harlan v. Thompson*, 20 Ala. 94.

In an action of debt on a prison-bounds bond, where the breach alleged is the escape of the debtor, it is also a good plea that the debtor continued a prisoner within the prison bounds as established by law, according to the term of his bond, until he was discharged by due course of law. *Morrow v. Parkman*, 14 Ala. 769.

The condition of a prison-bounds bond that the debtor will continue a prisoner until discharged by due course of law is in legal effect the same as if it had set out alternately the different modes, by a compliance with either of which the bond should become void. It is, therefore, not a sufficient answer to a specific breach of such a condition to plead generally a performance of the condition, but it should be specifically stated how the con-

dition had been performed. *Morrow v. Parkman*, 14 Ala. 769.

Evidence.—In an action for breach of a prison-bonds bond, the fact that an insolvent debtor, who had been discharged from imprisonment by making the oath required by law, had, a short time previously thereto, made a fraudulent disposition of his property, can not be given in evidence to invalidate his discharge. *Morrow v. Parkman*, 14 Ala. 769.

Trial.—Where a writ of ca. sa. issues at the suit of one for the use of another, and defendant is arrested thereon and enters into bond, with sureties, payable to the nominal plaintiff for the use, etc., as expressed on the face of the process, conditioned that defendant will continue a prisoner within the limits of the prison-bonds, in an action brought thereon in the name of the obligee for the benefit of the party shown to be really interested, the bond can not be taken as an admission that the obligee was living when it was executed. *Tait v. Frow*, 8 Ala. 543.

The transfer of property by a debtor, after his arrest and the execution of a bond to take the benefit of the act for the relief of insolvent debtors, does not constitute such a breach of the condition of the bond as can be inquired into in an action on it against the debtor and his security. *Rust v. Paine*, 16 Ala. 352.

Damages.—The measure of recovery on a bond to keep within prison limits can not be reduced below what the statute prescribes by proof of the inability of the principal to have discharged the judgment on which the ca. sa. issued, either in whole or in part. *Croom v. Travis*, 10 Ala. 237.

Review.—A judgment against a surety on a bail bond under Code, § 2737, will be reversed unless the record affirmatively shows that the debtor has been guilty of an escape by passing beyond the prison-bounds. *Stewart v. Warfield*, 37 Ala. 446.

"If the debtor is guilty of an escape by passing beyond the prison-bounds," without payment of the judgment, interest, and costs, the obligee in the bond is entitled to a summary remedy, by notice and motion, against the debtor and his sureties on the bailbond. Code, § 2737.

But no such summary proceeding is authorized in case the debtor is guilty of an escape, not by passing beyond the prison-bounds, but by failing to surrender himself to the jailer at the end of sixty days." *Stewart v. Warfield*, 37 Ala. 446, 448.

XII. WRONGFUL EXECUTION.

As to liability of officer, see the title SHERIFFS AND CONSTABLES. As to malicious execution, see the title MALICIOUS PROSECUTION.

§ 271. Nature and Grounds of Liability.

§ 272. — Wrongful Issuance of Execution.

A person is not liable in damages for procuring a wrongful execution, where the writ issued was voidable only, and not void. *Cogburn v. Spence*, 15 Ala. 549.

§ 273. — Wrongful or Excessive Levy.

An officer making an excessive levy is liable to the defendant in execution for the damages suffered by him by reason thereof in an action of trespass on the case. *Levens v. State*, 3 Ala. App. 45, 57 So. 497.

Persons who participate in the sale of property wrongfully levied on, though they are not liable as trespassers are guilty of conversion. *Stallings v. Gilbreath*, 146 Ala. 483, 41 So. 423.

In an action against a sheriff and another for selling under execution against a third person wood belonging to plaintiff, proof that plaintiff has bought the wood as agent for another party was sufficient to defeat recovery. *Smiley v. Hooper*, 147 Ala. 646, 41 So. 630.

§ 274. Persons Liable.

Where the writ under which property seized was void on its face, and the property was seized at the instance of defendant, it would be liable as a trespasser in the same manner as the levying officer. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89.

Persons authorizing an officer to make a wrongful execution, but having nothing to do with the levy or seizure, are not liable as trespassers. *Stallings v. Gilbreath*, 146 Ala. 483, 41 So. 423.

The issuing of execution on a bond,

where it is not authorized by the statute, is not the act of plaintiff, but of the clerk; and trespass will not lie against the former therefor. *Meredith v. Richardson*, 10 Ala. 828.

Plaintiffs in attachment are not liable with the sheriff for wrongful execution of process by selling at a place other than that named in the advertisement, with part of the property sold not present, and all sold in mass, they having done nothing more than sue out the attachment and place the writ in his hands, and after the levy told him to take the goods out of the house where they were, as they wanted it by a certain time. *Brock v. Berry*, 132 Ala. 95, 31 So. 517.

§ 275. Actions.

§ 276. — Nature and Form.

Trespass is the only remedy for damage occasioned to plaintiff by the malicious act of defendant in causing an execution issued against a third person to be levied on property belonging to plaintiff. *Tatum v. Morris*, 19 Ala. 302.

§ 277. — Defenses.

Where a sheriff, who received the execution after his term of office had expired, sold defendant's property by virtue of it, defendant, not knowing that fact, did not, by being present at the sale, asking a postponement, etc., waive the tort. *Andress v. Broughton*, 21 Ala. 200.

§ 278. — Parties.

A sheriff who, under execution against one of two joint owners of a chattel, sells the entire interest in the chattel, is liable as trespasser ab initio at the suit of the owner not affected by the execution, and not at the joint suit of both. *Sheppard v. Shelton*, 34 Ala. 652.

§ 279. — Evidence.

Admissibility.—Evidence that some of the property wrongfully taken from plaintiff was afterwards returned to her is admissible in mitigation of damages. *Stephenson v. Wright*, 111 Ala. 579, 20 So. 622.

In an action for the wrongful taking of goods under an execution issued upon a judgment in another county, and served by an officer from such county, the judgment and execution are inadmissible in

justification of the taking, but should be received in mitigation of damages. *Stephenson v. Wright*, 111 Ala. 579, 20 So. 622.

In an action against defendant for trespasses to person and property committed during the levy of an execution, plaintiff could prove by her husband, as against a general objection, the condition of the house when he arrived at night; the wrongful acts having occurred late in the afternoon. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89.

On an issue as to whether wood levied on under execution against another was the property of plaintiff, it appearing that the wood had been purchased by S., whom plaintiff claimed was his agent, it was proper to admit evidence as to contracts made by S. with other persons and as to marks placed by him on wood bought for other parties. *Smiley v. Hooper*, 147 Ala. 646, 41 So. 660.

In trespass for the wrongful taking of goods under an execution issued in another county, and served by an officer of that county, evidence as to the fraudulent character of the sale to plaintiff is inadmissible; the taking not being valid in any event. *Stephenson v. Wright*, 111 Ala. 579, 20 So. 622.

§ 280. — Damages.

As to instructions as to damages, see post, "Trial," § 281. As to damages in action against officers, see the title SHERIFFS AND CONSTABLES.

Where defendant caused goods to be levied on under a writ void on its face, and received and retained the goods with knowledge that the officers had committed an assault in making the levy, exemplary damages were allowable, in the jury's discretion. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89.

The act which confers the right on a jury, to impose damages for vexatiously, or for delay, claiming property levied on under execution (Aik. Dig., 168), no where requires that the jury, in giving damages, shall express, by their verdict, the causes which influenced them. *Bettis v. Taylor*, 8 Port. 564.

§ 281. — Trial.

In an action against a sheriff and an-

other for selling under execution against another wood belonging to plaintiff, it was proper to instruct that, unless the jury were reasonably satisfied from the evidence that the legal title was in plaintiff, they should find for defendant. *Smiley v. Hooper*, 147 Ala. 646, 41 So. 660.

In trespass for the wrongful taking of goods under an execution against a third person, where the evidence of both the plaintiff and the defendant showed without dispute that some of the property

taken belonged to the plaintiff, it was proper to charge that the undisputed proof showed that such property belonged to plaintiff, and that, as to it, defendants were trespassers. *Stephenson v. Wright*, 111 Ala. 579, 20 So. 622.

In an action for trespasses committed in levying an execution, whether defendant was liable by having ratified the acts of the levying officers held for the jury. *Stowers Furniture Co. v. Brake*, 158 Ala. 639, 48 So. 89.

Executive Department.

See the titles ATTORNEY GENERAL; CONSTITUTIONAL LAW; STATES. As to prosecuting attorneys, see the title DISTRICT AND PROSECUTING ATTORNEYS.

Executive Power.

See the titles CONSTITUTIONAL LAW; COUNTIES; EXTRADITION; MUNICIPAL CORPORATIONS; PARDON; STATES; STATUTES; TOWNS. See, also, the title OFFICERS.

Ex. P. M.
12/27/23

